In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JUAQUIN GARCIA SOTO,** **Defendant and Appellant.**

Case No. S236164

Sixth Appellate District, Case No. H041615
Monterey County Superior Court, Case No. SSC120180A
The Honorable Carrie M. Panetta, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General
AMIT KURLEKAR
Deputy Attorney General
State Bar No. 244230
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5559
Fax: (415) 703-1234
Email: Amit.Kurlekar@doj.ca.gov
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page

ISSUES PRESENTED

1. "[W]hether the trial court erred in instructing the jury, as the Court of Appeal found." (Order Granting Petn. for Review.)

2. "[I]f so, whether the error was prejudicial." (Order Granting Petn. for Review.)

INTRODUCTION

A jury convicted appellant of second degree murder and first degree burglary after he broke into a family's home and stabbed one of the family members, Israel Ramirez, to death. Appellant argued at trial that he killed Mr. Ramirez while in a state of methamphetamine-induced psychosis, which caused appellant to sincerely but unreasonably believe that Mr. Ramirez was attacking him. The trial court gave the jury CALCRIM No. 625, the model jury instruction on the use of voluntary intoxication evidence. That instruction states that such evidence can be considered with respect to a murder charge only in determining whether the defendant deliberated, premeditated, or formed an intent to kill.

The Court of Appeal held that CALCRIM No. 625 misstates the law as to how voluntary intoxication evidence may be considered by a jury. Specifically, the Court of Appeal concluded that when the prosecution advances a theory of express malice murder, voluntary intoxication should be considered relevant to determining not only whether the defendant formed an intent to kill but also whether that intent was unlawful. The court concluded that the instruction erroneously precluded the jury from considering intoxication in assessing whether appellant acted in imperfect self-defense. The Court of Appeal further held, however, that appellant was not prejudiced by the instructional error due to the overwhelming evidence of his guilt of murder.

The Court of Appeal erred in disapproving the instruction. CALCRIM No. 625 correctly encapsulates current Penal Code section 29.4—formerly Penal Code section 22—the statute codifying California law on the use of voluntary intoxication evidence in murder (and other criminal) prosecutions.[1] The Court of Appeal's contrary conclusion runs counter to the Legislature's intent in enacting limitations on the use of voluntary intoxication evidence, as reflected in the statute's legislative history. The Court of Appeal's holding also contravenes longstanding judicial policy against allowing voluntary intoxication to mitigate crimes resulting from impaired judgment. Additionally, the Court of Appeal read section 29.4 to have the absurd consequence of putting murder defendants who expressly intend to kill their victims in a better position than murder defendants who kill their victims out of conscious disregard for human life. This court has repeatedly interpreted homicide law to avoid that consequence, and should do so again here. Finally, even if voluntary intoxication evidence could be properly considered in support of imperfect self-defense in *some* cases, the trial court did not err in giving CALCRIM No. 625 here because appellant's ultimate intended use of that evidence was to support his theory that his unreasonable killing of Mr. Ramirez was fueled by a methamphetamine-induced psychotic delusion—a theory that this court squarely prohibited in *People v. Elmore* (2014) 59 Cal.4th 121. The Court of Appeal's judgment should therefore be affirmed on the alternate ground that no instructional error occurred.

---

[1] Further undesignated statutory references are to the Penal Code. At the time of trial, section 22 codified the principles governing the use of voluntary intoxication evidence in criminal trials. It was later renumbered as section 29.4. Like the Court of Appeal opinion (Typed Opn. at p. 13, fn. 5), we refer to section 29.4 or former section 22, as appropriate to the context. When dealing with the general meaning of language that is identical in both versions of the statute, we refer to section 29.4.

The judgment should also be affirmed on the basis that any instructional error was harmless regardless of the standard because even if the jury had found that appellant did not commit murder with express malice based on his voluntary intoxication, it still necessarily would have found that he killed with implied malice, which voluntary intoxication cannot be used to negate. Moreover, any error was harmless because, as the Court of Appeal correctly concluded, the evidence belied any assertion of imperfect self-defense. Accordingly, the judgment should be affirmed even if instructional error did occur.

STATEMENT OF THE CASE

A. Prosecution Case

On July 10, 2012, at 6:00 p.m., appellant knocked loudly on the door of Bernardino Solano's unit in a Greenfield apartment building. (5 RT 115, 132.) Mr. Solano answered the door, and appellant, who appeared upset, told him to come outside. (5 RT 116.) Appellant was hiding his right arm behind his back. (5 RT 117.) Mr. Solano refused to step outside and attempted to close the door, but appellant blocked it with his foot. (5 RT 117-118.) Appellant took three to four steps into the apartment, where Mr. Solano's wife and three children were. (5 RT 119.) Once inside the apartment, appellant looked around as though he were searching for something, while continuing to hide his right hand. (5 RT 120-121.) After two minutes, appellant left, appearing angry. (5 RT 121-122.) Once he was gone, Mr. Solano's daughter called the police. (5 RT 123.) Appellant did not stumble, slur his words, or smell of alcohol during this episode. (5 RT 133-134.)

On this same night, Israel Ramirez and his girlfriend, Patricia Saavedra, were sitting on their sofa in another unit of the same apartment building, watching television. The couple's son was also in the room.

(5 RT 145.) At 6:40 p.m., appellant kicked in the door, breaking it into pieces, and entered the apartment. (5 RT 147-148.) Mr. Ramirez asked appellant what he wanted. Appellant did not respond, but walked towards Mr. Ramirez—who was still sitting on the couch—and asked Mr. Ramirez if he was alone. (5 RT 149-150.) With his right hand tucked into his pocket, appellant walked right next to Mr. Ramirez and continued to ask him if he was alone. (5 RT 150-151.)

Appellant then stabbed Mr. Ramirez in the neck with a "blade." (5 RT 151.) Mr. Ramirez got up and ran into the kitchen; appellant followed him, threatening Ms. Saavedra with his knife on the way. (5 RT 152, 156-157.) In the ensuing struggle, appellant stabbed Mr. Ramirez to death. (See 5 RT 153-154 [Ms. Saavedra's testimony that she saw Mr. Ramirez's dead body in the hallway]; 7 RT 423.)

Appellant left the building and paced around for five minutes before running through an alley. (5 RT 182, 187.) He wound up in his car in front of the home of his brother and sister-in-law, where his sister-in-law found him. Another person present called the police. (5 RT 204-205.) When appellant heard the sirens, he said, "I told you[] not to call the fucking cops." (6 RT 208.) He ran into the house. (5 RT 271.) He was arrested soon thereafter. Appellant was found to be under the influence of alcohol and narcotics when apprehended, but not to the extent that he could not care for himself. (6 RT 338-339; 7 RT 509.)

B. Defense Case

1. Percipient witnesses

A drug test administered to appellant at the hospital after his arrest revealed the presence of methamphetamine, marijuana, and opiates, as well as a blood-alcohol level of 0.035 percent. (8 RT 570-573.) Appellant denied having taken any drugs, however, and the nurse who administered

the test, Michele Villanueva, did not think that appellant behaved as if he were intoxicated or under the influence. (8 RT 575-578.)

Appellant testified that he "remember[ed] some parts; not all parts" of his attack on Mr. Ramirez. (8 RT 582.) During the three or four days preceding the attack, appellant was living on the streets and using alcohol and methamphetamine. (8 RT 582-584.) The prolonged use of drugs deprived appellant of sleep and left him "tired, . . . we[a]k, . . . hearing voices, [and] seeing shadows." (8 RT 583-584; see also 8 RT 607.)

On the day of the attack itself, appellant began drinking alcohol and smoking methamphetamine early in the morning. (8 RT 584-585.) That night, appellant stopped at Mr. Ramirez's apartment building because he needed to find work and he had met somebody outside that building a few years before who had given him work. (8 RT 585-587.) Appellant was carrying a knife that he used for field work. (8 RT 588.) Appellant walked inside the building, knocked on Mr. Solano's door, entered Mr. Solano's apartment, asked Mr. Solano if anybody else was there, and left the apartment. (8 RT 587-589.)

Appellant went next door and kicked open the door of Mr. Ramirez's apartment. (8 RT 589.) Appellant entered and saw a man and a woman whom he had never seen before sitting in the living room. (8 RT 589-590.) As appellant entered the living room, the woman—Ms. Saavedra—walked into an adjoining bedroom and closed the door behind her. (8 RT 589-592.) The man—Mr. Ramirez—walked into the kitchen. (8 RT 592.) At that point, appellant tried to leave the apartment, but Mr. Ramirez "came at" him, "jabbing at" appellant with a knife. (8 RT 592-593.) Appellant drew his own knife, and the two men fought. (8 RT 594-595.) Appellant was eventually able to push Mr. Ramirez away and run into the exterior hallway, but Mr. Ramirez chased him into the hallway and continued to attack him. (8 RT 595-597.) Mr. Ramirez fell on top of appellant and tried

to sink his knife into appellant's chest, but appellant was able to hold up Mr. Ramirez's arm. (8 RT 598-600.) Appellant kept stabbing wildly with his knife until he felt Mr. Ramirez "freeze up," at which point appellant slid out from underneath Mr. Ramirez and escaped downstairs. (8 RT 600-602.)

2. Expert testimony

Dr. Amanda Gregory was "qualified as an expert in the area of methamphetamine induced psychosis." (8 RT 681.) Dr. Gregory testified that her examination of appellant led her to "a diagnosis of a psychotic disorder induced by methamphetamine at the time of the incident." (8 RT 681-683.) Dr. Gregory repeatedly identified "paranoid delusion[s]" and "delusional thinking" as the main manifestations of the psychosis. (8 RT 684, 686, 690.) She explained that "when somebody is undergoing these paranoid delusions, they're more apt to misperceive interactions with other people, so they might see threats that are actually in reality are none [*sic*]." (8 RT 686.) In addition to having these "inaccurate beliefs about people being threatening," a person in the grip of these delusions could also suffer "hallucinations which could involve hearing voices or seeing things." (8 RT 684.) Other symptoms of methamphetamine-induced psychosis include "sleep deprivation [and] negative[] impacts [on the] ability to process information, to make accurate judgments, and to make good decisions." (8 RT 685.) Dr. Gregory opined that appellant's actions leading up to his killing of Mr. Ramirez—foregoing sleep for several days, entering Mr. Ramirez's building without any clear reason, and breaking into strangers' homes—were consistent with somebody suffering from methamphetamine-induced psychosis and showed that appellant "might have been responding to delusional thinking at that time." (8 RT 684-691.)

C. Voluntary Intoxication Instruction and Defense Argument

The trial court instructed the jury, without objection, with CALCRIM No. 625, the voluntary intoxication instruction:

> You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation.
>
> A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect.
>
> You may not consider evidence of voluntary intoxication for any other purpose.

(2 CT 407.) The jury was also instructed on both implied and express malice murder. (2 CT 400-401.)

Appellant's trial counsel devoted the bulk of the defense argument (10 RT 890-902) to Dr. Gregory's testimony about the effects of intoxication on appellant's behavior (10 RT 896-900).

D. The Verdict

On June 27, 2014, the jury found appellant guilty of second degree murder (§ 187) and first degree burglary, during which he used a knife and a person was present (§§ 459, 667.5, subd. (c), 12022, subd. (b)). (2 CT 311-312.)

E. The Court of Appeal's Ruling

The Sixth District Court of Appeal held that CALCRIM No. 625 improperly prohibited the jury from considering evidence of voluntary intoxication in determining whether appellant's intent to kill was unlawful

for purposes of the express malice theory of murder raised at his trial. (Typed Opn. at pp. 14-19.)

The Court of Appeal agreed with respondent's argument that former section 22 barred (and current section 29.4 bars) consideration of voluntary intoxication evidence to mitigate implied malice murder to manslaughter. (Typed Opn. at p. 15; see also *People v. Mendoza* (1998) 18 Cal.4th 1114, 1126 [noting that former section 22 was enacted to abrogate *People v. Whitfield* (1994) 7 Cal.4th 437, which held that voluntary intoxication evidence can be considered to mitigate implied malice murder].)

The Court of Appeal observed that the statute explicitly allows evidence of voluntary intoxication to be used to negate express malice, an element of murder that the court emphasized is the "'deliberate intention *unlawfully* to take away the life'" of the victim. (Typed Opn. at pp. 15-16; see also former § 22; §§ 29.4, 188.) The court further noted that while CALCRIM No. 625 allows juries to consider voluntary intoxication in deciding whether a defendant formed the intent to kill, it implicitly bars juries from considering such intoxication in deciding whether that intent was unlawful. (Typed Opn. at pp. 15-16.) The court concluded that this implicit bar was error in this case because "when a defendant honestly believes in the need of self-defense"—as appellant claimed he did because of his voluntary intoxication—"the intent to kill is not 'unlawful' under Penal Code section 188 and, therefore, express malice is negated." (Typed Opn. at p. 16.) The Court of Appeal nonetheless affirmed the judgment, finding harmless the instructional error that it had identified. (Typed Opn. at pp. 19-22.)[2]

---

[2] The Court of Appeal also rejected a second argument by appellant asserting evidentiary error. (Typed Opn. at pp. 22-26.) That argument is not at issue here.

F. The Petition for Rehearing and Modification Order

Respondent filed a petition for rehearing under Government Code section 68081. Respondent urged that the Court of Appeal had erroneously disapproved CALCRIM No. 625 because voluntary intoxication evidence is categorically inadmissible on the issue of the unlawfulness of an intent to kill; a contrary conclusion would lead to the absurd result of placing an express malice murder defendant in a more favorable position than a similarly situated implied malice murder defendant. (Rehg. Petn. at pp. 7-12.) In the alternative, respondent contended that allowing consideration of voluntary intoxication as evidence of unlawfulness in this case would have been tantamount to allowing a prohibited delusion defense to unlawfulness. (Rehg. Petn. at pp. 13-14.)

The Court of Appeal denied rehearing and modified its opinion. (Modification Order at pp. 1-2.)[3] Notwithstanding that the need for self-defense may not be based on a delusion, the court discerned "substantial evidence" in the record "from which reasonable jurors could have found that defendant's belief in the need for self-defense was not entirely delusional," namely Dr. Gregory's testimony that "sleep deprivation caused by methamphetamine use negatively affects users' ability to process information, form judgments, and make good decisions." (Modification Order at p. 1.) With respect to its disapproval of CALCRIM No. 625's exclusive focus on intent to kill, the Court of Appeal did not deny that its ruling would "produce[] an 'incongruous' result," but stated that such incongruity "is a consequence of Section 29.4, which explicitly makes voluntary intoxication relevant to express malice while omitting implied malice." (Modification Order at p. 2.)

---

[3] The modification order is Exhibit B to respondent's petition for review and is available at 2016 WL 3961816.

This court granted petitions for review from each party, specifying that the "issues to be briefed and argued" would be "(1) whether the trial court erred in instructing the jury, as the Court of Appeal found, and (2) if so, whether the error was prejudicial." (Order Granting Petn. for Review.)

SUMMARY OF ARGUMENT

In relevant part, section 29.4 provides that in the context of murder prosecutions, "[e]vidence of voluntary intoxication is admissible solely on the issue of . . . whether the defendant premeditated, deliberated, or harbored express malice aforethought." This ambiguous provision begs the question, however, of *how* voluntary intoxication evidence can be used to undermine a showing of express malice. CALCRIM No. 625 answered that question by stating that voluntary intoxication evidence can be used to show the lack of a specific intent to kill. In the opinion below, the Court of Appeal addressed the ambiguity in a contrary fashion, holding that such evidence can also be used to show that a defendant's specific intent to kill was not unlawful.

The drafters of CALCRIM No. 625 correctly understood and applied the statute. Former section 22 was amended in 1995 in response to *Whitfield*, *supra*, 7 Cal.4th 437, which held that voluntary intoxication evidence could be considered to mitigate implied malice murder. The amendments aimed to supersede *Whitfield* by expressly preventing the use of voluntary intoxication evidence to show the absence of implied malice. The legislative history of those amendments reveals that the Legislature considered implied malice murder a general intent crime that it distinguished from express malice murder on the ground that the latter had a specific intent requirement—namely, the specific intent to kill. Because section 29.4 allows the use of voluntary intoxication evidence to mitigate express malice murder but not implied malice murder, the more reasonable reading of that provision is that such evidence can only be used to negate

the component of express malice not shared by implied malice—namely, again, the specific intent to kill.

The contrary reading by the Court of Appeal runs afoul of the policy considerations underlying the divide between general and specific intent crimes. As this court articulated in *People v. Hood* (1969) 1 Cal.3d 444, the distinction between the two kinds of intent was devised as an analytical framework for deciding whether an offense could be excused to any degree by voluntary intoxication. While goal-oriented crimes can be mitigated or excused by intoxication, crimes manifesting the impaired judgment naturally resulting from voluntary intoxication cannot be mitigated or excused. CALCRIM No. 625 captures this divide exactly by instructing that a defendant can use voluntary intoxication to mitigate only the goal-oriented component of express malice—the specific intent to kill. On the other hand, allowing a defendant to use voluntary intoxication evidence to support an imperfect self-defense claim would improperly allow mitigation of murder based precisely on the defendant's impaired judgment.

The Court of Appeal's ruling not only contravenes both legislative intent and well-established judicial policy, it does so in a way that creates an absurd consequence repeatedly disapproved by this court. Specifically, under the Court of Appeal's rationale, a defendant having the specific intent to kill is allowed to use voluntary intoxication evidence to mitigate murder to manslaughter, but a defendant who acts only with implied malice—conscious disregard for life without the specific intent to kill—is not allowed that same use of that same evidence. As this court has done previously on several occasions, it should presume the Legislature to have avoided an absurd statutory scheme that confers preferential treatment on intentional killers vis-à-vis unintentional killers.

Even if the Court of Appeal were correct in concluding that former section 22 did not categorically bar the use of voluntary intoxication

evidence to support an imperfect self-defense claim, the trial court's decision to instruct the jury with CALCRIM No. 625 in this particular case would have still been correct. Appellant's sole use of the voluntary intoxication evidence was to support his claim that he engaged in imperfect self-defense because he killed Mr. Ramirez in the throes of a methampthemine-induced psychotic delusion. But the theory that one can mitigate murder to manslaughter by claiming any kind of delusion—drug-induced or otherwise—was squarely and recently rejected by this court in *People v. Elmore* (2014) 59 Cal.4th 121. Appellant therefore had no valid use for the voluntary intoxication evidence in service of his imperfect self-defense claim.

The error the Court of Appeal identified was harmless in any event. As this court has consistently recognized in past voluntary intoxication cases, the applicable test for prejudice is the one from *People v. Watson* (1956) 46 Cal.2d 818, which evaluates prejudice arising from misinstruction on how to weigh certain kinds of evidence. Applying that standard, it is not reasonably probable that appellant would have received a more favorable verdict had the jury been instructed that it could consider voluntary intoxication in determining the unlawfulness of his express intent to kill. Even if appellant succeeded in convincing the jury that his voluntary intoxication precluded him from committing murder with express malice, the jury would still necessarily have found that he killed with implied malice, which voluntary intoxication cannot negate. Consequently, the jury would still have returned the same second degree murder verdict. As an independent basis for finding harmless error, the evidence in this case belied any assertion of imperfect self-defense through voluntary intoxication. Every percipient witness other than appellant refuted the suggestion that he was severely intoxicated, and there was no dispute that appellant was the aggressor against Mr. Ramirez. Accordingly, the Court

of Appeal's judgment should be affirmed even if instructional error did occur.

ARGUMENT

I. THE TRIAL COURT DID NOT MISINSTRUCT THE JURY AS TO THE PROPER USE OF VOLUNTARY INTOXICATION EVIDENCE WITH RESPECT TO APPELLANT'S MURDER CHARGE

The Court of Appeal erred in two ways when it concluded that the jury should have been instructed to consider voluntary intoxication evidence in determining whether appellant acted in imperfect self-defense. First, section 29.4 categorically bars consideration of such evidence in determining whether one who kills intentionally has an unlawful intent. Second, appellant's intended use of voluntary intoxication evidence to show that he killed while suffering from methamphetamine-induced psychosis was barred by *Elmore*'s prohibition against basing an imperfect self-defense theory on delusions.

A. CALCRIM No. 625 Correctly Instructs Juries that Voluntary Intoxication Evidence Can Only Be Used To Negate a Murder Defendant's Premeditation, Deliberation, or Specific Intent To Kill for Purposes of Express Malice

Section 29.4's reference to express malice presents an ambiguity for this court's resolution. "A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable." (*Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776; accord, *Snukal v. Flightways Mfg., Inc.* (2000) 23 Cal.4th 754, 778.) Even when the words of a statute are well-defined in themselves, the statute is ambiguous if a reasonable disagreement exists about the scope of a permission or restriction therein. For example, in *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, this court considered a statute banning the "nonsale distribution" of tobacco products on public land except when

the distributor is leasing such land for a "private function where minors are denied access." (*Id.* at pp. 713-715, internal quotation marks omitted.) The court found the scope of the exception to the ban to be facially ambiguous; specifically, one could read the statute to prohibit tobacco distribution entirely at a street fair to which minors have access or, alternatively, to allow distribution as long as the distributor denied minors access to the specific site it operated at the fair. (*Ibid.*)

The same kind of ambiguity exists with respect to section 29.4, which provides in relevant part that in the context of murder prosecutions, "[e]vidence of voluntary intoxication is admissible . . . on the issue of . . . whether the defendant . . . harbored express malice aforethought." Like the proviso in the tobacco statute in *R.J. Reynolds* concerning denial of access to minors, the reference to express malice is an exception to a statutory restriction. In particular, section 29.4 contains a broad ban on the use of evidence of intoxication but carves out an exception that allows a defendant to submit voluntary intoxication evidence to support a claim that the defendant did not kill the victim with express malice.

That exception is ambiguous. Express malice requires (1) an intent to kill that (2) is itself unlawful. (E.g., *Elmore*, *supra*, 59 Cal.4th at pp. 132-133; *In re Christian S.* (1994) 7 Cal.4th 768, 778-779.) One could therefore reasonably read section 29.4 to allow consideration of voluntary intoxication evidence in determining (1) intent to kill, (2) unlawfulness, or (3) both. The Court of Appeal chose the last of these alternatives. (Typed Opn. at pp. 14-16.) In doing so, however, it recognized that the drafters of CALCRIM No. 625—who strived to "accurately state existing law" (Cal. Rules of Court, rule 2.1050(b))—adopted the first of those alternative readings (Typed Opn. at p. 15 [CALCRIM No. 625 instructs juries to "only consider voluntary intoxication 'in deciding whether the defendant acted with an intent to kill'" and not the unlawfulness of that intent]). Similar to

the ambiguity raised by the excepting clause in *R.J. Reynolds*, the ambiguity created by these reasonable readings of the express malice clause requires resolution by this court. (See also *People v. Smith* (2004) 32 Cal.4th 792, 797-798 [statute requiring registered sex offenders to "inform" law enforcement of change of address ambiguous as to whether registrant had a duty simply to timely mail change-of-address form or to ensure police receipt of that form]; *Snukal, supra*, 23 Cal.4th at pp. 778-779 [statute binding corporation to contract executed by two of its officers ambiguous as to whether it is bound when document is executed by one individual holding two offices]; *Hughes, supra*, 17 Cal.4th at p. 774-775 [statute allowing state board to discipline licensed architect who "has been guilty" of specified misconduct ambiguous as to whether qualifying misconduct must have occurred after license was granted].)

Because section 29.4's language concerning express malice "is susceptible of more than one reasonable construction," this court "can look to legislative history . . . and to rules or maxims of construction" to decide between those competing constructions. (*Smith, supra*, 32 Cal.4th at p. 798; accord, *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838; *In re Dannenberg* (2005) 34 Cal.4th 1061, 1081.) As set forth below, both the relevant legislative history and the canons of statutory construction—particularly the canon disapproving statutory constructions that lead to absurd consequences—support the reading of section 29.4 adopted in CALCRIM No. 625 but rejected by the Court of Appeal.

1. The legislative history of former section 22 of the Penal Code shows that the Legislature intended to allow consideration of voluntary intoxication evidence only in determining a defendant's intent to kill, not the unlawfulness of that intent

Prior to 1996, subdivision (b) of former section 22 allowed the admission of voluntary intoxication evidence "'solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.'" (*Whitfield*, *supra*, 7 Cal.4th at p. 446.) The defendant in *Whitfield* was an intoxicated driver who killed another driver in a car collision. (*Id.* at pp. 442-443.) This court reversed a Court of Appeal decision concluding that, under the statute then in effect, "evidence of voluntary intoxication [could not] establish the absence of implied malice, because second degree murder based upon implied malice is not a specific intent crime." (*Id.* at p. 446.) In support of its holding that voluntary intoxication evidence *could* be used to establish the absence of implied malice, *Whitfield* relied on two main rationales: (1) the statute broadly allowed for the use of such evidence to show that the defendant did not "harbor[] malice aforethought" without distinguishing between express and implied malice; and (2) implied malice murder was a specific intent crime for purposes of the statute. (*Id.* at pp. 446-449.)

The Legislature swiftly responded to *Whitfield*, introducing Senate Bill No. 121 to supersede the decision in January 1995. (Sen. Bill No. 121 (1995-1996 Reg. Sess.).) The initial draft of the bill proposed a narrow response to *Whitfield*, disallowing the use of voluntary intoxication evidence only with respect to implied malice murders committed by intoxicated drivers. (*Ibid.*) Soon thereafter, however, the bill's scope was expanded, limiting admission of voluntary intoxication evidence "solely [to] the issue of whether or not the defendant actually formed a required

specific intent, *or, when charged with a homicide, whether the defendant* premeditated, deliberated, or harbored *express* malice aforethought." (Sen. Amend. to Sen. Bill No. 121 (1995-1996 Reg. Sess.) Mar. 23, 1995.)

A committee analysis issued a few days after the March 23 amendment explained that the amendment targeted *Whitfield*'s holding that "[u]nder Penal Code section 22, voluntary intoxication [was] admissible to show the defendant did not have malice aforethought even when the prosecution use[d] a theory of implied malice." (Sen. Com. on Crim. Procedure, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Mar. 23, 1995.)[4] Noting that *Whitfield* had "emphasized that the Legislature did not distinguish between express and implied malice aforethought" in former section 22, the analysis declared that Senate Bill No. 121 "distinguishe[d] express malice from implied malice," and that "[b]y expressly limiting the admissibility of voluntary intoxication to the issue of express malice, the author [was] making it inadmissible when a theory of implied malice is used." (Sen. Com. on Crim. Procedure, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Mar. 23, 1995.) After one more technical amendment changing the word "homicide" to "murder," the statutory language proposed in Senate Bill No. 121 became the language used in the version of former section 22 at issue in this case and still used in section 29.4. (Sen. Amend. to Sen. Bill No. 121 (1995-1996 Reg. Sess.) Apr. 3, 1995; see also Sen. Com. on Crim.

---

[4] "To determine the purpose of legislation, a court may consult contemporary legislative committee analyses of that legislation, which are subject to judicial notice." (*In re J.W.* (2002) 29 Cal.4th 200, 211; see also *Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 717 ["a legislative committee staff analysis . . . may be considered in determining legislative intent"].)

Procedure, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Mar. 23, 1995 [describing amendment as "technical"].)

As Senate Bill No. 121 made its way through the legislative process, both the Legislature and the Governor were clearly informed that the bill would "make voluntary intoxication inadmissible . . . on the issue of whether a defendant had implied malice aforethought when charged with murder." (Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Apr. 3, 1995; see also *ibid.* ["This bill makes voluntary intoxication admissible on the issue of whether the defendant harbored express malice aforethought but not implied malice aforethought"]; Sen. Bill No. 121, 3d reading (1995-1996 Reg. Sess.) May 23, 1995 [same]; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Apr. 3, 1995 [same]; Off. of Crim. Justice Planning, Enrolled Bill Rep. on Sen. Bill No. 121 (1995-1996 Reg. Sess.) prepared for Governor Wilson (Sept. 11, 1995) ["This bill would explicitly limit the applicability of a voluntary intoxication defense to the issue of express malice, and not implied malice"]; California Highway Patrol, Enrolled Bill Rep. on Sen. Bill No. 121 (1995-1996 Reg. Sess.) prepared for Governor Wilson (Sept. 15, 1995) ["This bill distinguishes express malice from implied malice"].)[5] Advocacy groups in opposition similarly recognized that the bill would prevent use of voluntary intoxication evidence to negate implied malice, and they opposed the bill on that specific ground in letters to the Legislature. (Francisco Lobaco, American Civil Liberties Union Cal. Legis. Off., letter to Sen. Pub.

---

[5] This court has recognized that both floor analyses and enrolled bill reports are proper resources for determining legislative intent. (See *R.J. Reynolds*, *supra*, 37 Cal.4th at p. 715 [floor analyses]; *In re Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1218, fn. 3 [enrolled bill reports].)

Safety Com. re Sen. Bill No. 121 (1995-1996 Reg. Sess.) July 5, 1995; Cal. Attys. for Crim. Justice, letter to bill author Sen. Mike Thompson (1995-1996 Reg. Sess.) June 14, 1995; see *Martin v. Szeto* (2004) 32 Cal.4th 445, 450-451 [noting that letter from bill's opponent confirmed sponsor's understanding of legislative history].)

The legislative history shows that Senate Bill No. 121 was drafted "to clarify existing statutory law" by repudiating *Whitfield*'s conclusion that "the phrase 'when a specific intent crime is charged' includes murder even where the prosecution relies on a theory of implied malice." (Off. of Crim. Justice Planning, Enrolled Bill Rep. on Sen. Bill No. 121 (1995-1996 Reg. Sess.) prepared for Governor Wilson (Sept. 11, 1995).) Instead, "[m]urder, based on implied malice, is more akin to a general intent crime, e.g., it is not necessary to prove that the defendant had the precise purpose to kill." (*Ibid.*) Accordingly, "[i]n that implied malice is malice inferred from the defendant's conduct rather than by proof of an actual intent to kill, it is logical to prohibit the introduction of voluntary intoxication when the prosecution is relying upon that theory." (*Ibid.*) Similarly, in a letter to the Governor, the bill's author and sponsor explained that "SB 121 seeks to return common sense to the law by bringing it back to its pre-Whitfield state by explicitly establishing that second degree murder based on implied malice is not a specific intent crime, thereby precluding the use of the voluntary intoxication defense in those cases." (Sen. Thompson, sponsor of Sen. Bill No. 121 (1995-1996 Reg. Sess.), letter to Governor, Sept. 13, 1995.)[6]

[6] Letters to the Governor from a bill's sponsor are relevant pieces of legislative history to the extent that they reflect the motivations behind the bill. (*Martin*, *supra*, 32 Cal.4th at pp. 450-451.)

Additionally, the legislative history reveals an understanding that the sole difference between implied malice and express malice is that only the latter requires a specific intent to kill. (See Cal. Dept. Finance, Enrolled Bill Rep. on Sen. Bill No. 121 (1995-1996 Reg. Sess.) prepared for Governor Wilson (Sept. 11, 1995) ["the difference between express and implied malice is that first degree murder results from expressed malice (holding a gun to someone's head and pulling the trigger)" while "[i]mplied malice is associated with second degree murder (shooting a gun into a building, but not intentionally picking out one person to kill)"]; Cal. Dept. Finance, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) Apr. 21, 1995 [same].)[7] This same understanding has been expressed repeatedly in this court's opinions. (See, e.g., *People v. Saille* (1991) 54 Cal.3d 1103, 1115 [noting that the concept of "'deliberate intention' . . . distinguishes 'express' from 'implied' malice"]; *People v. Welch* (1999) 20 Cal.4th 701, 755-756 [approving trial court instruction that "express malice is where the activity shows an intent to kill" as "clarifying for the jury the difference between express and implied malice" (internal quotation marks omitted)]; see also *People v. Smith* (2005) 37 Cal.4th 733, 749 (dis. opn. of Werdegar, J.) ["the crucial difference between implied malice . . . and express malice . . . is the specific intent to kill a person"]; *id.* at p. 747 (maj. opn.) [accepting dissent's articulation of distinction between two kinds of malice].)

The conclusion that express malice is simply implied malice plus the specific intent to kill follows from a detailed understanding of what each

---

[7] This court has previously considered bill analyses from the Department of Finance as part of the relevant legislative history of a statute. (See, e.g., *Sierra Club v. Superior Court* (2013) 57 Cal.4th 157, 172; *Planning and Conservation League v. Dept. of Water Resources* (1998) 17 Cal.4th 264, 272-273.)

kind of malice requires. As set forth *ante*, express malice requires (1) an intent to kill that (2) is itself unlawful. (E.g., *Elmore*, *supra*, 59 Cal.4th at pp. 132-133; *Christian S.*, *supra*, 7 Cal.4th at pp. 778-779.) The unlawfulness component of "'the express malice definition means simply that there is no justification, excuse, or mitigation for the killing recognized by the law.'" (*Elmore*, *supra*, at p. 133; accord, *People v. Curtis* (1994) 30 Cal.App.4th 1337, 1352.)

This court, meanwhile, has articulated two different formulations for the "abandoned and malignant heart" required for implied malice. (§ 188.) The "wanton disregard" formulation "state[s] that malice is implied when the defendant for a base, antisocial motive and with wanton disregard for human life, does an act that involves a high degree of probability that it will result in death." (*People v. Knoller* (2007) 41 Cal.4th 139, 152, internal quotation marks omitted.) Under the "conscious disregard" formulation, on the other hand, "[m]alice is implied when the killing is proximately caused by an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*Ibid.*) In *Knoller*, this court reaffirmed previous decisions holding that "these two definitions of implied malice in essence articulated the same standard," but expressing a preference for the "conscious disregard" formulation as the easier one for juries to understand. (*Ibid.*)

Proof of implied malice requires that "the defendant killed without any legally recognized justification or excuse (such as self-defense)." (*Curtis*, *supra*, 30 Cal.App.4th at p. 1352.) This "mean[s] the same thing" as the term "'unlawfully' in the definition of express malice . . . : the absence of any justification, excuse, or mitigation recognized by law." (*Id.* at p. 1353.)

Viewed in light of these judicial decisions, the legislative history of Senate Bill No. 121 supports the interpretation of former section 22 set forth in CALCRIM No. 625, not the contrary interpretation adopted by the Court of Appeal. (See, e.g., *People v. Scott* (2014) 58 Cal.4th 1415, 1424 ["It is a settled principle of statutory construction that the Legislature is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof" (internal quotation marks omitted)].) Confining consideration of voluntary intoxication evidence to the "intent to kill" component of express malice comports with the Legislature's understanding that it is the intent to kill that differentiates express malice from implied malice. Similarly, the Legislature's overarching intent to allow voluntary intoxication evidence to be considered only with respect to specific intent crimes implies that such evidence should be considered only with respect to the component of express malice that makes it a specific intent crime—the intent to kill. And given the Legislature's clear insistence that voluntary intoxication evidence not be considered with respect to implied malice murder, one would not expect the Legislature to have intended to allow consideration of such evidence with respect to express malice's unlawfulness component, which is equivalent to the absence of justification, excuse, or mitigation required for implied malice.

2. The Court of Appeal's holding contravenes the judicial policy underlying the distinction between general and specific intent crimes

Allowing a defendant to use voluntary intoxication evidence to support an imperfect self-defense claim ignores established judicial policy governing what kinds of crimes can be excused or mitigated by intoxication. "The distinction between specific and general intent crimes evolved as a judicial response to the problem of the intoxicated offender." (*Hood, supra,*

1 Cal.3d at p. 455; accord, *People v. Atkins* (2001) 25 Cal.4th 76, 82.) "On the one hand, the moral culpability of a drunken criminal is frequently less than that of a sober person effecting a like injury." (*Ibid.*) "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." (*Ibid.*)

"Before the nineteenth century, the common law refused to give any effect to the fact that an accused committed a crime while intoxicated." (*Hood*, *supra*, 1 Cal.3d at p. 455; accord, *Atkins*, *supra*, 25 Cal.4th at p. 82.) In an attempt to soften that rule, judges considered a theory "that evidence of intoxication could be considered to negate intent, whenever intent was an element of the crime charged." (*Hood*, at p. 456; accord, *Atkins*, at p. 82.) That theory was too broadly applicable, however, given that almost all crimes have mens rea components. (*Ibid.*)

"To limit the operation of the doctrine and achieve a compromise between the conflicting feelings of sympathy and reprobation for the intoxicated offender, later courts both in England and this country drew a distinction between so-called specific intent and general intent crimes." (*Hood*, *supra*, 1 Cal.3d at p. 456; accord, *Atkins*, *supra*, 25 Cal.4th at p. 82.) The former crimes are those that involve "simple goal-directed behavior . . . such as strik[ing] another," which intoxicated individuals are still "capable of forming an intent to do." (*Hood*, at p. 458; accord, *Atkins*, at p. 91.) General intent crimes, on the other hand, are those that result from the failure to "exercis[e] judgment about the social consequences of . . . acts or controlling . . . impulses toward antisocial acts," which an intoxicated person "is not as capable as a sober man of doing." (*Ibid.*) Because general intent crimes "are so frequently committed" with the kind of "rash[] and impulsive[]" behavior brought on by intoxication, allowing intoxication evidence to mitigate or excuse such crimes would have the "anomalous"

and undesirable effect of giving the intoxicated a built-in excuse for committing them. (*Ibid.*)

In *Hood*, this court used this calculus to determine that intoxication evidence could not be used in defense against charges of "assault with a deadly weapon or simple assault." (*Hood*, *supra*, 1 Cal.3d at p. 458; accord, *People v. Rocha* (1971) 3 Cal.3d 893, 897-899.) Over three decades later—and well after the passage of Senate Bill No. 121—this court determined that arson is also a general intent crime because it is normally committed as "an angry impulsive act" rather than as "the product of pyromania," i.e., having the preexisting goal of setting fires. (*Atkins*, *supra*, 25 Cal.4th at pp. 91-92.)

The policy considerations outlined and applied in *Hood* and *Atkins* both support CALCRIM No. 625's implementation of section 29.4 and specifically refute appellant's theory that voluntary intoxication evidence can support imperfect self-defense. The "goal-oriented" component of express malice is the specific intent to kill, and so voluntary intoxication evidence is rightly limited to negating only that component. (*Hood*, *supra*, 1 Cal.3d at p. 458.) The claim that voluntary intoxication resulted in a mistaken belief in the need to defend oneself, in contrast, is a claim that alleges deterioration of one's "judgment about the social consequences of [one's] acts" and is therefore disapproved. (*Ibid.*)

Whitfield should not be seen as a retreat from the policy calculus articulated in *Hood* for several reasons. First, as described *ante* in Argument I.A.1, *Whitfield*'s inclusion of implied malice as a mental state that could be negated by voluntary intoxication was based in large part on the failure of former section 22 to differentiate between the two kinds of malice. (*Whitfield*, *supra*, 7 Cal.4th at pp. 446-449.) Although *Whitfield* cited *Hood* in its discussion of whether implied malice was a kind of specific intent, it did so only to state that implied malice did not neatly fall

into either the general intent category or the specific intent category. (*Id.* at pp. 449-450.) That statement, however, ignored *Hood*'s "policy-based divide separating general from specific intent offenses," which is the "key" consideration in determining when voluntary intoxication is exculpatory. (*Id.* at pp. 463-464 (conc. and dis. opn. of Mosk, J.); see also *Rocha*, *supra*, 3 Cal.3d at pp. 897-898 ["Policy considerations, not the specific intent-general intent dichotomy, were the principal bases of" *Hood*].)

Justice Mosk *did* apply *Hood*'s policy considerations and concluded that implied malice murder is a general intent crime, as "intoxication naturally lends itself to the crime's commission because it impairs the sound judgment or lowers the inhibitions that might stop a sober individual from committing a highly dangerous act leading to another's death." (*Whitfield*, *supra*, 7 Cal.4th at p. 463 (conc. and dis. opn. of Mosk, J.); see also *id.* at p. 464 [implied malice murder cannot be a specific intent crime because it does not require "goal-oriented behavior"].) Similarly, intoxication naturally lends itself to a claim of imperfect self-defense because it impairs the sound judgment that might stop a sober individual from unreasonably perceiving a lethal threat.

Justice Mosk's view was ultimately embraced by the Legislature (see Argument I.A.1, *ante*), as analyses of Senate Bill No. 121 cited his opinion with approval. (Sen. Bill No. 121, 3d reading (1995-1996 Reg. Sess.) May 23, 1995; Assem. Com. on Public Safety, Analysis of Sen. Bill No. 121 (1995-1996 Reg. Sess.) as amended Apr. 3, 1995.) And in *Atkins*, this court returned to *Hood*'s methodology of allowing voluntary intoxication evidence to mitigate or excuse only crimes involving goal-oriented behavior as opposed to simple impaired judgment. Because appellant's imperfect self-defense claim is an attempt to mitigate his criminal act based on his impaired judgment, the trial court properly precluded the jury from considering voluntary intoxication evidence in support of that claim.

3. Allowing consideration of voluntary intoxication evidence in determining the unlawfulness of a defendant's intent to kill would lead to absurd consequences

One of the fundamental maxims of statutory construction is the directive to avoid absurd consequences. (See, e.g., *In re Greg F.* (2012) 55 Cal.4th 393, 406 ["'We must . . . avoid a construction that would produce absurd consequences, which we presume the Legislature did not intend'"]; *People v. Montes* (2003) 31 Cal.4th 350, 356 ["'We will avoid any interpretation that would lead to absurd consequences'"].) But the Court of Appeal's interpretation of section 29.4 would lead to an absurd consequence repeatedly rejected by this court—the favorable treatment of those who kill with express malice over those who kill with implied malice.

This court has repeatedly held that a theory of mitigation of the unlawfulness component of express malice murder applies to the same extent to the wrongfulness aspect of implied malice. The court clearly articulated this coextensiveness in *Christian S.*, *supra*, 7 Cal.4th 768. In that case, the court held that because "[a] person who actually believes in the need for self-defense necessarily believes he is acting lawfully," a successful assertion of imperfect self-defense would negate the unlawfulness component of express malice. (*Id.* at pp. 778-780; accord, *People v. Anderson* (2002) 28 Cal.4th 767, 782 ["a person who actually, albeit unreasonably, believes it is necessary to kill in self-defense intends to kill lawfully, not unlawfully," and is therefore "not malicious"]; *Curtis*, *supra*, 30 Cal.App.4th at p. 1352 [noting that *Christian S.* "held that imperfect self-defense rebuts the intent to kill 'unlawfully' within the meaning of the express malice definition"].)

Christian S. further held that imperfect self-defense would similarly preclude a conviction for implied malice murder because "[a] defendant who acts with the requisite actual belief in the necessity for self-defense

does not act with the base motive required for implied malice, i.e., with an abandoned and malignant heart." (*Christian S.*, *supra*, 7 Cal.4th at p. 780, fn. 4, internal quotation marks omitted; accord, *Curtis*, *supra*, 30 Cal.App.4th at pp. 1352-1353.) As this court explained, "A contrary conclusion"—"namely, that imperfect self-defense applies only in cases of express, but not implied, malice—would [have led] to a totally anomalous and absurd result, in which a defendant, who unreasonably believes that his life is in imminent danger, would be guilty only *of manslaughter* if he acts *with the intent to kill* his perceived assailant, but would be guilty *of murder* if he does *not* intend to kill, but only to seriously injure, the assailant." (*Christian S.*, *supra*, 7 Cal.4th at p. 780, fn. 4.) The court found "no authority to support such an incongruous rule." (*Ibid.*)

In two companion cases, *People v. Lasko* (2000) 23 Cal.4th 101 and *People v. Blakeley* (2000) 23 Cal.4th 82, this court further developed *Christian S.*'s conclusion that it would be "anomalous and absurd" to allow a mitigation theory to asymmetrically negate the unlawfulness component of express malice but not the "abandoned and malignant heart" required for implied malice. (See *Lasko*, *supra*, at p. 109; *Blakeley*, *supra*, at p. 88.) *Lasko* asked "what offense is committed when a person, acting with a conscious disregard for human life, *unintentionally* kills a human being, but the killing occurs during a sudden quarrel or in the heat of passion." (*Lasko*, *supra*, at p. 108.) Observing that "a person who *intentionally* kills as a result of provocation . . . lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter," the court concluded that provocation similarly mitigates an implied malice murder to voluntary manslaughter. (*Id.* at pp. 108-109.) Following the reasoning in *Christian S.*, the *Lasko* court concluded that it "cannot be . . . the law" that "one who shoots and kills another in the heat of passion and with the intent to kill is guilty only of voluntary manslaughter, yet one who shoots and kills another

in the heat of passion and with conscious disregard for life but with the intent merely to injure, a less culpable mental state than intent to kill, is guilty of murder." (*Ibid.*)

In *Blakeley*, the court considered the related question of whether "one who unintentionally and unlawfully kills in imperfect self-defense is guilty only of involuntary manslaughter," or is instead guilty of voluntary manslaughter like a defendant who intentionally but unlawfully kills in imperfect self-defense. (*Blakeley*, *supra*, 23 Cal.4th at pp. 88-89.) Just as in *Lasko*, the court concluded 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. (*Ibid.*) In so concluding, the court held that "there is no valid reason to distinguish between those killings that, absent unreasonable self-defense, would be murder with express malice, and those killings that, absent unreasonable self-defense, would be murder with implied malice." (*Ibid.*; accord, *Anderson*, *supra*, 28 Cal.4th at p. 782.)

Christian S., *Lasko*, *Blakely*, and the other authorities cited above all support a conclusion that CALCRIM No. 625 correctly instructs juries to consider evidence of voluntary intoxication only in determining whether a defendant formed an intent to kill. As the Court of Appeal below recognized (Typed Opn. at p. 15) and as explained in detail *ante* in Argument I.A.1, former section 22 barred (and current section 29.4 bars) consideration of voluntary intoxication evidence to mitigate implied malice murder to manslaughter. Because the only difference between express and implied malice is the former's requirement of an intent to kill, the more reasonable reading of section 29.4 is that it allows voluntary intoxication evidence to disprove the intent to kill in an express malice murder prosecution but *not* to disprove that such intent was unlawful.

A contrary reading would mean that a murder defendant who intended to kill could use voluntary intoxication evidence to show that he did not intend to act unlawfully, but a murder defendant who did not intend to kill—i.e., who only intended to injure—could not use the same evidence to show what is the equivalent to an absence of unlawfulness in the implied malice context, i.e., that he acted without an abandoned and malignant heart. Such an "anomalous and absurd" outcome is exactly the one found untenable in *Christian S.* (7 Cal.4th at p. 780, fn. 4.)

That result would also run afoul of *Lasko*'s admonition that a defendant intending to kill should not benefit from malice mitigation where a similarly situated defendant "with the intent merely to injure, a less culpable mental state than intent to kill, [would be] guilty of murder." (*Lasko*, *supra*, 23 Cal.4th at pp. 108-109.) And it would violate *Blakeley*'s holding that the application of imperfect self-defense is symmetrical between the unlawfulness of express malice and the abandoned and malignant heart of implied malice. (*Blakeley*, *supra*, 23 Cal.4th at pp. 88-89.) Accordingly, all three cases support a reading of section 29.4 that allows consideration of voluntary intoxication evidence only in connection with formation of intent to kill in express malice murder cases.

The Court of Appeal did not deny that its holding would lead to absurd outcomes. Instead, the Court of Appeal identified section 29.4 as the source of that absurdity because of its explicitly disparate treatment of express malice as opposed to implied malice. (Modification Order at p. 2.) But that assertion ignored the ambiguous nature of section 29.4, in particular the alternate construction reflected in CALCRIM 625—namely, that the statute's disparate treatment of express and implied malice is accounted for by the permissible use of voluntary intoxication evidence by a defendant to dispute the formation of an intent to kill, the mental state unique to express malice. Because the construction reflected in CALCRIM

No. 625 avoids the absurd consequence that would flow from the Court of Appeal's construction, the model instruction's construction should prevail.

4. Appellant's attacks on CALCRIM No. 625 are unpersuasive

Other than adopting the Court of Appeal's reasoning (OBM 28-29), appellant advances three arguments as to why CALCRIM No. 625 overly restricts juries' use of voluntary intoxication evidence. All are meritless.

First, appellant expounds on the general concept that imperfect self-defense negates the unlawfulness required for express malice and claims that as a *factual* matter, voluntary intoxication could trigger a defendant's unreasonable but sincere belief in the need for self-defense. (OBM 18-23.) That claim begs the question, however, of whether the Legislature barred consideration of voluntary intoxication *as a matter of law* in determining the unlawfulness of a defendant's intent to kill. As discussed *ante*, that is exactly what the Legislature did through Senate Bill No. 121.

Second, appellant contends that even though section 29.4 specifically limits the use of voluntary intoxication evidence "when [the defendant is] charged with murder" to determining "whether the defendant premeditated, deliberated, or harbored express malice aforethought," its general allowance for consideration of such evidence to determine "whether or not the defendant actually formed a required specific intent" independently allows such evidence to be used in determining the unlawfulness of an intent to kill. (OBM 17, 23-28.) Appellant gives no justification for this strained reading of section 29.4, however, other than suggesting that his reading is plausible because the word "or" is not necessarily disjunctive. Even assuming that the word "or" is ambiguous here, both canons of construction and the legislative history of Senate Bill No. 121 conclusively refute appellant's contention. Most saliently, the more specific clause in section 29.4 concerning murder prosecutions is the controlling provision

over the clause discussing specific intent in crimes more generally. (See, e.g., *People v. Ahmed* (2011) 53 Cal.4th 156, 163 ["a specific statute prevails over a more general one relating to the same subject"].) Because premeditation, deliberation, and express malice are all kinds of specific intent in that they can be negated by evidence of intoxication (*Hood*, *supra*, 1 Cal.3d at pp. 455-458), appellant's theory would also render section 29.4's murder clause superfluous, violating the canon that "significance must be given to every word in a statute in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage." (*People v. Leiva* (2013) 56 Cal.4th 498, 506.) Additionally, because the Legislature amended former section 22 to reestablish the restrictions on the use of voluntary intoxication evidence in murder prosecutions in particular (Argument I.A.1, *ante*), the Legislature could not have intended the "specific intent" clause of former section 22 to provide an escape hatch from those very restrictions. Finally, even if appellant were correct and the general "specific intent" clause were not displaced by section 29.4's murder clause, his contention would fail because, as set forth *ante* in Argument I.A.1, Senate Bill No. 121 codified the Legislature's view that the only specific intent implicated in the malice aforethought required for murder is the intent to kill component of express malice.

Third, appellant attempts to avoid the restrictions of section 29.4 entirely by arguing that he was not asserting a voluntary intoxication defense as such, but rather was trying to use voluntary intoxication evidence to support a defense of imperfect self-defense. (OBM 25-26.) But section 29.4 does not merely limit the "defense" of voluntary intoxication; rather, it imposes limits on the admissibility of "[*e*]*vidence* of voluntary intoxication." (§ 29.4, italics added.) And section 29.4 does not make an exception to the prohibition on consideration of voluntary intoxication evidence for cases in which a defendant argues imperfect self-

defense. Appellant's argument is also unpersuasive because it is based on the false underlying premise that separate "voluntary intoxication" and "imperfect self-defense" defenses exist. "[V]oluntary intoxication . . . is not a defense to crime as such," but rather "may be relevant to whether the defendant formed a specific intent necessary for its commission." (*People v. Boyer* (2006) 38 Cal.4th 412, 469; see also *People v. Castillo* (1997) 16 Cal.4th 1009, 1014 ["Intoxication is now relevant only to the extent that it bears on the question of whether the defendant actually had the requisite mental state"]; § 29.4, subd. (a) ["No act committed by a person while in a state of voluntary intoxication is less criminal by reason of his or her having been in that condition"].) Similarly, "[i]t is well established that imperfect self-defense is not an affirmative defense," but "is instead a shorthand way of describing one form of voluntary manslaughter" that results form "negating the element of malice." (*People v. Simon* (2016) 1 Cal.5th 98, 132.) Accordingly, imperfect self-defense claims fall within the broad limits set forth by the Legislature in former section 22 on how voluntary intoxication *evidence* can be used to negate malice in murder prosecutions. Finally, the absurdity of appellant's argument is evident in that it would allow defendants to indirectly use voluntary intoxication evidence to negate even implied malice, which would undermine the central goal of Senate Bill No. 121. (See Argument I.A.1, *ante*; see also *People v. Mendoza*, *supra*, 18 Cal.4th at p. 1126 [noting that former section 22 was enacted to abrogate *Whitfield*'s holding that voluntary intoxication evidence can be considered to mitigate implied malice murder].)[8]

---

[8] Senate Bill No. 121 necessarily superseded *People v. Cameron* (1994) 30 Cal.App.4th 591, on which appellant relies heavily (OBM 21, 23, 26), because that case relied on *Whitfield* to allow voluntary intoxication evidence to be considered in negation of implied malice. (*Cameron*, at pp. 599-601.) And *Christian S.* does not support appellant's argument (continued...)

B. The Jury Was Properly Instructed That Appellant Could Not Use Voluntary Intoxication Evidence to Support an Imperfect Self-Defense Claim Because the Only Such Evidence Was That He Killed While Suffering from a Drug-Induced Delusion

In *Elmore*, this court held that "unreasonable self-defense, as a form of mistake of fact, has no application when the defendant's actions are entirely delusional." (*Elmore*, *supra*, 59 Cal.4th at pp. 136-137.) Unlike a "defendant who makes a factual mistake" and thereby "misperceives the objective circumstances," a "delusional defendant holds a belief that is divorced from the circumstances." (*Id.* at p. 137.) "The line between mere misperception and delusion is drawn at the absence of an objective correlate." (*Ibid.*)

While disapproving imperfect self-defense claims in which unreasonableness stems from delusions, *Elmore* also clarified that defendants are not forbidden from using any evidence of mental illness in support of such claims. Specifically, *Elmore* concluded that evidence of mental illness is admissible to support a defendant's contention that the defendant misperceived the nature of the "objective correlate" to his subjective perception. (*Elmore*, *supra*, 59 Cal.4th at p. 137.) *Elmore* relied on *People v. Wells* (1949) 33 Cal.2d 330, in which an assault defendant claimed that he struck his victim in an attempt to defend himself from a third individual. (*Elmore*, *supra*, 59 Cal.4th at p. 137.) Wells offered

---

(...continued)
because, as appellant himself admits, the *Christian S.* court rejected the argument that unreasonable self-defense had been *eliminated* by the abolition of the diminished capacity defense. (OBM 25, citing *Christian S.*, *supra*, at pp. 774-778.) Here, the question is not whether unreasonable self-defense should be eliminated as a means to negate malice, but rather whether and how section 29.4 restricts the use of voluntary intoxication evidence to negate malice.

expert testimony that he "suffered from an abnormal physical and mental condition, not amounting to insanity." (*Ibid.*) This condition "put him in a state of tension that rendered him highly sensitive to external stimuli and abnormally fearful for his personal safety." (*Ibid.*) "As a result, he reacted to apparent threats more violently and unpredictably than an average person would." (*Ibid.*) Thus, *Elmore* concluded, "Wells held a belief which, although skewed by mental illness, was nevertheless factually based." (*Ibid.*, internal quotation marks omitted.) "There was no evidence that Wells's perception of a threat was delusional," i.e., not based in reality. (*Ibid.*)

Assuming for sake of argument that defendants may sometimes be allowed to present voluntary intoxication evidence to dispute the unlawfulness of their intent to kill, appellant sought to use that evidence to support an *Elmore*-barred delusion defense, not a *Wells* defense grounded in the skewed perception of reality. His expert did not generally testify as to the debilitative effects of methamphetamine abuse, but rather was qualified as an expert specifically on the psychosis brought about by particularly prolonged abuse. (8 RT 681.) In her testimony, she identified delusional thinking and paranoid delusions—including auditory and visual hallucinations—as the hallmark manifestations of the psychosis. (8 RT 684, 686, 690.) Appellant himself described the effects of prolonged methamphetamine abuse as causing him to hear voices and see shadows. (8 RT 583-584; see also 8 RT 607.) And unlike the defendant in *Wells*, neither appellant nor his expert offered any testimony as to how some nondelusional aspect of methamphetamine intoxication caused him to kill Mr. Ramirez. There was, for example, no testimony that he suffered from heightened sensitivity to stimuli that caused him to believe Mr. Ramirez was wielding a knife when he was actually holding a less threatening object. (See *Elmore*, *supra*, 59 Cal.4th at p. 137 ["One who sees a snake

where there is nothing snakelike . . . is deluded," while "[a] person who sees a stick and thinks it is a snake is mistaken, but that misinterpretation is not delusional"].)

In finding *Elmore* inapposite, the Court of Appeal cited Dr. Gregory's testimony that intoxication can cause "sleep deprivation," which in turn "negatively affects users' ability to process information, form judgments, and make good decisions." (Modification Order at p. 1.) But Dr. Gregory never testified that these effects of intoxication played a role in appellant's alleged belief that Mr. Ramirez pursued him with a knife, which allegedly motivated appellant to kill Mr. Ramirez in imperfect self-defense.[9] And just as importantly, Dr. Gregory gave no indication in her testimony that appellant's diminished abilities to process information, form judgments, and make decisions were independent or separate from his delusion.

The Court of Appeal's distinction of *Elmore* effectively holds that defendants can circumvent the bar against delusion as a predicate for imperfect self-defense if they claim that their voluntary intoxication impaired their decisionmaking and judgment, even when the bad decisions or judgments coincided with or were caused by a delusion. Under this holding, it is difficult to imagine a situation in which a defendant claiming voluntary intoxication could *not* evade *Elmore*. Because intoxicants by their nature alter judgment and perception, virtually any such defendant would be able to point to some effect of intoxication that is not inherently delusional, and then use that effect as a gateway to present evidence that the effect caused, resulted from, or accompanied an intoxication-caused delusion.

---

[9] Rather, Dr. Gregory blamed appellant's poor decisionmaking and judgment for his decision to enter Mr. Ramirez's apartment in the first place. (8 RT 685-686.)

Not only would the Court of Appeal's decision vitiate *Elmore*, it would do so in a way that cannot be reconciled with the Penal Code. As *Elmore* observed, delusion is not a proper ground for imperfect self-defense because it is essentially an assertion of insanity, a lack of any culpability as opposed to a basis for asserting mitigated culpability. (*Elmore*, *supra*, 59 Cal.4th at pp. 139-146.) But by allowing defendants to leverage their allegations of voluntary intoxication into a de facto delusion defense, the Court of Appeal's holding effectively allows those defendants to claim—at the guilt phase—insanity based on their voluntary intoxication. Moreover, the Legislature has flatly prohibited defendants from basing "a plea of not guilty by reason of insanity . . . on the basis of . . . an addiction to, or abuse of, intoxicating substances." (§ 29.8.)

In sum, the Court of Appeal's ruling establishes the following incongruous legal landscape. Some defendants—those claiming mental illness when they committed their crimes—cannot assert delusion as a basis for imperfect self-defense, but rather can assert delusion only as a basis for insanity pleas. Other defendants—those claiming intoxication-associated delusions—cannot use their delusions as a basis for insanity pleas, but *can* assert delusion as a basis for imperfect self-defense. The defendants claiming intoxication therefore have a defense against murder at the guilt phase that those claiming mental illness do not, even though the Legislature has clearly indicated its desire to limit intoxication's exculpatory impact. The Legislature could not have intended for such a reward to result from the exact conduct—voluntary intoxication—that it deemed to not mitigate or negate criminal liability in sections 29.4 and 29.8.

II. ANY INSTRUCTIONAL ERROR DID NOT PREJUDICE APPELLANT

Appellant challenges the Court of Appeal's holdings that (1) his claim of instructional error be evaluated under the *Watson* test for prejudice, and

(2) the error was harmless under that standard. Appellant is wrong on both counts.

A. The Applicable Standard for Determining Prejudice Is the *Watson* Standard Governing State Law Error

As the Court of Appeal observed (Typed Opn. at pp. 19-20), this court has held that an instruction erroneously limiting the jury's consideration of voluntary intoxication evidence "would have the effect of excluding defense evidence" and would therefore be "subject to the usual standard for state law error: the court must reverse only if it also finds a reasonable probability the error affected the verdict adversely to defendant" (*Mendoza*, *supra*, 18 Cal.4th at pp. 1134-1135; see also *Watson*, *supra*, 46 Cal.2d at p. 836 [setting forth "reasonable probability" prejudice standard for state law error].) The court has hewed to that standard in more recent cases as well. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 897; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 187 (*Letner*).)

Assuming instructional error here, application of the *Watson* standard would also be consistent with this court's observation that "[a]n instruction relating intoxication to any mental state" is a pinpoint instruction. (*Castillo*, *supra*, 16 Cal.4th at p. 1014; accord, *People v. Bolden* (2002) 29 Cal.4th 515, 559.) Instructional errors with respect to pinpoint instructions are evaluated under the *Watson* standard. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830, citing *People v. Ervin* (2000) 22 Cal.4th 48, 91; *People v. Fudge* (1994) 7 Cal.4th 1075, 1111-1112.) Even if the assumed errors were characterized as misinstruction on appellant's imperfect self-defense theory, that theory—that he is guilty of manslaughter—"is considered a lesser and necessarily included offense of murder." (*Simon*, *supra*, 1 Cal.5th at p. 132.) And errors on lesser included offenses are also subject to review under the *Watson* standard. (*People v. Breverman* (1998) 19 Cal.4th 142, 165.)

Appellant requests that this court revisit its adoption of the *Watson* standard in *Mendoza*, citing this court's subsequent decisions holding that misinstruction on elements of a crime is evaluated for prejudice under the "harmless beyond a reasonable doubt" test of *Chapman v. California* (1967) 386 U.S. 18. (OBM 31-35.) In making that request, appellant ignores this court's recent citations to *Mendoza*—and its continued adoption of the *Watson* standard in this context—in both *Letner* and *Covarrubias*. *Covarrubias* in particular illustrates the fallacy in appellant's argument on its merits. As appellant observes (OBM 32-33), *Covarrubias* applied the *Chapman* standard when the jury was simply not told one of the elements of a charged special circumstance. (*Covarrubias*, *supra*, 1 Cal.5th at p. 928.) But as noted *ante*, *Covarrubias* also followed *Mendoza* and applied the *Watson* test to a claim that the jury was improperly instructed on the use of voluntary intoxication evidence. (*Id.* at p. 897.) Appellant's assertion of error here is the same as the one to which *Watson* applied in *Covarrubias*—that the jury was erroneously not allowed to consider evidence that he presented in the way he wanted that evidence considered. It is not that the trial court's instructions omitted or misstated the elements of any crime. *Covarrubias* therefore defeats, rather than supports, appellant's claim.[10]

---

[10] Appellant cites a federal court decision disagreeing with *Mendoza* as to whether the error he asserts here is one of federal constitutional magnitude. (OBM 34, fn. 10.) Appellant mistakenly states that his cited decision was issued by the Ninth Circuit Court of Appeals. It was actually issued by a federal district court. (See generally *Valdez v. Castro* (N.D.Cal. July 9, 2007, No. C-00-04733 MMC) 2007 WL 2019564.) And that decision did not provide any analysis for its disagreement, instead merely referring to the trial court's prior order finding a constitutional violation. (*Id.* at p. *8.) As such, it provides no reason for this court to abandon what is now its well-settled position that *Watson* applies to such errors.

Similarly unpersuasive is appellant's contention that *Chapman* would apply here because failure to instruct on a defense is federal constitutional error. (OBM 29-30, 33.) Appellant's jury *was* instructed on voluntary intoxication and imperfect self-defense, distinguishing this case from his cited cases. (See *Mathews v. United States* (1988) 485 U.S. 58, 61, 63 [failure to instruct jury altogether on entrapment defense]; *United States v. Escobar de Bright* (9th Cir. 1984) 742 F.2d 1196, 1198, 1201-1202 [failure to instruct jury that one cannot conspire with a government agent].) *Mathews*, moreover, is not constitutionally based, but rather is an application of supervisory principles guiding federal criminal trials. The Supreme Court, moreover, has expressed skepticism that the right to present a defense includes the right to instructions on that defense. (*Gilmore v. Taylor* (1993) 508 U.S. 333, 343-344; see also *id.* at pp. 349-351 (conc. opn. of O'Connor, J.) [reading majority opinion as deciding that instructional errors as to a defense are state law errors].) *Gilmore* definitively recognized that the high court's decisions on the right to present a defense had not established a right to instruction on a defense. (*Id.* at pp. 343-344; see also *id.* at pp. 349-351 (conc. opn. of O'Connor, J.) [agreeing that prior decisions had not established right to instruction].)

Appellant next suggests that this court silently endorsed *Chapman* review in cases such as this one when it denied review of the Court of Appeal's decision in *People v. Thomas* (2013) 218 Cal.App.4th 630. (OBM 35-36.) As appellant appears to recognize, this suggestion is mistaken. (OBM 36, fn. 11 ["Appellant acknowledges that the denial of review lacks precedential value"]; see also *People v. Triggs* (1973) 8 Cal.3d 884, 890 ["Preliminarily we declare that our refusal to grant a hearing in a particular case is to be given [n]o weight insofar as it might be deemed that we have acquiesced in the law as enunciated in a published opinion of a Court of Appeal when such opinion is in conflict with the law as stated by

this court"], disapproved on other grounds in *People v. Lillenthal* (1978) 22 Cal.3d 891, 896, fn. 4.) In any event, *Thomas* is inapposite. The Court of Appeal in *Thomas* declined to follow this court's holding in *Breverman* that failure to instruct on a lesser included offense is evaluated for prejudice under *Watson*. (*Thomas*, at p. 644.) *Thomas* did so on the ground that *Breverman* involved a sua sponte failure to instruct while the defendant in *Thomas* had requested the instruction on a lesser included offense. (*Ibid.*) Whatever the wisdom of the distinction proffered in *Thomas*, it does not apply here because appellant, like the defendant in *Breverman* and unlike the defendant in *Thomas*, failed to object to CALCRIM No. 625.

Finally, appellant seizes on the Court of Appeal's suggestion below—which it ultimately cast aside—that *Chapman* review might be warranted under *Montana v. Egelhoff* (1996) 518 U.S. 37. (OBM 36-38, citing Typed Opn. at p. 20.) But this court was aware of *Egelhoff* when it decided *Mendoza*. (See *Mendoza*, *supra*, 18 Cal.4th at p. 1141 (dis. opn. of Brown, J.), citing *Egelhoff*, at pp. 40, 56.) And this court has subsequently cited *Egelhoff* to *support* its rulings that "the withholding of voluntary intoxication evidence to negate the mental state" of crimes does not "violate [a defendant's] due process rights by denying him the opportunity to prove he did not possess the required mental state." (*Atkins*, *supra*, 25 Cal.4th at p. 93; accord, *People v. Sorden* (2005) 36 Cal.4th 65, 72.) Appellant's speculation that consideration of *Egelhoff* might cause this court to repudiate *Mendoza*, *Letner*, and *Covarrubias* is therefore misplaced.

In any event, *Egelhoff* undercuts, rather than supports, appellant's argument. The statute under consideration in *Egelhoff* restricted the exculpatory impact of voluntary intoxication evidence to an even greater degree than does section 29.4 by completely prohibiting consideration of such evidence "in determining the existence of a mental state which is an element of the offense." (*Egelhoff*, *supra*, 518 U.S. at p. 41 (plur. opn. of

Scalia, J.), internal quotation marks omitted.) Four justices concluded that excluding voluntary intoxication evidence could not violate due process because such evidence was not historically admissible. (*Id.* at pp. 41-56.) The fifth and deciding vote came from Justice Ginsburg's concurrence. (*Egelhoff*, at pp. 56-61 (conc. opn. of Ginsburg, J.).) Justice Ginsburg observed that if a statute excluded concededly relevant and exculpatory evidence, it would violate due process. (*Id.* at p. 57.) On the other hand, a state *could* constitutionally redefine the contours of what evidence is relevant to exculpate a defendant by redefining what could mitigate a culpable mental state. (*Id.* at p. 57.) This latter principle was also embraced by the four dissenting justices. (*Id.* at p. 71 (dis. opn. of O'Connor, J.); *id.* at p. 73 (dis. opn. of Souter, J.).) Justice Ginsburg concluded that the Montana statute was constitutionally permissible because it "extract[ed] the entire subject of voluntary intoxication from the mens rea inquiry, . . . thereby rendering evidence of voluntary intoxication logically irrelevant to proof of the requisite mental state." (*Id.* at p. 58 (conc. opn. of Ginsburg, J.).)

Justice Ginsburg thus effectively joined the plurality in concluding that the extent to which a state limits the exculpatory impact of voluntary intoxication evidence is a matter of state law, without federal constitutional dimension. Consequently, under *Egelhoff* any instructional error here would have reflected a mere misinterpretation of the state law determination manifested in former section 22. *Watson* is therefore the applicable prejudice standard.

B. Any Instructional Error Was Harmless Because the Jury Necessarily Concluded That Appellant Killed Mr. Ramirez with Implied Malice

Under appellant's theory of prejudice, the jury could have concluded that appellant's intent to kill was not unlawful for purposes of express

malice murder if it had been allowed to consider voluntary intoxication evidence in determining unlawfulness of his intent. (OBM 38-47.) Even if that theory were correct—and, as discussed *post* in Argument II.C, it is not—the purported instructional error would *still* have been harmless because the jury would have convicted appellant of second degree murder based on an *implied* malice theory.

Appellant's jury was instructed that he was guilty of murder if he killed Mr. Ramirez with express or implied malice. (2 CT 400.) If the jury's verdict was in fact based on implied malice, then that verdict would not have been affected by the purported instructional error because, as discussed at length *ante*, voluntary intoxication evidence categorically cannot be considered to negate implied malice.

If the jury's verdict was based on express malice alone, on the other hand, then the jury must have determined that appellant "unlawfully intended to kill" Mr. Ramirez. (2 CT 400.) In such a case, the jury's finding that appellant intended to kill Mr. Ramirez would not be challenged based on the assumed instructional error because the jury was instructed to consider voluntary intoxication evidence in making that finding through CALCRIM No. 625. (2 CT 407.) The finding of intent to kill would have satisfied the elements of implied malice because the jury necessarily would have found that (1) appellant "intentionally committed an act"; (2) the "natural and probable consequences of the act were dangerous to human life"; and (3) "[a]t the time he acted, he knew his act was dangerous to human life." (2 CT 400; see *People v. Rogers* (2006) 39 Cal.4th 826, 868 ["Defendant's act of shooting Clark certainly could be characterized as one involving a high degree of probability that it will result in death or the natural consequences of which are dangerous to life" (internal quotation marks omitted)].) The jury would have also found the final element of implied malice satisfied—that appellant "deliberately acted with conscious

disregard for human life" (2 CT 400)—because it made the equivalent finding that appellant's intent to kill was unlawful (Argument I.A.1, *ante*). Even if the Court of Appeal correctly concluded that the jury should have been allowed to consider appellant's voluntary intoxication to determine unlawfulness of his intent for purposes of express malice, the jury would not have been able to consider such intoxication in determining conscious disregard for purposes of implied malice. Accordingly, because "the jury found that [appellant stabbed Mr. Ramirez] with the intent to kill," there is "no reasonable probability it would have believed that his conduct and state of mind did not fit the definition of second degree murder committed with implied malice." (*Rogers*, *supra*, 39 Cal.4th at p. 868.)

The jury also necessarily found that appellant acted with implied malice based on the death of Mr. Ramirez during appellant's commission of a burglary. As this court explained in *People v. Chun* (2009) 45 Cal.4th 1172, implied malice is imputed to a defendant who kills during the commission of a felony that is "inherently dangerous to human life." (*Id.* at pp. 1182-1187.) And burglary is such a felony. (*Carlos v. Superior Court* (1983) 35 Cal.3d 131, 138, overruled on other grounds in *People v. Anderson* (1987) 43 Cal.3d 1104, 1138-1147; see also *People v. Hughes* (2002) 27 Cal.4th 287, 355 ["Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence" (internal quotation marks omitted)].)

In short, either the jury did conclude that appellant killed with implied malice, or it necessarily would have so concluded had it found no express malice after being instructed to consider voluntary intoxication evidence in determining unlawfulness of intent. Appellant would therefore have been

found guilty of second degree murder whether or not the trial court committed the purported instructional error, rendering any such error harmless.

C. There Is No Reasonable Probability That the Jury Would Have Found That Appellant Acted in Imperfect Self-Defense Even If It Had Considered Voluntary Intoxication Evidence in Deciding That Issue

Even if the jury had been instructed to consider appellant's voluntary intoxication in determining whether he acted in imperfect self-defense, it is not reasonably probable that it would have found that he so acted. Appellant hypothesizes that the jury could have found him to have been so intoxicated that he wrongly but sincerely believed one or more of the following: (1) Mr. Ramirez was the aggressor inside his apartment; (2) Mr. Ramirez chased appellant into the hallway and attacked him after appellant had broken off the initial confrontation; and (3) Mr. Ramirez was a threat to kill appellant while the two men were allegedly wrestling on the ground. (OBM 38-44, 47.) Appellant's prejudice argument fails for multiple reasons.

First, as explained *ante* in Argument I.B, the actual evidence and argument presented by appellant at trial supported his imperfect self-defense claim only in the sense that he allegedly killed Mr. Ramirez in the throes of methamphetamine-induced psychotic delusions. In line with *Elmore*, the jury was rightly instructed that it could not consider hallucinations in determining whether appellant killed with malice. (2 CT 409.) It was also instructed that "[i]mperfect self-defense does not apply to purely delusional acts." (2 CT 406.) Those instructions would have correctly precluded the jury from finding imperfect self-defense whether or not it was allowed to consider intoxication.

Second, several percipient witnesses—Mr. Solano, the police, and even Ms. Villanueva on behalf of the defense—contradicted appellant's

self-serving testimony that he was severely intoxicated. No other percipient witness supported his allegation of severe intoxication. The jury was entitled to—and likely did—credit the testimonies of disinterested witnesses over that of appellant. (Cf. *People v. Silva* (2001) 25 Cal.4th 345, 369 [jury "could disbelieve those portions of defendant's statements that were obviously self-serving"].)

Third, the jury was instructed that it could consider appellant's voluntary intoxication in determining whether appellant had the requisite specific intent to commit burglary—specifically, "the intent to commit assault with a deadly weapon or assault with force likely to commit great bodily injury at the time the defendant entered the apartment of Israel Ramirez. (2 CT 416.) The jury concluded that appellant did in fact commit burglary, confirming that it rejected appellant's allegation that he was so severely intoxicated that he could not form the mens rea required for his crimes.

Fourth, the only percipient witnesses who observed appellant's behavior before the attack—Mr. Solano and Ms. Saavedra—testified that appellant was consistently behaving in an aggressive manner from the moment he arrived at the apartment building, belying appellant's allegation that he became an aggressor only after he unreasonably perceived some danger from Mr. Ramirez. While appellant challenges the believability of Ms. Saavedra's testimony (OBM 41), the jury evidently believed her version of events when it rejected appellant's *reasonable* self-defense claim that Mr. Ramirez was in fact the aggressor. That credibility determination is unassailable on appeal. "The impeachment arguments that" appellant "repeats against" Ms. Saavedra "involve simple conflicts in the evidence that were for the jury to resolve." (*People v. Friend* (2009) 47 Cal.4th 1, 41.) Moreover, "it is not a proper appellate function to reassess the credibility of witnesses." (*Ibid.*, internal quotations omitted.) That is

especially true here because, as appellant admits (OBM 41, fn. 14), voluntary intoxication evidence is not relevant to show what actually happened on the night of the killing. And even if Ms. Saavedra's testimony could be questioned at this stage, her testimony that appellant was the aggressor was supported by appellant's own testimony that he kicked in the apartment door.

Finally, as the Court of Appeal below concluded (Typed Opn. at pp. 21), even the facts as appellant allegedly perceived them would not have entitled him to act in self-defense, so his voluntary intoxication would not have rendered his intent lawful. "If one makes a felonious assault upon another, or has created appearances justifying the other to launch a deadly counterattack in self-defense, the original assailant 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." (*People v. Salazar* (2016) 63 Cal.4th 214, 249, internal quotation marks omitted and italics added and omitted.) In other words, an initial aggressor may not "stand his ground and thus defend himself" simply because he has "decline[d] to carry on the affray" and "honestly endeavor[ed] to escape from it"; the aggressor must also "fairly and clearly inform his adversary of his desire for peace and of his abandonment of the contest." (*People v. Moore* (1954) 43 Cal.2d 517, 524 .) Appellant was by his own admission the aggressor, as he kicked down the door of Mr. Ramirez's residence and entered with a knife. (See *Salazar*, at pp. 249-250 [defendant was the aggressor and committed felonious assault when he "initiated the confrontation by approaching the victim with a cocked gun"; see also § 198.5 ["Any person using force . . . within his or her residence shall be presumed to have held a reasonable fear of imminent peril of death or great bodily injury . . . when that force is used against another person . . . who unlawfully and forcibly enters . . . the residence"].) While appellant

testified that he declined further combat and endeavored to escape by running out of Mr. Ramirez's apartment, he 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.

Appellant asks this court to look beyond the evidence presented at his trial and examine the jury's deliberation time, verdicts, and questions to the judge. (OBM 44-46.)[11] Specifically, he contends that these aspects of the jury's conduct show that his case was a "close" one. As an initial matter, merely showing that this case was "close" in some general way would not help appellant. He would have to more precisely show that the specific issue of whether he unreasonably felt the need to act in self-defense was close *and* that instructing the jury differently on voluntary intoxication could have led the jury to a different conclusion on that issue. Appellant has not made any such showing.

Appellant's argument for prejudice based on deliberation time relies on *People v. Woodard* (1979) 23 Cal.3d 329. But this court has since rejected reading *Woodard* as standing for the proposition that long deliberation times imply a close case. (*People v. Brown* (1985) 40 Cal.3d 512, 535, revd. on other grounds (1987) 479 U.S. 538.) As *Brown* explained, the error in *Woodard* was prejudicial because the evidence itself was essentially in equipoise—a circumstance not present here. (*Brown*, at p. 535, citing *Woodard*, at p. 341.) Lower courts have similarly "decline[d] to take [*Woodard*'s] isolated comment" about deliberation time "as legal

---

[11] Appellant also observes that "[t]he prosecutor explicitly told the jury in closing argument that voluntary intoxication cannot be considered for imperfect self-defense." (OBM 46, internal quotation marks omitted.) In other words, the prosecutor simply repeated what the jury had already been told, and so his statement was not any more or less prejudicial than the alleged instructional error itself.

authority . . . to conclude that" a long deliberation implies a close case. (*People v. Walker* (1995) 31 Cal.App.4th 432, 437.) Such conclusions "would amount to sheer speculation" and would ignore the more commonsense observation "that the length of the deliberations could as easily be reconciled with the jury's conscientious performance of its civic duty, rather than its difficulty in reaching a decision." (*Id.* at p. 439; accord, *People v. Mateo* (2016) 243 Cal.App.4th 1063, 1075; *People v. Houston* (2005) 130 Cal.App.4th 279, 301.)[12]

Appellant also speculates that the jury's verdict—convicting appellant of burglary but not convicting him of first degree murder—showed that it "intended to show some degree of leniency." (OBM 45.) Whatever the propriety of accusing the jury of engaging in such results-based decisionmaking, appellant's speculation only hurts him. If, as appellant suggests, the jury decided what outcome it thought was generally fair—here, second degree murder—and then rendered verdicts to reach that outcome, changing the instruction on voluntary intoxication would not have made a difference. The jury would have followed its visceral inclination to convict appellant of murder regardless. Conversely, if the jury had wanted to reach a voluntary manslaughter verdict notwithstanding the evidence, it simply would have done so. (Cf. *Schad v. Arizona* (1991) 501 U.S.624, 647-648 [pointing out irrationality of jury convicting defendant of capital murder to avoid having to either convict him of first degree murder or acquit him altogether].)

The inapposite cases that appellant cites (OBM 46) do not change this conclusion. In *Olden v. Kentucky* (1988) 488 U.S. 227, the jury's

---

[12] Had the jury returned an immediate guilty verdict, appellant would presumably have argued that the short deliberation time on a supposedly close case illustrated the severity of the prejudice from the asserted error.

conviction in its verdict was called into question because the verdict could not "be squared with the State's theory of the alleged crime." (*Id.* at p. 233.) Here, in contrast, the second degree murder verdict was completely consistent with the prosecutor's theory that appellant maliciously stabbed Mr. Ramirez to death without justification, excuse, or mitigating circumstance. Meanwhile, in *People v. Brown* (1993) 17 Cal.App.4th 1389, the court noted that the jury was unable to reach a verdict on one of the two charges before it because of victim testimony that "was vague in many aspects and inconsistent in others." (*Id.* at 1398.) No such vague or inconsistent testimony undermined the solidity of appellant's murder conviction, and *Brown* did not establish that a split verdict alone implies a close case.

Finally, appellant states that the jury's notes during deliberations show that they were at one point unsure whether appellant or Mr. Ramirez started the fight. (OBM 44-46.)[13] But even assuming that appellant has correctly interpreted the jury's notes, the question of who started the fight is one about the objective facts of the night of the killing. By rejecting appellant's theory of perfect self-defense—a rejection that is not at issue here—the jury conclusively determined that appellant started the fight, and whether and how severely appellant was intoxicated would not bear on that determination.[14]

---

[13] One of these notes used the phrase, "set in motion the chain of events," which appellant posits the jury might have taken from the unreasonable self-defense instruction. (OBM 44, internal quotation marks omitted.) Not only is that guess wildly speculative, it is irrelevant given that the jury's *actual* question in the note was not about unreasonable self-defense but about who actually started the fight.

[14] In contrast, the jury's notes and readbacks in *People v. Pearch* (1991) 229 Cal.App.3d 1282, were germane to the issue on which the appellate court found error. (*Id.* at pp. 1293-1295, cited at OBM 46.)

CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: February 16, 2017

Respectfully submitted,

XAVIER BECERRA
Attorney General of California
GERALD A. ENGLER
Chief Assistant Attorney General
JEFFREY M. LAURENCE
Senior Assistant Attorney General
SETH K. SCHALIT
Supervising Deputy Attorney General

AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

SF2016400967
20945719.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S ANSWER BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 15,090 words.

Dated: February 16, 2017

XAVIER BECERRA
Attorney Generalof California

AMIT KURLEKAR
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Juaquin Soto** No.: **S236164**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage fully prepaid that same day in the ordinary course of business.

On February 17, 2017, I served the attached **Respondent's Answer Brief on the Merits and Respondent's Request for Judicial Notice** by placing true copies enclosed in sealed envelopes in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Sixth District Appellate Program
Attn: Executive Director
95 South Market Street, Suite 570
San Jose, CA 95113

Monterey Superior Court
Salinas Division
240 Church Street, Suite 318
Salinas, CA 93901

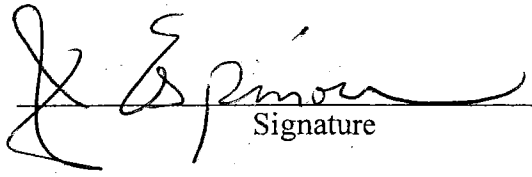
Stephen B. Bedrick
Attorney at Law
1970 Broadway, Suite 1200
Oakland, CA 94612 (2 copies)

Sixth Appellate District
California Court of Appeal
333 West Santa Clara Street, Suite 1060
San Jose, CA 95113

The Honorable Dean D. Flippo
District Attorney
Monterey District Attorney's Office
P O. Box 1131
Salinas, CA 93902

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on February 17, 2017, at San Francisco, California.

J. Espinosa
Declarant



Signature

SF2016400967; 20933332.doc