IN THE SUPREME COURT

FOR THE STATE OF CALIFORNIA

The People of the State of California, Plaintiff and Respondent, v. JUAQUIN SOTO, Defendant and Appellant	)	case no. S236164 (Court of Appeal case no. H041615)

Monterey County Superior Court case no. SSC 120180
Carrie Panetta, Judge

* * *

APPELLANT'S REPLY BRIEF ON THE MERITS

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I.

THE TRIAL COURT ERRED (AS THE COURT OF APPEAL FOUND) WHEN IT INSTRUCTED THE JURY THAT INTOXICATION WAS IRRELEVANT TO IMPERFECT SELF-DEFENSE

A. Respondent Does Not Deny Several Key Contentions Made by Appellant

Respondent does not deny or address, and should be deemed implicitly to concede, the following contentions in Appellant's Opening Brief on the Merits (AOBM):

1. The prosecutor explicitly conceded during pre-trial proceedings that under People v. Cameron (1994) 30 Cal.App.4th 591, 601, intoxication is relevant to imperfect self-defense. (CT:I:168; RT:I:5)

2. The trial court delivered two instructions which effectively stated, to the contrary, that intoxication was not relevant to imperfect self-defense.

3. When, as here, there is sufficient evidence of imperfect self-defense to warrant instruction, the prosecution must prove the absence of imperfect self-defense beyond a reasonable doubt in order to prove the necessary element of malice.

4. The combination of methamphetamine intoxication and alcohol intoxication could help explain how a defendant could honestly, but mistakenly, believe the victim remained an imminent deadly threat, even if he was no longer attacking.

5. Under People v. Mendoza (1998) 18 Cal.4th 1114, 1134, when, as here, the trial court instructs on intoxication, it has a *sua sponte* duty to instruct correctly. Accord: People v. Townsel (2016) 63 Cal.4th 25, 63. Thus, trial counsel's failure to request a correct instruction on intoxication does not matter.

6. Under People v. Mendoza, 18 Cal.4th at 1126, when the prosecution must prove specific intent, it also must prove the knowledge which is necessary to form that specific intent.

B. Respondent's Arguments Are Without Merit

Respondent's various arguments are without merit.

1. Respondent contends Penal Code §29.4[1] is ambiguous regarding whether it makes voluntary intoxication relevant to intent to kill, unlawful intent to kill, or both. (Resp's. Answer Brief on the Merits (RABM) 25) The claim is meritless. Intoxication is relevant to both. No court has found that statute ambiguous in the 20 years it has existed. That is because there is no ambiguity. "Express malice" is clearly defined by statute. It means the intent to kill *unlawfully*. Penal Code §188 ("express malice" exists "when there is manifested a deliberate intention unlawfully to take away the life . . ."); People v. Elmore (2014) 59 Cal.4th 121, 132-133. Thus, intoxication is relevant to both intent to kill, and intent to kill unlawfully. There is no ambiguity there.

2. Respondent argues that the legislative history of Penal Code §29.4 (former §22) prohibits intoxication from being relevant to imperfect self-defense, because the purpose of that statute was to abrogate People v. Whitfield (1994) 7 Cal. 4th 437, 446. (RABM 27-31) Whitfield had allowed intoxication to serve as a stand-alone defense to implied malice second degree murder. See People v. Timms (2007) 151 Cal.App. 4th 1292, 1298. Respondent's argument is incorrect. The amendment to former §22(b)

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[1] Penal Code §29.4 (former §22) reads:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

did not abrogate any aspect of imperfect self-defense.

Such contention was similar to the argument made by the Attorney General in In re Christian S. (1994) 7 Cal.4th 768, 774-778. The AG argued there that the 1981 statutory amendment to former Penal Code §28, which eliminated the defense of diminished capacity, also eliminated the defense of imperfect self-defense. In Christian S. this Court rejected that contention. It held that nothing in the relevant amendment affected imperfect self-defense. That is because nothing in the amendment said anything about imperfect self-defense. Id., 7 Cal.4th at 774-778. That amendment merely eliminated the defense of diminished capacity. The same analysis applies here. Because nothing in the 1995 amendment to the intoxication statute, former Penal Code §22(b), said anything about imperfect self-defense, that amendment does not apply to imperfect self-defense.

Respondent quotes a letter from the author of the 1995 amendment, who stated its purpose was to bring the law regarding intoxication "back to its pre-Whitfield state . . ." (RABM 30) Under the law's previous "pre-Whitfield state," §22 did not address, or impose any limit upon, the applicability of intoxication to imperfect self-defense.

Respondent is correct that the amendment to §22 prohibited intoxication from serving as a stand-alone defense to implied malice second-degree murder. But imperfect self-defense requires far more than simply disproving implied malice. Imperfect self-defense requires proof that the defendant had an actual (but unreasonable) belief in the imminent threat of great bodily injury (GBI) or death, and that the defendant had an actual (but unreasonable) belief in the need to use immediate deadly force to protect himself from that threat. People v. Elmore, supra, 59 Cal.4th at 133-134; In re Christian S., supra, 7 Cal.4th at 773. If the prosecution fails to disprove those facts beyond a reasonable doubt, the defendant is entitled to

the partial defense of imperfect self-defense, regardless of whether he acted with the intent to kill, or conscious disregard of human life. People v. Bryant (2013) 56 Cal.4th 959, 969-970. Thus, the fact that the 1995 amendment to §22 prohibited intoxication from serving as a stand-alone defense to implied malice second degree murder had no effect upon imperfect self-defense for at least two reasons. First, imperfect self-defense does not require the absence of implied malice. Second, imperfect self-defense requires far more than simply the absence of implied malice.

Respondent claims the "murder clause" in §22 (which allows intoxication to be used to prove premeditation, deliberation, and express malice) controls over the "specific intent" clause[2] in §22, because, supposedly, a specific statute prevails over a general statute. (RABM 41-42) The claim is meritless. Both clauses are in the same paragraph of the same statute. They are joined by the word "or," which means both clauses equally apply. In addition, in People v. Mendoza, 18 Cal. 4th at 1133, this Court held intoxication is relevant to the specific intent to aid and abet a murder.

3. Respondent cites a few stray phrases from the legislative history of §22 and argues that the statutory amendment somehow narrowed the scope of imperfect self-defense. (RABM 27-31) But there is not even a single reference to imperfect self-defense in the legislative history. That is because the amendment to §22 did not alter, and did not intend to alter, the doctrine of imperfect self-defense.

4. Respondent argues the legislative history of §22 as if there were two separate statutes proscribing second degree murder, with one requiring express malice, and the other requiring implied malice. (RABM 27-33) That, of course, is not the case. There is only one second degree murder statute, Penal Code §188.

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[2]Those clauses are further discussed at pp. 6-7, infra.

5. Respondent's argument, boiled down to its essence, is that intoxication should not be deemed relevant to imperfect self-defense whenever there is a contention that the homicide was implied malice second degree murder. (See RABM 31-33) Respondent's argument is meritless. Whenever a defendant intends to kill, he also acts with conscious disregard of human life. That means that whenever there is express malice murder, there also is implied malice. So, to take Respondent's argument to its logical conclusion, intoxication could never be used to prove imperfect self-defense, because all second degree murders necessarily involve, at the minimum, implied malice. (RABM 31)

This argument by Respondent fails, because it is directly contrary to the text of §29.4, which makes voluntary intoxication admissible to disprove express malice. Indeed, Respondent admits that §29.4 makes voluntary intoxication admissible to disprove express malice. (RABM 31)

6. Respondent cites People v. Atkins (2001) 25 Cal.4th 76, 82 for the propositions that (i) "On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury," and (ii) "On the other hand, it is commonly felt that a person who voluntarily gets drunk and while in that state commits a crime should not escape the consequences." (RABM 34) Appellant agrees. (i) Appellant's culpability should be less than a sober person's, because his intoxication may have caused him unreasonably to believe that he needed to defend himself more aggressively than the law allowed. However, (ii) Appellant does not seek to "escape the consequences" of his actions. He should be convicted of a serious felony, manslaughter.

7. Respondent concedes that under In re Christian S., supra, 7 Cal.4th at 780, fn. 4, imperfect self-defense equally mitigates both express malice and implied malice second degree murder. (RABM 37-38)

Respondent also acknowledges, citing People v. Blakely (2000) 23 Cal.4th 82, 88-89, "that the mitigating effects of imperfect self-defense on implied malice murder are the same as they would be on express malice murder - - namely, reduction to voluntary manslaughter." (RABM 39) Appellant largely agrees. Those contentions support Appellant's position that the same evidence - - including intoxication - - may be used to establish imperfect self-defense, regardless of whether the prosecution's primary theory of second degree murder was express malice or implied malice.

8. Former §22(b), current §29.4, reads:

> Evidence of voluntary intoxication is admissible solely on the issue of [first clause] whether or not the defendant actually formed a required specific intent, *or* [second clause], when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought. (emphasis added)

Appellant argued at AOBM 17-24 that §29.4 provides two statutory bases for rendering intoxication relevant to imperfect self-defense. In the AOBM, Appellant discussed the second clause in §29.4 first (which clause Respondent calls the "murder clause" (see p. 4, supra)), because the Court of Appeal relied on this clause. The second clause of §29.4 provides:

> Evidence of voluntary intoxication is admissible solely on the issue of . . . [second clause] when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought.

Under this clause, intoxication is relevant to imperfect self-defense, because imperfect self-defense mitigates malice aforethought, and because §29.4 makes intoxication relevant to express malice. That was the Court of Appeal's holding.

Respondent counters on the theory that "The Legislature barred consideration of voluntary intoxication as a matter of law in determining the

unlawfulness of a defendant's intent to kill." (RABM 41) This argument is wrong. Sec. 29.4 expressly states that intoxication is relevant to express malice (the intent to kill *unlawfully*).

9. Appellant argued at AOBM 18-23 that Penal Code §29.4 also makes intoxication relevant to imperfect self-defense under the first clause in §29.4, which reads:

> Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent or . . .

Respondent claims the "specific intent" clause in §29.4 does not apply. According to Respondent, the word "or" in §29.4 must be read in the disjunctive, such that the "specific intent" clause does not apply to murder cases. Respondent alternatively contends that the word "or" is ambiguous, and should be interpreted in the disjunctive, to establish two mutually exclusive alternatives, such that, in a murder case, intoxication may only be used to disprove "premeditation," "deliberation," and "express malice," but may not be used to disprove any other "required specific intent . . ." (ARBM 41) Respondent is mistaken. The "specific intent" clause applies to all cases, including murder cases.

The word "or" does not mandate mutually exclusive alternatives. Instead, "or," as used in §22(b), refers to two possible alternatives, such that it is used in the conjunctive. As shown at AOBM 27, the word "or" is commonly used in the conjunctive. See, e.g., In re Jesusa V. (2004) 32 Cal.4th 588, 621 (child custody statute requiring "the physical presence of the prisoner *or* the prisoner's attorney is read in the conjunctive; both must be present).

The Legislature did not intend for the word "or" to be used in the disjunctive in §22(b). Intoxication has always been relevant to many types of specific intent in murder cases in addition to premeditation, deliberation,

and express malice. For example, intoxication is relevant to the specific intent needed to aid and abet a murder. People v. Mendoza, 18 Cal. 4th at 1133. Intoxication is relevant to the specific intent needed to commit the felony underlying a felony murder. CALCRIM 625, Bench Notes. Intoxication is also relevant to other specific other intents required for murder, or special circumstances murder, such as the intent to inflict torture, or the intent to kill a witness. CALCRIM 625, Bench Notes; and see, e.g., People v. Letner and Tobin (2010) 50 Cal.4th 99, 186 (Letner).

The word "or" in (former) §22(b) merely provides for alternative ways in which intoxication may be used. It does not establish mutually exclusive provisions. Thus, the word "or" allows intoxication to be used in determining specific intent in a murder case, just as intoxication may also be used to determine premeditation, deliberation, and malice in a murder case.

People v. Mendoza, 18 Cal.4th at 1131-1134, is dispositive on this point. Mendoza held that evidence of intoxication could be relevant to the defendant's specific intent to aid and abet a murder. Mendoza effectively held that the word "or" in former Penal Code §22(b) was used in the disjunctive, when it allowed intoxication to apply to the specific intent to aid and abet in a murder case. Accordingly, under Mendoza, evidence of intoxication should have been usable to prove *either* the question of whether the defendant formed a required specific intent, *or* whether the defendant premeditated, deliberated, or harbored express malice. The trial court erred when it instructed to the contrary.

Respondent claims "or" must be read in the disjunctive, because, otherwise, the "murder clause" would be rendered superfluous. (RBM 42) Respondent is wrong. The "murder clause" is not superfluous. It includes premeditation, deliberation, and express malice. Those elements are not

contained in the "specific intent" clause.

10. Respondent claims that Appellant advances "the false premise that separate voluntary intoxication" and "imperfect self defense" defenses exist. (RBM 43) Respondent is wrong. There is nothing false about that premise. Voluntary intoxication and imperfect self-defense are very separate defenses. i) Voluntary intoxication may serve as a complete defense to express malice. It may help show that the defendant did not premeditate or form the intent to kill. ii) Imperfect self-defense may serve as a partial defense to murder. It may reduce murder to manslaughter, but it requires a very specific *mens rea* (which *mens rea* the prosecution must disprove), namely, that the defendant i) has the actual belief that he is in imminent danger of GBI or death, and ii) has the actual belief that he must immediately use deadly force to protect himself from that danger. These beliefs need not be reasonable. Intoxication may cause, or help explain how, the defendant's beliefs could be actual, even if they were unreasonable.

11. Respondent argues that Appellant may not rely on imperfect self defense, because his behavior was supposedly delusional, and because People v. Elmore, supra, 59 Cal.4th at pp. 136-137, prohibits unreasonable self defense, "when the defendant's actions are entirely delusional." (RABM 44-47) Respondent is mistaken. There was no delusion involved in this homicide. Appellant testified that Ramirez stabbed Appellant with a large kitchen knife. That kitchen knife, with a 10" blade, was found next to Ramirez's body. There was nothing delusional about that knife with the 10" blade. Appellant testified that Ramirez stabbed him several times with the knife, both in the kitchen and in the hallway outside the apartment. Ramirez did stab Appellant several times. Appellant's blood was found in the hallway. One stab wound punctured Appellant's lung.

There was nothing delusional about those stab wounds, either.[3]

Appellant testified that he continued to stab Ramirez in the hallway, because he thought, otherwise, that Ramirez would kill him. That belief may have been unreasonable, and Appellant's intoxication may have caused him to form such an unreasonable belief, but there was no delusion there, either. Ramirez most likely would have killed Appellant with his 10" knife, unless Appellant did something to protect himself.

12. For all these reasons, and those stated in the AOB, intoxication is relevant to imperfect self-defense, and the trial court erred when it instructed to the contrary.

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[3]Appellant may have been delusional when he entered Solano's apartment, and then kicked in Ramirez's door, looking for someone who three years ago, and outside that building, hired him to perform farm labor. But he certainly was not delusional when he described Ramirez attacking and stabbing him with the large kitchen knife. Appellant's psychologist testified that people can be delusional in some ways, but rational in other ways.

II.

THE INSTRUCTIONAL ERRORS WERE PREJUDICIAL

A. The Correct Standard of Prejudice Is Harmless Beyond Reasonable Doubt under Chapman

1. Respondent Does Not Deny Several Key Contentions Made by Appellant

Respondent does not deny or address, and should be deemed implicitly to concede, the following contentions made in Appellant's AOBM:

1. In murder cases, the prosecution must prove malice as a necessary element. Penal Code §187(a).

2. Once sufficient evidence of imperfect self-defense, is presented - - and that occurred here - - the prosecution has the burden of disproving such partial justification beyond a reasonable doubt in order to prove malice.

3. Under such circumstances, the lack of such partial justification is a necessary element of the crime of murder, or, at least, it is a component of the necessary element of malice. People v. Rios (2000) 23 Cal.4th 450, 454.

4. Because the lack of justification is a necessary element of murder, or, at least, a necessary component of an element of murder, namely, malice, the standard of prejudice for misinstruction is harmless beyond a reasonable doubt under Chapman v. California (1967) 386 U.S. 18.

2. Respondent's Arguments Are Without Merit

Respondent's various arguments are without merit.

1. Respondent argues under People v. Castillo (1997) 16 Cal.4th 1009, 1014, that an instruction on intoxication is a

pinpoint instruction; that such an instruction must be requested; that no such request was made here; and that instructional errors regarding pinpoint instructions are evaluated for prejudice under People v. Watson (1956) 46 Cal.2d 818. (RABM 48) Appellant disagrees. The pinpoint instruction doctrine does not apply here, because the trial court did instruct on intoxication. Under People v. Mendoza, supra, 18 Cal.4th at 1134, whenever, as here, a trial court instructs on intoxication, it has a *sua sponte* duty to instruct correctly. Accord: People v. Castillo (1997) 16 Cal.4th 1009, 1014.

An error in a *sua sponte* instruction on a necessary element of a crime - - here, in the case of imperfect self-defense, the lack of partial justification - - violates due process under the 5th and 14th Amendments. Sandstrom v. Montana (1979) 442 U.S. 510. Prejudice from such a constitutional error is reviewed under Chapman v. California (1967) 386 U.S. 18.

2. Respondent argues that the erroneous intoxication instruction merely had the effect of excluding defense evidence, such that the standard of prejudice is the state law standard under Watson. (RABM 48) Respondent is incorrect. As shown at AOBM 31-33, the effect of the instruction was not just to exclude defense evidence. The effect of the instruction was to present the jury with an incorrect rule regarding a necessary element of the crime.

3. Respondent argues that any misinstruction on imperfect self-defense should be treated as misinstruction on a lesser included offense, which is reviewable for prejudice under Watson.

Respondent cites People v. Breverman (1998) 18 Cal.4th 142, 165 on this point. (RABM 48-49) Appellant disagrees. This case presents an exception to that rule.

When, as here, sufficient evidence of imperfect self-defense is presented, the prosecution must prove, as a necessary element of the crime of murder, the lack of justification[4] in order to establish the element of malice. People v. Rios (2000) 23 Cal.4th 450, 462, Rios relied in part upon Mullaney v. Wilbur (1975) 421 U.S. 684, 696, 44 L.Ed 2d 508. Mullaney v. Wilbur held that the absence of heat of passion must be treated as part of the definition of murder for jury instruction purposes. Rios stated that the Mullaney v. Wilbur principle equally applied to imperfect self-defense. Thus, under Rios and Mullaney v. Wilbur the absence of imperfect self-defense must be treated as part of the definition of murder for jury instruction purposes.

When, as here, the trial court instructs incorrectly on a necessary element, such as the lack of justification, the error is federal constitutional error under Sandstrom, and the standard of prejudice is harmless beyond a reasonable doubt under Chapman. That is true even when the lack of justification does not establish innocence, but instead establishes that the homicide was the lesser-included offense of voluntary manslaughter.

When Breverman held that the Watson standard applied to the failure to instruct on a lesser-included offense, Justice Kennard dissented. She believed the failure to instruct on the lesser-included offense of heat of passion manslaughter violated the 6th Amendment right to have a jury determine every element of the crime. She wrote, "Instructions that omit or

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[4]Appellant uses the term "lack of justification" as shorthand for the terms "lack of justification, or, in the case of imperfect self-defense, the lack of partial justification ."

misdescribe an element of the offense, preventing the jury from making a necessary factual finding, are constitutionally defective." People v. Breverman, supra, 19 Cal.4th at 189 (dis.opn. of Kennard, J.)

Justice Kennard explained that under Mullaney v. Wilbur "The absence of heat of passion must be treated as part of the definition of murder for jury instruction purposes." *Id.,* 19 Cal.4th at 190. She wrote: "Given the manner in which California has structured the relationship between murder and voluntary manslaughter, the complete definition of malice is the intent to kill or the intent to do a dangerous act with conscious disregard of its danger *plus the absence of* both heat of passion and unreasonable self-defense." Id. 19 Cal.4th at 189 (emphasis in original). She concluded that the correct standard of prejudice for misinstruction on imperfect self-defense was Chapman. "Instructions omitting or misdescribing an element of an offense are subject to harmless error analysis under the test of Chapman ...". *Id.*, 19 Cal.4th at 194.

A decade later, in People v. Moye (2009) 47 Cal.4th 537, 564 (dis.opn. of Kennard, J.) Justice Kennard reasserted that position. She contended once again that instructional error regarding the malice element of murder (there, the failure to instruct on heat of passion) was federal constitutional error, and that prejudice should be examined under Chapman. She noted in Moye that this Court had not yet squarely addressed the question of the correct standard of prejudice for misinstruction on the malice element of murder. That is because in both Breverman, 19 Cal.4th at 170, n.19, and Moye, 47 Cal.4th at 558, n.5, the majority deemed the issue waived, because the defendant did not raise it.

Appellant believes that Justice Kennard was correct that under Mullaney v. Wilbur the standard of prejudice for the failure to instruct correctly on heat of passion and/or imperfect self-defense should be

Chapman. That is true because Mullaney v. Wilbur and People v. Rios (decided two years after Mendoza) held that, when, as here, misinstruction on a lesser-included offense constitutes misinstruction on the necessary element of the lack of justification, such misinstruction is federal constitutional error. Such federal constitutional error is subject to the Chapman test for prejudice. That is what the Court of Appeal held in People v. Thomas (2013) 218 Cal.App.4th 630, 633.[5]

> This Court held in People v. Rios, supra, 23 Cal.4th at 454:
>
> . . . where murder liability is at issue, evidence of heat of passion or imperfect self-defense bears on whether an intentional or consciously indifferent criminal homicide was malicious, and thus murder, or nonmalicious, and thus the lesser offense of voluntary manslaughter. In such cases, the People may have to prove the *absence* of provocation, or of any belief in the need for self-defense, in order to *establish* the *malice element of murder*. (italics in original)

Under Rios, 23 Cal.4th at 454, 462, the prosecution has the burden of proving the lack of justification -- meaning the absence of imperfect self-defense - - beyond a reasonable doubt in order to prove malice, and to prove murder. Under Rios, when there is sufficient evidence of imperfect self-defense, the lack of justification is a necessary element, on which the trial court must instruct *sua sponte*. People v. Elmore (2014) 59 Cal.4th 121, 134. As this Court held in People v. Rios, supra, 23 Cal.4th at 454:

> If the issue of provocation or imperfect self-defense is thus "properly presented" in a murder case (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704), the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. (*Id.*, at pp. 703-704) (italics in original)

Thus, under Rios and Mullaney v. Wilbur, the absence of justification is an

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[5]For a more detailed discussion of Thomas, see AOBM 35-36.

element which the prosecution must prove beyond a reasonable doubt.

Although Appellant relied heavily on Rios in his AOBM, Respondent totally fails to discuss or even cite Rios. That should be deemed an implicit concession that Respondent has no answer to Appellant's argument that under Rios the prosecution must prove, as a necessary element, the lack of justification. Rios was decided in 2000, two years after Mendoza. Under Rios, Mendoza's reliance upon the Watson standard warrants reexamination, or at least warrants limitation to the aiding and abetting scenario presented in Mendoza.

Rios remains good law. In People v. Milward (2011) 52 Cal.4th 580, 587, this Court reaffirmed the principle in Rios that the People must prove the absence of provocation or imperfect self-defense (when sufficient evidence is presented) in order to prove malice.

4. In Mullaney v. Wilbur, supra, 421 U.S. at 704, a heat of passion case, the United States Supreme Court held: "the Due Process Clause requires the prosecution to prove beyond reasonable doubt the absence of the heat of passion or sudden provocation when the issue is properly presented in a homicide case."

In In re Winship (1970) 397 US 358, 364, 25 L.Ed.2d 368 the Supreme Court stated, "We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime for which he is charged."

In People v. Rios, supra, 23 Cal.4th at 462, this Court held that these principles in Mullaney v. Wilbur and In re Winship apply to imperfect self-defense, as well as to heat of passion manslaughter. Thus, under the due process clause, when imperfect self-defense is properly presented, the prosecution must prove the absence of imperfect self-defense beyond a

reasonable doubt. (Id.) Under Rios the "fact(s) necessary to constitute the crime for which he is charged," within the meaning of In re Winship, include the lack of justification. Accordingly, the lack of justification is a necessary element of murder.

In People v. Najera (2006) 138 Cal.App.4th 212, 227, the Court of Appeal explicitly held that the lack of justification was a necessary element of murder. Accord: People v. Saavedra (2007) 156 Cal.App.4th 561, 571. Under Rios, the lack of justification is either a necessary element of murder, or a necessary part of the element of malice. Because the failure to instruct correctly on the lack of justification constitutes the failure to instruct on a necessary element, the misinstruction violated the federal due process clause under Sandstrom v. Montana. Prejudice thereunder is evaluated under Chapman.

5. Appellant acknowledged in the AOBM that People v. Mendoza, supra, 18 Cal.4th at 1134-1135, states that the standard of prejudice for erroneous instruction on intoxication regarding aiding and abetting a murder is that under Watson. However, Appellant showed in the AOBM that in the two decades following Mendoza, some aspects of the law underlying this issue have changed. This Court has repeatedly held that an instructional error on a necessary element is reviewed under Chapman. See,e.g., People v. Banks (2014) 59 Cal.4th 1113, 1153; People v. Wilkins (2013) 56 Cal.4th 333, 348, 349; and other authorities cited at AOBM 32-

33[6].

Respondent argues that two decisions subsequent to Mendoza have reaffirmed the use of the Watson standard regarding erroneous instruction on intoxication, namely, People v. Letner and Tobin (2010) 50 Cal.4th 99, 187 (Letner), and People v. Covarrubias (2016) 1 Cal.5th 838, 897. (RABM 48-49) However, on closer analysis, the language in both Letner and Covarrubias was dictum. And neither of those cases involved instruction on the necessary element of lack of justification, which instruction warrants federal due process protection.

Letner involved aiding and abetting a homicide. The defendants argued the intoxication instructions were defective, because they did not explicitly tell the jury that intoxication was relevant to aiding and abetting. This Court disagreed. It held the intoxication instructions were accurate, as far as they went. Nothing in those instructions, and no arguments from the lawyers, erroneously precluded the jury from using intoxication in deciding whether the defendants aided and abetted. Because this Court found no error, the statement in Letner that Watson applied was dictum. That is because this Court concluded in Letner that the jury was not misinstructed regarding intoxication and aiding and abetting.

In People v. Covarrubias, supra, 1 Cal.5th at 895-899, the situation was similar. In Covarrubias, like Letner, the challenge was that the intoxication instruction did not specifically tell the jury that intoxication

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[6] Appellant described at AOBM 34, fn. 10 the final resolution of the case of the aider and abettor in Mendoza, co-defendant Valdez. Valdez took his case to federal court on *habeas corpus*. The Ninth Circuit held that the standard of prejudice for the failure to instruct correctly on intoxication and aiding and abetting was harmless beyond a reasonable doubt under Chapman. The Ninth Circuit's ruling was described in a subsequent order from the United States District Court. See Valdez v Castro (ND Cal. 2007) U.S. District Lexis 53174, 2007 WL 2019564.

was relevant to aiding and abetting. In Covarrubias, like Letner, this Court noted that the aiding and abetting instructions, although not as complete as they might have been, were accurate.

In addition, Covarrubias noted that the jury necessarily resolved the factual issue presented by the intoxication instructions under a different instruction, regarding specific intent. That is another factor disproving prejudice. Because neither the instructions nor the prosecutor's argument in Covarrubias was erroneous regarding intoxication, the Court's comment that prejudice would be measured under Watson was merely dictum.

Finally, and perhaps most importantly, Letner and Covarrubias are distinguishable in an additional, critical way. Both cases involved asserted errors in instructing on the relevancy of intoxication to aiding and abetting. On that issue, this Court held in both of those cases, as in Mendoza, that the Watson standard applied.

However, neither Letner, nor Covarrubias, nor Mendoza involved the issue presented here, namely, misinstruction on the relevance of intoxication to the necessary element of lack of justification. Under Mullaney v. Wilbur and People v. Rios, the failure to instruct correctly on the element of lack of justification constitutes a federal due process violation. Such due process violation is subject to the Chapman test for harmless error. Thus, Letner and Covarrubias are not relevant on this point, because neither involved instruction on an issue - - the lack of justification - - which warrants federal due process protection.

6. In Gilmore v. Taylor (1993) 508 U.S. 333, 343, 124 L.Ed.2d 306 (cited at RABM 50), the United States Supreme Court held that an instruction "violates due process if it relieves the State of its burden of proving all of the elements of the offense charged beyond a reasonable doubt." That is what occurred here. The incorrect instruction on

intoxication relieved the prosecution of its burden to prove the lack of justification in order to prove malice.

Gilmore v. Taylor, supra, 508 U.S. at 343, states that the rules of Winship and Sandstrom do not apply where instructions merely create the risk "that the jury would fail to consider evidence that related to an affirmative defense ..." That distinction does not apply here. That is because California law, as stated in Elmore and Rios, provides that imperfect self-defense is not just an affirmative defense. Instead, once sufficient evidence is presented of imperfect self-defense, the prosecution has the burden of proving the lack of justification in order to prove malice. Thus, under California law, imperfect self-defense is not merely an affirmative defense for the defendant to prove. Instead, the absence of justification is a necessary element, or part of a necessary element, which the prosecution must prove. Because Elmore and Rios place upon the prosecution the burden of proving the element of lack of justification, proof of that necessary element is entitled to due process protection under Mullaney v. Wilbur, and Sandstrom v. Montana. The standard of prejudice for such a due process violation is Chapman.

7. Appellant argued at AOBM 29 and 33 that the incorrect instructions on intoxication violated a second federal constitutional right, namely, the right to be instructed on the defense theory of the case under Mathews v. United States (1998) 485 U.S. 58, 61, 65. Respondent contends Mathews does not apply, because Appellant's jury was instructed on voluntary intoxication (although it was instructed incorrectly), while Mathews' jury did not receive any instruction at all on the defense theory. (RABM 50) Respondent is incorrect. A jury is no better off when it is instructed incorrectly than when it is not instructed at all.

Respondent claims Mathews does not apply, because, supposedly,

that decision was based on the Supreme Court's supervisory authority, rather than on constitutional principles. (RABM 50) Respondent is incorrect. Mathews was constitutionally based. As stated in Gilmore v. Taylor, supra, 508 U.S. at 343, the United States constitution "guarantees criminal defendants a meaningful opportunity to present a complete defense." Gilmore relied upon Mathews, Crane v. Kentucky (1986) 476 U.S. 683, 690, 90 L.Ed.2d 636 and Chambers v. Mississippi (1973) 410 U.S. 284, 38 L.Ed.2d 297, which all provide that a defendant has a federal constitutional right to present a defense.

8. Appellant argued at AOBM 35-36 that under People v. Thomas (2013) 218 Cal.App.4th 630, 633, the correct standard of prejudice for misinstruction on voluntary manslaughter is harmless beyond a reasonable doubt under Chapman. Thomas relies upon Mullaney v. Wilbur, 421 U.S. at 704, which holds that the lack of justification is a necessary element, which the prosecution must prove beyond a reasonable doubt. Thomas' explanation of why Chapman applies is similar to Justice Kennard's explanation in her dissents in Breverman and Moye of why Chapman applies to misinstruction on the lack of justification. Respondent's convoluted attempts to distinguish Thomas (ARBM 51) are mistaken.[7]

9. Appellant argued at AOBM 36-38 that the combination of the opinions of the four dissenting justices plus the concurring justice in Montana v. Egelhoff (1996) 518 U.S. 37 supported Appellant's position

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[7]At AOBM 35-36 Appellant discusses the procedural history of Thomas. The Court of Appeal initially applied the Watson test. Then this Court granted review and transferred the case back to the Court of Appeal to reconsider the standard of prejudice. The Court of Appeal applied Chapman and found the error prejudicial. When the AG petitioned for review, this Court denied review.

that Chapman applies here. That is because the instructions here prevented the jury from considering evidence (intoxication) which California law makes relevant to an element of the offense, namely, the lack of justification.

Respondent contends that this Court disagreed with Appellant's reading of Egelhoff in People v. Atkins (2001) 25 Cal.4th 76, 93 (RABM 51). Appellant disagrees. Atkins does not apply. Atkins was an arson case, which is a general intent crime. Intoxication is not relevant to general intent crimes.

Respondent notes the concurrence in Egelhoff of Justice Ginsburg, the fifth justice, who observed that, if a statute excluded concededly relevant and exculpatory evidence, it would violate due process. (ARBM 51-52) That is what occurred here, when the intoxication instruction told the jury that it could not consider exculpatory evidence which was relevant to the necessary element of lack of justification.

On this point, California's law is different than Montana's. California law, under Rios, provides that the lack of justification is an element of the crime, or a component of an element of the crime, which the prosecution must prove. Accordingly, instructing the jury that it could not consider evidence relevant to a necessary element of the crime violated the due process clause. Such federal constitutional errors are evaluated under Chapman.

B. The Instructional Errors Were Prejudicial

Respondent's arguments are without merit.

1. Respondent argues that any instructional error was harmless, because such an error would only have affected a conviction on the theory of express malice murder, and would not have affected implied

malice murder. (RABM 52-54) Respondent is wrong. This is merely a rehash of Respondent's argument that imperfect self-defense is not usable when the prosecution asserts implied malice murder. Appellant has disposed of that argument at pp. 4-6, supra.

2. Respondent notes that CALCRIM 520, second degree murder (see CT:II:400), told the jury that "The defendant acted with express malice if he unlawfully intended to kill." From that phrase Respondent contends in a convoluted manner that the jury somehow knew it was allowed to consider Appellant's intoxication. (ARBM 53) The contention is meritless. CALCRIM 625, the instruction on intoxication, explicitly told the jury that it could only consider intoxication for the limited purpose of "deciding whether the defendant acted with an intent to kill. . ." (CT:II:407) CALCRIM 625 said nothing about determining whether the defendant acted with an *unlawful* intent to kill. As shown, this instruction was defective. Respondent's claim on this point is merely a rehash of its prior arguments.

3. Respondent claims the jury "necessarily found that Appellant acted with implied malice based on the death of Mr. Ramirez during Appellant's commission of a burglary." (RABM 54) This claim is mistaken. It depends on multiple false premises.

a. The jury did not convict Appellant of a homicide which was based on the burglary. The jury acquitted Appellant of burglary felony murder.

b. The claim of implied malice is not supported by the record. Kicking in a door does not constitute malice. Malice involves *mens rea* toward a human being. Penal Code §188; People v. Cervantes (2001) 26 Cal.4th 860, 867-868. A door does not so qualify.

c. Respondent claims malice should be imputed to a defendant who kills during the commission of a felony that is inherently

dangerous to human life. (RABM 54) That sounds like the second degree felony murder rule. Assuming that "rule" has any continuing viability, that "rule" was not at issue here. The jury was not instructed on it.

4. Respondent argues that, even if the jury was instructed incorrectly on intoxication, any error was harmless as to Appellant's alleged theory that "Mr. Ramirez chased Appellant into the hallway and attacked him after Appellant had broken off the initial confrontation." (Respondent's phrasing, RABM 55) Appellant disagrees. That is a straw man argument. This was not Appellant's position. Appellant contends that, after the initial fight in the kitchen, Appellant ran out of the apartment, down the hallway, and toward the stairs, seeking to flee the building. Ramirez ran after Appellant. Appellant then sensed, although mistakenly, that Ramirez *was about to* attack him. Appellant stopped, turned around, and attacked Ramirez, because Appellant believed that Ramirez was about to attack him.

Appellant's beliefs that Ramirez was about to attack him near the end of the hallway, and Appellant had to stab Ramirez first, in order to protect himself, may have been mistaken because of Appellant's intoxication on multiple substances. Intoxication on methamphetamine could have caused Appellant to think and behave in a paranoid fashion, and to believe that Ramirez was about to stab him again, even if that was not true. Intoxication on alcohol could have caused Appellant to perceive incorrectly, and to act in an unduly aggressively manner not warranted by the facts. Accordingly, correct instructions on intoxication would most likely have made a difference in helping the jury determine how Appellant's beliefs in the need for self-defense could be actual, even if they were unreasonable..

5. Respondent argues that Appellant's intoxication defense that he killed Ramirez "in the throes of methamphetamine-induced

psychotic delusions." (RABM 55) Respondent claims any instructional error was harmless, because imperfect self-defense cannot be based on delusions. (RABM 55) Respondent's argument is baseless. There was no delusion during this fight. Appellant's testimony that Ramirez stabbed him with a kitchen knife with a 10" blade was not delusional. The knife with the 10" blade was found on the hallway floor. Nor was there any delusion regarding the fact that Ramirez stabbed Appellant several times and punctured Appellant's lung. Under People v. Elmore, 59 Cal.4th at 130, Appellant's beliefs were mistakes of fact, not delusions. Under Elmore, a person who sees a stick and thinks it is a snake is mistaken, but is not delusional. Accord: People v. Ocegueda (2016) 247 Cal.App.4th 1393, 1409.

6. Respondent claims some witnesses contradicted Appellant's testimony that he was intoxicated, and "no other percipient witness supported his allegation of severe intoxication." (RABM 56) Respondent is incorrect. It misstates the record. Two police officers, Mendoza and Sanchez, and three ex-relatives, Venegas, Luna, and Rico, all testified that Appellant was intoxicated. Officer Mendoza testified that, when he arrested Appellant, Appellant's behavior was bizarre, and seemed to be caused by intoxication. When Mendoza took Appellant to the hospital, Appellant appeared under the influence of drugs. The toxicology report found methamphetamine in Appellant's blood stream. He had three empty baggies with meth residue in his pocket. At the time of the fight, his blood alcohol content was .08. (See AOBM 10, fn. 1) He was seen holding a half-empty 24 oz. beer can.

7. Respondent claims that, because the jury rejected Appellant's intoxication defense regarding the burglary, it also would have rejected his intoxication defense regarding the murder, even with correct

instructions. (RABM 56) Respondent is incorrect. There were two points in time during the fight when correct instructions on intoxication would have made a difference:

(i) The first time was when Appellant fled the apartment, ran down the hallway, got almost as far as the stairs, and then turned around and stabbed Ramirez. Appellant may then have believed, although mistakenly, that Ramirez was about to stab him again. So Appellant may have believed that he had to stab Ramirez first to prevent Ramirez from stabbing him. (ii) The second time was when they were fighting on the hallway floor, and when Appellant stabbed Ramirez more times than necessary, mistakenly believing, because of intoxication, that Ramirez remained a threat when he no longer was. At those two moments Appellant was required to make instantaneous and critical decisions, depending on rapidly changing circumstances.

The jury needed to answer several questions about Appellant's mental state at those two moments in the fight in the hallway. Those questions included: whether Appellant actually believed: (a) that Ramirez was about to reinitiate his attack on Appellant; (b) that the threat of death or GBI was imminent; (c) that the threat would not have disappeared if Appellant continued running away; and (d) that once Appellant started stabbing Ramirez, that Appellant needed to continue stabbing Ramirez, because Ramirez was not yet neutralized.

During these points in the fight, Appellant had to perform split-second evaluations of circumstances and had to conduct split-second decision-making. Appellant's split-second responses could easily have been distorted by intoxication. Thus, the failure to instruct correctly on intoxication adversely affected the jury's determinations of Appellant's mental state during these critical moments. That failure adversely affected

the jury's ability to decide whether Appellant actually (although unreasonably) believed he needed to act in self-defense. Answering those questions was a far more complicated task for the jury than simply determining Appellant's mental state when he kicked in the door several minutes earlier.

8. Respondent argues that the jury necessarily believed the story told by the victim's girlfriend that Appellant was the initial attacker. Otherwise, the jury would have acquitted on complete self-defense. (ARBM 56) Appellant disagrees. The jury could have rejected complete self-defense on the theory that, even if Ramirez was the initial attacker, and even if Appellant had the initial right to stab him in self-defense, that such a right dissipated once Ramirez became sufficiently disabled. At that point Appellant no longer had the legal right to continue stabbing him. See CALCRIM 505, regarding when the right to self-defense terminates. However, if the jury had been correctly instructed on intoxication, it could easily have found imperfect self-defense, on the theory that Appellant mistakenly believed, due to his intoxication, that he had to continue stabbing Ramirez.

9. Respondent argues that, intoxicated or not, Appellant had no right to self-defense. Respondent relies on People v. Salazar (2016) 63 Cal.4th 214, 249, which holds that an original aggressor "cannot slay his adversary in self-defense unless he has first, in good faith, declined further combat, and has fairly notified him that he has abandoned the affray." (RABM 57) Respondent claims this principle disqualified Appellant from any kind of self-defense, because Appellant "never testified that he informed or notified Mr. Ramirez that he was abandoning the conflict. Absent such notification, Appellant had no right of even imperfect self-defense." (RABM 58) Respondent is incorrect. It misstates the law.

A defendant is not obligated to verbally notify his opponent that he is abandoning the conflict. The simple act of withdrawal, without verbal notification, may be sufficient. People v. Nem (2003) 114 Cal.App.4th 160, 166-167.[8] Under Nem, formal notification is not required. Withdrawal is sufficient. That is what Appellant did here. He left the apartment and ran down the hallway toward the stairs. That flight should have been sufficient to inform Ramirez that Appellant was withdrawing. Instead, Ramirez chased after Appellant, eager to resume the fight. Appellant turned around, thought he had no chance to escape, and then stabbed Ramirez before Ramirez could stab him. Thus, Appellant's initial conduct when he fled from the apartment and ran toward the stairs was sufficient to establish that he "declined further combat and has fairly notified [Ramirez] that he has abandoned the affray," within the meaning of Salazar, so as to revive his right to imperfect self-defense. People v. Nem, supra.

10. Appellant argued at AOB 44-47 that several events during jury deliberation showed the case was close, including: (a) The jury acquitted Appellant of premeditated first degree murder. (b) It acquitted Appellant of first degree felony murder, even though it convicted him of the underlying felony, burglary. (c) The acquittal on felony murder showed the jury intended to apply a degree of leniency. (d) The jury sent the trial judge a note which requested explanation of a phrase in CALCRIM 571, the imperfect self-defense instruction. (e) The jury deliberated for close to two days after the taking of evidence took barely five days. (f) The jury requested read back of Appellant's testimony regarding the start of the

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[8]Prior to the Nem opinion, CALJIC 5.54 stated that, to regain the right to self-defense, the defendant was required to "inform" his opponent that he wanted to stop fighting. After the Nem decision, CALJIC 5.54 was modified to read that the defendant must "by words or conduct cause his opponent to be aware . . ."

fight.

Respondent asks this Court to disregard these indications of the closeness of the case. (i) Respondent claims Appellant failed to show that the case was close on the issues of self-defense and intoxication. (RABM 58) Respondent is incorrect. Appellant's entire defense was self-defense, both complete and imperfect, based in part on the fact that his state of mind was distorted by intoxication. Thus, if the case was close, it was close on the issues of self-defense and intoxication. (ii) Respondent claims, if the jury's verdict showed leniency, that meant the jury convicted Appellant of what it thought was fair. So, a correct intoxication instruction would not have mattered. (RABM 59) Respondent is incorrect. The jury convicted Appellant of the lowest degree of homicide which the instructions allowed. If the jury knew it could rely on intoxication in determining whether or not Appellant acted in imperfect self-defense, it probably would have returned a verdict of manslaughter based on imperfect self-defense.

(iii) Respondent tries to distinguish Olden v. Kentucky (1988) 488 U.S. 227, which found prejudice because the verdict could not "be squared with the State's theory of the alleged crime." Id. at p. 233. Respondent claims that did not occur here, because the second degree murder conviction was supposedly consistent with the prosecutor's theory of the case. (RABM 60) Respondent is incorrect. The prosecutor sought a first degree murder conviction both on premeditation and felony murder. The jury rejected both those theories. (iv) Respondent argues that, even if the jury's note showed it was unsure about who started the fight, that did not matter, because the rejection of Appellant's complete self-defense "conclusively determined that Appellant started the fight. . ." (RABM 60) Respondent is incorrect. As shown above, the jury may have rejected complete self-defense on the theory that, even if Ramirez was the initial attacker, Appellant stabbed him

more times than was necessary, because Ramirez had already been disabled.

11. Finally, Respondent does not deny that, if prejudice is measured under the Chapman test, the instructional errors were prejudicial. That test should apply here.

WHEREFORE, for all these reasons, and those stated in the AOBM, the instructional error was prejudicial. Thus, Appellant prays for reversal.

DATE: March 30, 2017

Respectfully submitted,

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Certification of Word Count

I certify that, according to our computer's word count, the text of this Appellant's Reply Brief on the Merits is 8302 words.

Dated: March 30, 2017

/s/ STEPHEN B. BEDRICK
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PROOF OF SERVICE BY MAIL

I, S.B. MERIDIAN, hereby declare under penalty of perjury that I am a citizen of the United States, over the age of eighteen years, and not a party to the within action; that my business address is 1970 Broadway, Suite 1200, Oakland, CA 94612.

On the date below, I served the following documents:

APPELLANT'S REPLY BRIEF ON THE MERITS

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