IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

CHARLES ELMORE,

Defendant and Appellant.

No. S188238

Second District Court of Appeal, Division Seven, Case No. B216917
Los Angeles County Superior Court Case No. TA090607
Honorable Arthur Lew, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

Eric R. Larson, SBN 185750
330 J Street, # 609
San Diego, CA 92101
(619) 238-5575
Larson1001@yahoo.com

Attorney for Defendant and
Appellant Charles Elmore

By Appointment of The
Supreme Court Of California

TOPICAL INDEX

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CALIFORNIA CODES

RULES OF COURT

OTHER

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,	)	No. S188238
	)	
Plaintiff and Respondent,	)	
	)	
v.	)	
	)	
CHARLES ELMORE,	)	
	)	
Defendant and Appellant.	)	
	)	

Second District Court of Appeal, Division Seven, Case No. B216917
Los Angeles County Superior Court Case No. TA090607
Honorable Arthur Lew, Judge Presiding

APPELLANT'S OPENING BRIEF ON THE MERITS

ISSUE PRESENTED

"Does the doctrine of imperfect self-defense apply when the defendant's actual, but unreasonable, belief in the need to defend himself was based solely on a psychotic delusion?"

STATEMENT OF CASE

By information, appellant was charged with one count of murder, in violation of Penal Code section 187, subdivision (a). (1 C.T. p. 62.) Upon a

jury trial, appellant was found guilty of first degree murder. (2 C.T. pp. 270, 272.) He was thereafter sentenced to a term of 25 years to life in prison. (2 C.T. pp. 295-298.)

On appeal, appellant asserted his conviction should be reversed because: 1) The trial court prejudicially erred by refusing to instruct his jury on the lesser included offense of voluntary manslaughter based on imperfect self-defense due to psychotic delusion and hallucination; and 2) The trial court prejudicially erred by refusing to instruct his jury on the effect of the hallucination evidence on the elements of premeditation and deliberation for purposes of first degree murder.

The Court of Appeal unanimously agreed with appellant's second contention, and reversed his first degree murder conviction while providing the prosecutor the option of conducting a retrial or accepting a reduction in the verdict to second degree murder. (Slip Opn. pp. 13-19.) The Court of Appeal unanimously rejected appellant's first contention, finding that "[t]he doctrine of imperfect self-defense ... does not apply where the subjective belief in the need to defend oneself arises not from objective circumstances but purely from the defendant's mental illness." Because the Court of Appeal ruled that imperfect self-defense did not apply as a matter of law under these circumstances, it did not consider the separate and additional

questions of whether the evidence in this case would have supported an instruction on this partial defense and whether the failure to give such an instruction would have been prejudicial. (Slip Opn. p. 12.)

On February 2, 2011, this Court granted review on the following question: "Does the doctrine of imperfect self-defense apply when the defendant's actual, but unreasonable, belief in the need to defend himself was based solely on a psychotic delusion?"

STATEMENT OF FACTS

Appellant adopts the summary of the evidence as set forth in the Court of Appeal's Opinion. (Slip Opn. pp. 2-11.)

ARGUMENT

I

THE DOCTRINE OF IMPERFECT SELF-DEFENSE APPLIES IF THE DEFENDANT HAS AN ACTUAL, BUT UNREASONABLE, BELIEF IN THE NEED TO DEFEND HIMSELF THAT WAS BASED ON A PSYCHOTIC DELUSION

A. Introduction

Manslaughter is a lesser included offense of murder, and the "distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.) "Malice exists, if at all, only when an unlawful homicide was committed with the

'intention unlawfully to take away the life of fellow creature' [citation], or with awareness of the danger and a conscious disregard for life [citations]." (*Ibid.*) Imperfect self-defense and sudden quarrel/heat of passion are not elements of voluntary manslaughter, but rather they are alternative means of raising a doubt about the element of malice in a murder prosecution. (*Ibid.*)

"Under the doctrine of imperfect self-defense, when the trier of fact finds that a defendant killed another person because the defendant *actually*, but unreasonably, believed he was in imminent danger of death or great bodily injury, the defendant is deemed to have acted without malice and thus can be convicted of no crime greater than voluntary manslaughter." (*In re Christian S.* (1994) 7 Cal.4th 768, 771, emphasis in original.)

The current statutory scheme, the legislative history underlying these statutes, and the historical body of applicable case law all dictate the result that a defendant who kills another person in the actual, but unreasonable, belief in the need to defend himself based on a psychotic delusion is entitled to rely upon the doctrine of imperfect self-defense to negate malice and reduce his offense to voluntary manslaughter.

///

///

///

B. The Current Statutory Scheme Supports Application Of The Imperfect Self-Defense Doctrine

The California Penal Code currently contains the following pertinent statutes:

"§ 22.

(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. Evidence of voluntary intoxication shall not be admitted to negate the capacity to form any mental states for the crimes charged, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act.

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

...." (Enacted 1872. Amended by Stats. 1995, c. 793 (S.B. 121), § 1.)

"§ 25.

(a) The defense of diminished capacity is hereby abolished. In a criminal action, as well as any juvenile court proceeding, evidence concerning an accused person's intoxication, trauma, mental illness, disease, or defect shall not be admissible to show or negate capacity to form the particular purpose, intent, motive, malice aforethought, knowledge, or other mental state required for the commission of the crime charged.

(b) In any criminal proceeding, including any juvenile court proceeding, in which a plea of not guilty by reason of insanity is entered, this defense shall be found by the trier of fact only when the accused person proves by a preponderance of the evidence that he or she was incapable of knowing or understanding the nature and quality of his or her act and of distinguishing right from wrong at the time of the commission of the offense.

(c) Notwithstanding the foregoing, evidence of diminished capacity or of a mental disorder may be considered by the court only at the time of sentencing or other disposition or commitment.

(d) The provisions of this section shall not be amended by the Legislature except by statute passed in each house by rollcall vote entered in the journal, two-thirds of the membership concurring, or by a statute that becomes effective only when approved by the electors." (Added by Initiative Measure, approved by the people, June 8, 1982.)

"§ 28.

(a) Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged.

(b) As a matter of public policy there shall be no defense of diminished capacity, diminished responsibility, or irresistible impulse in a criminal action or juvenile adjudication hearing.

(c) This section shall not be applicable to an insanity hearing pursuant to Section 1026.

...." (Added by Stats. 1981, c. 404, p. 1592, § 4. Amended by Stats. 1982, c. 893, p. 3318, § 3; Stats. 1984, c. 1433, § 1.)

"§ 29.

In the guilt phase of a criminal action, any expert testifying about a defendant's mental illness, mental disorder, or mental defect shall not testify as to whether the defendant had or did not have the required mental states, which include, but are not limited to, purpose, intent, knowledge, or malice aforethought, for the crimes charged. The question as to whether the defendant had or did not have the required mental states shall be decided by the trier of fact." (Added by Stats. 1984, c. 1433, § 3.)

Thus, pursuant to the plain language of current Penal Code sections 28 and 29, in the guilt phase of a criminal trial, a defendant charged with murder is entitled to rely upon evidence of mental disease, mental defect, or mental disorder in order to establish that he did not harbor the malice aforethought required for a murder conviction. This is in contrast to section 22, in which the Legislature has provided that in the guilt phase of a trial, voluntary intoxication evidence may only be offered to negate express, but not implied, malice aforethought. This is also in contrast to section 25, which provides that evidence of diminished capacity, due to either intoxication or mental defect or disease, may only be offered in the sanity phase of a criminal trial.

Consistent with the above, the current statutory scheme by its terms strongly supports the conclusion that in the guilt phase of a criminal trial, a defendant who is charged with murder and who is found to have killed in the actual, but unreasonable, belief in the need to defend himself as a result of mental disease, mental defect, or mental disorder, does not possess the malice aforethought required to be convicted of murder, and is instead guilty of voluntary manslaughter based on well-established principles of imperfect self-defense that existed prior to the enactment of the current versions of all of the above statutes. (See *Brown v. Kelly Broadcasting Co.*

(1989) 48 Cal.3d 711, 724 [A court's primary task in construing a statute is to determine the Legislature's intent, and this task begins with examining the words themselves for the answer].)

C. The Relevant Case Law And Legislative History Also Support Application Of The Imperfect Self-Defense Doctrine

Over sixty years ago, in *Wells*, this Court observed that a defendant who commits an offense in the actual, but unreasonable, belief in the need to defend himself due to mental illness lacks malice aforethought. (*People v. Wells* (1949) 33 Cal.2d 330, 344-345 ("*Wells*"), disapproved on other grounds in *People v. Wetmore* (1978) 22 Cal.3d 318, 323-352 & fn. 5.) In that case, the defendant, charged with an assault with malice aforethought, attacked a prison guard without any objectively reasonable provocation or evidence that the defendant was actually in danger. (See *Id.* at p. 338.) This Court held that while the defendant's proffered psychiatric testimony regarding his mental illness did not amount to insanity, and also did not render him guiltless of any crime based on perfect self-defense, it was admissible to establish that he attacked the guard in the actual, but unreasonable, belief in the need to defend himself due to his mental illness for purposes of negating the element of malice aforethought. (*Id.* at pp. 344-345.)

In 1979, in *Flannel*, this Court rejected the People's contention that the only factors recognized as negating malice, so as to reduce murder to manslaughter, are sudden quarrel or heat of passion upon reasonable provocation (Pen. Code § 192) and diminished capacity. (*People v. Flannel* (1979) 25 Cal.3d 668, 677-679 ("*Flannel*").) This Court concluded that imperfect self-defense is not encompassed within those two categories, but is a distinct partial defense to a charge of murder. (*Ibid.*)

After reviewing the common law origins of the doctrine of imperfect self-defense, this Court further concluded that an honest belief, if unreasonably held, cannot be consistent with malice. (*People v. Flannel, supra,* 25 Cal.3d at p. 679.) "*No matter how the mistaken assessment is made*, an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously [harbor malice aforethought]." (*Ibid.*, emphasis added.)

Quoting one scholar, the *Flannel* Court observed, "'Since manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent, it logically includes some killings involving other types of mitigation, and such is the rule of the common law.'" (*People v. Flannel, supra,* 25 Cal.3d at p. 679.) Quoting other scholars, the Court observed that this is "'the more humane view that, while [the defender] is

not innocent of crime, he is nevertheless not guilty of murder; rather, he is guilty of the in-between crime of manslaughter.'" (*Id.* at p. 680.)

Subsequently, in 1981, in response to public outcry stemming from an infamous case in which the defense of diminished capacity was successfully asserted, the Legislature passed Senate Bill No. 54, which amended several sections of the Penal Code and added Penal Code section 28 in order to abolish the defense of diminished capacity.[1] (Stats. 1981, c. 404, p. 1592; *In re Christian S, supra,* 7 Cal.4th at p. 771.) As held by this Court in *Christian S.*, in enacting Senate Bill No. 54, the Legislature expressly intended to abolish the defense of diminished capacity, and did not intend to abolish the previously well-established and separate defense of imperfect self-defense. (*In re Christian S., supra,* 7 Cal.4th at pp. 773-783.)

Of particular importance to the issue herein, this Court observed that the legislative intent behind this amendment stated that "'*except in the delusional self-defense kinds of cases,* there will have to be a showing of

---

[1] In all, the Legislature "added to the Penal Code sections 28 and 29, which abolished diminished capacity and limited psychiatric testimony. It amended section 22 on the admissibility of evidence of voluntary intoxication, section 188 on the definition of malice aforethought, and section 189 on the definition of premeditation and deliberation. Other sections not relevant here were also amended." (*People v. Saille* (1991) 54 Cal.3d 1103, 1111.) In 1982, the electorate passed a complimentary initiative that similarly abolished the defense of diminished capacity. (Pen. Code § 25, subd. (a).)

provocation, the traditional basis of manslaughter, to reduce murder to manslaughter.'" (*In re Christian S., supra,* 7 Cal.4th at p. 781, emphasis in original, quoting the Letter from Joint Com. For the Revision of the Pen. Code to Governor's Deputy Legal Affairs Sect., Sept. 4, 1981, emphasis added.) Thus, consistent with the above legislative history underlying Senate Bill No. 54 and Penal Code section 28, a showing of reasonable provocation is not required in delusional self-defense cases such as this one.

In 1994, this Court held that under then Penal Code section 22, evidence of voluntary intoxication was admissible in order to negate implied malice in a murder prosecution. (*People v. Whitfield* (1994) 7 Cal.4th 437, 446-451.) In 1995, the Legislature responded to the decision in *Whitfield* by amending Penal Code section 22 to provide that evidence of voluntary intoxication is admissible solely on the issues of premeditation, deliberation, and express malice, and is therefore inadmissible to negate implied malice. (Pen. Code section 22, subd. (b).) The legislative intent behind this amendment was clear; the Legislature intended to overrule the holding of *Whitfield.* (See *People v. Mendoza* (1998) 18 Cal.4th 1114, 1124-1126.)

In 2002, in *Anderson,* this Court observed that the doctrine of imperfect self-defense set forth in *Flannel* is now also grounded in statute.

(*People v. Anderson* (2002) 28 Cal.4th 767, 782 ("*Anderson*").) As stated in *Anderson*, "[a]lthough less obvious, the imperfect self-defense form of manslaughter is also based on statute. *People v. Flannel*, *supra*, 25 Cal.3d 668, the leading case developing the doctrine, 'had two *independent* premises: (1) the notion of mental capacity ... and (2) a grounding in both well-developed common law and in the statutory requirement of malice (Pen. Code, § 187).' (*In re Christian S.*, *supra*, 7 Cal.4th at p. 777.) In 1981, the Legislature abolished diminished capacity, thus making the first premise no longer valid. (*Ibid.*) But the second premise remains valid. (*Ibid.*) Express malice exists 'when there is manifested a deliberate intention *unlawfully* to take away the life of a fellow creature.' (§ 188, italics added.) A killing in self-defense is *lawful*. Hence, a person who actually, albeit unreasonably, believes it is necessary to kill in self-defense intends to kill lawfully, not unlawfully. 'A person who actually believes in the need for self-defense necessarily believes he is acting lawfully.' (*In re Christian S.*, *supra*, 7 Cal.4th at p. 778.) Because express malice requires an intent to kill unlawfully, a killing in the belief that one is acting lawfully is not malicious. The statutory definition of implied malice does not contain similar language, but we have extended the imperfect self-defense rationale to any killing that would otherwise have malice, whether express or

implied. '[T]here 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.' (*People v. Blakeley* [2000] 23 Cal.4th [82] at p. 89.)" (*Ibid.*, all emphasis in original.)

In 2005, this Court decided *Wright*, which was a case in which the Court had granted review to decide whether the doctrine of imperfect self-defense applies "to a case in which the defendant's actual, though unreasonable, belief in the need to defend himself was based on delusions and/or hallucinations resulting from mental illness *or voluntary intoxication*, without any objective circumstances suggestive of a threat." (*People v. Wright* (2005) 35 Cal.4th 964, 966, emphasis added.) However, this Court ultimately declined to decide this question because in that case, the defendant was allowed to assert this partial defense, and thus even if the defense did apply, the defendant therein had suffered no prejudice.[2] (*Ibid.*)

In a concurring Opinion by Justice Brown that was joined by Justices Baxter and Moreno, Justice Brown articulated her belief that a series of

---

[2] Unlike *Wright*, this case does not involve any issue relating to voluntary intoxication. Toxicology tests performed on appellant following his arrest indicated that he did not have any drugs or alcohol in his system on the day of the stabbing. (6 R.T. pp. 2157-2158.)

flawed decisions and patchwork legislative solutions had left the law governing homicide in California confusing and in some cases anomalous. Justice Brown further suggested that the Legislature was perhaps better situated to solve the problem. (*People v. Wright, supra,* 35 Cal.4th at pp. 975-986 (conc. opn. of Brown, J.).)

Justice Brown opined that this Court erred in 1979 in *Flannel* when it disconnected imperfect self-defense from voluntary manslaughter based on a sudden quarrel or heat of passion, and endorsed enactment of a "reasonably unreasonable" standard for imperfect self-defense. (*People v. Wright, supra,* 35 Cal.4th at pp. 980-986 (conc. opn. of Brown, J.).) However, Justice Brown recognized "the problem of how, without a statutory provision, we can fictionally impute malice where there is no actual malice in the defendant's delusional inner world. [fn.]" (*Id.* at p. 984.) Ultimately, Justice Brown encouraged the Legislature to amend the Penal Code to abrogate the *Flannel* decision and to impose a reasonable provocation requirement upon imperfect self-defense. (*Id.* at pp. 985-986.)

Since the *Wright* decision in 2005, the Legislature has not acted upon this request, and has not amended any of the pertinent statutes.

In light of all of the above, under the current statutory scheme enacted by our Legislature, a defendant who kills in the actual, but unreasonable,

belief in the need to defend himself based on a psychotic delusion is entitled to contend that he is guilty of the lesser included offense of voluntary manslaughter based on imperfect self-defense.

As set forth above, in 1979, this Court held that imperfect self-defense is distinct from both heat of passion manslaughter and diminished capacity. (*People v. Flannel, supra,* 25 Cal.3d at pp. 677-679.) This Court further concluded that an honest belief, if unreasonably held, cannot be consistent with malice. (*People v. Flannel, supra,* 25 Cal.3d at p. 679.) This is so, "[*n*]*o matter how the mistaken assessment is made....*" (*Ibid.*, emphasis added.)

Because both imperfect self-defense and diminished capacity were firmly established by 1981, it must be assumed that the Legislature was aware of both doctrines when it chose to amend the Penal Code to abolish diminish capacity, but not imperfect self-defense. (See *In re Christian S., supra,* 7 Cal.4th at p. 774; see also *Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 303 [the Legislature is presumed to be aware of existing judicial decisions, and when the Legislature subsequently acts to amend a statute without modifying or overturning the prior decision, we presume the Legislature acquiesced in that prior judicial decision].)

In fact, in this case, the legislative history underlying the 1981 amendment expressly endorses the application of the imperfect self-defense doctrine as set forth in *Flannel* to the circumstances in the case at bar by providing that "*except in the delusional self-defense kinds of cases,* there will have to be a showing of provocation, the traditional basis of manslaughter, to reduce murder to manslaughter.'" (See *In re Christian S., supra,* 7 Cal.4th at p. 781, emphasis in original.)

In addition, Penal Code section 28, by its express terms, provides that evidence of mental disease, mental defect, or mental disorder is admissible to negate the element of malice aforethought. The statute does not provide an additional requirement that any acts committed as a result of such mental disease, defect, or disorder must also be objectively reasonable based on a showing of provocation in order to negate malice aforethought.

Moreover, it is beyond clear that the Legislature knows how to amend the Penal Code in response to a judicial decision with which it disagrees, and the Legislature did exactly that in 1995 when it amended Penal Code section 22 to abrogate the decision in *Whitfield* and provide that voluntary intoxication evidence may not negate implied malice. (Pen. Code § 22.)

Furthermore, in 2002, this Court recognized that the imperfect self-defense doctrine set forth in *Flannel* is not merely a creature of the common

law, but is now also grounded in the statutory scheme. (*People v. Anderson, supra,* 28 Cal.4th at p. 782.)

Finally, consistent with Justice Brown's concurrence in *Wright*, even if a reasonably unreasonable standard makes logical sense and would be preferable as urged by Justice Brown, the current statutory scheme does not support application of a reasonably unreasonable standard for imperfect self-defense. The fact that the Legislature has never acted to amend the scheme over the more than three decades since *Flannel* was decided, and the more than five years since *Wright* was decided, further supports the conclusion that the Legislature has not and has never intended to incorporate a reasonably unreasonable standard upon the doctrine of imperfect self-defense.

D. The Court of Appeal's Opinion In This Case

The Court of Appeal in this case held that "[t]he doctrine of imperfect self-defense ... does not apply where the subjective belief in the need to defend oneself arises not from objective circumstances but purely from the defendant's mental illness. (Slip Opn. p. 12.) In reaching this conclusion, the Court of Appeal cited to and relied primarily upon the Court of Appeal's decision in *People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437 ("*Mejia-Lenares*"). (Slip Opn. p. 12.) As will be shown below, *Mejia-Lenares* was incorrectly decided.

E. *Mejia-Lenares* Was Incorrectly Decided

In *Mejia-Lenares*, the Fifth District Court of Appeal held that to trigger application of the doctrine of imperfect self-defense, there must also be some evidence of objectively reasonable circumstances that would support a defendant's belief in the need to defend himself from imminent peril. (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th 1437.) Appellant respectfully urges that *Mejia-Lenares* was incorrectly decided for numerous reasons.

First, the plain language of Penal Code section 28 does not support this conclusion. Consistent with this plain statutory language, evidence of mental defect, i.e. evidence of delusion or hallucination, may negate the element of malice aforethought required for murder. There is nothing in the statutory scheme to require an additional finding that the defendant's subjective belief due to mental defect be supported by some objective circumstances.

Second, in examining the evolution of the decisions underlying the imperfect self-defense doctrine at the outset of its opinion, the Court of Appeal in *Mejia-Lenares* purported to distinguish this Court's decision in *Wells* on the basis that *Wells* "involved a belief which, although skewed by mental illness, was nevertheless factually based." (*People v. Mejia-Lenares,*

supra, 135 Cal.App.4th at pp. 1449-1450.) The Court of Appeal further purported to distinguish *Wells* on the basis that in *Wells*, "the defendant was not suffering from a delusion, but from an abnormal reaction to reality." (*Id.* at p. 1450.)

The court's analysis was flawed. The Court of Appeal did not state what objective facts in *Wells* would have justified the defendant's belief in the need to use self-defense apart from his mental illness, and in fact there were none. *Wells* involved a completely unprovoked attack on a prison guard with no objective circumstances giving rise to an actual belief in the need to use self-defense, let alone a rational one. (See *People v. Wells, supra,* 33 Cal.2d at pp. 338, 344-345.) Moreover, that the psychiatric testimony in *Wells* described the defendant's mental condition as causing "the patient to react abnormally to situations and external stimuli" rather than using the word "delusion" or another term is a distinction without a difference. (See *Id.* at p. 344.) The defendant's actions in *Wells* were due exclusively to his mental illness; the field of psychiatry has substantially evolved since the 1940's when the defendant in *Wells* was on trial, and the fact that the psychiatrists in *Wells* used slightly different medical terminology to describe the defendant's mental illness is not a basis to distinguish *Wells* from what it is, a case decided long prior to *Flannel* in which this Court determined that the defendant was

entitled to negate malice by relying upon imperfect self-defense premised solely on evidence of mental illness. (See *Id.* at pp. 338, 344-345.)

Third, in reaching its conclusion, the Court of Appeal relied heavily on *People v. Saille, supra,* 54 Cal.3d 1103. (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th at pp. 1450-1453.) However, the Court of Appeal's reliance on *Saille* was misplaced. As noted by this Court in *Christian S.*, *Saille* was not an imperfect self-defense case, and it was by its own terms inapplicable to imperfect self-defense. (See *In re Christian S. supra,* 7 Cal.4th at pp. 779-780.) As also recognized in subsequent decisions of this Court, the definition of malice contained in *Saille* has itself been deemed inaccurate and overly broad. (See *People v. Rios, supra,* 23 Cal.4th at pp. 460-462, 469.) Properly defined, malice implies intent combined with an absence of factors that would reduce the killing to manslaughter. (*Ibid.*)

Fourth, the Court of Appeal erroneously equated imperfect self-defense with a mistake of fact defense and reasoned that because in their view mistake of fact requires a negligent perception of actual facts, imperfect self-defense cannot be founded on a delusion. (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th at pp. 1453-1454.) This analysis was flawed because mistake of fact is a complete defense to a crime, whereas imperfect self-defense is only a partial defense in a homicide case that reduces culpability

from murder to manslaughter. In addition, mistake of fact under the common law is based on an honest and reasonable belief, whereas imperfect self-defense is based on an unreasonable belief. (See *People v. Lucero* (1988) 203 Cal.App.3d 1011, 1016 [discussing mistake of fact].) Moreover, this Court has previously observed that the analysis applicable to imperfect self-defense is not applicable to mistake of fact. (See *In re Christian S., supra,* 7 Cal.4th at p. 779, fn. 3 [an unreasonable mistake in the need to use self-defense may properly negate malice, but is not also a complete defense under Penal Code section 26 which codifies the mistake of fact defense].)

Fifth, the Court of Appeal's decision to additionally require objective reasonableness of a defendant's subjective belief hinged in part on failing to correctly interpret *Flannel* as having placed the imperfect self-defense doctrine outside the ambit of a reasonableness requirement. As stated by the Court of Appeal in *Mejia-Lenares*:

"We recognize that *Flannel* states: 'No matter how the mistaken assessment is made, an individual cannot genuinely perceive the need to repel imminent peril or bodily injury and simultaneously be aware that society expects conformity to a different standard.' (*People v. Flannel, supra*, 25 Cal.3d at p. 679.) In our view, this statement does not render irrelevant the basis of a defendant's actual belief: it relied on the expanded mental component of malice construed and applied in *People v. Conley* [(1966)] 64 Cal.2d 310, which established the defense of diminished capacity. As the California Supreme Court has since recognized, this portion of *Flannel's* reasoning is no longer valid due to the abolition of diminished capacity. (*In re Christian S., supra,* 7 Cal.4th 768 at p. 777.)" (*People v. Mejia-Lenares, supra*, 135 Cal.App.4th at p. 1454.)

However, in *Christian S.*, this Court did not recognize that the above quoted portion of *Flannel's* reasoning was no longer valid because it related to the doctrine of diminished capacity. (See *In re Christian S., supra*, 7 Cal.4th at pp. 776-777.) Rather, in *Christian S.*, this Court recognized that *Flannel's* recognition of the doctrine of imperfect self-defense was based on two independent premises, the prior concept of diminished capacity, and both the common law and statutory requirement of malice. (*Ibid.* ["The doctrine of imperfect self-defense had a lineage independent of the notion of mental capacity set forth in *Conley*."].) The fact that the Legislature later chose to abrogate the defense of diminished capacity negated *Flannel's* prior premise, but had no effect on its latter premise which remains fully intact subsequent to the legislative amendment. (*Ibid.*)

As subsequently explained by this Court in *Anderson* in explaining imperfect self-defense, "[e]xpress malice exists 'when there is manifested a deliberate intention *unlawfully* to take away the life of a fellow creature.' (§ 188, italics added.) A killing in self-defense is *lawful*. Hence, a person who actually, albeit unreasonably, believes it is necessary to kill in self-defense intends to kill lawfully, not unlawfully. ... Because express malice requires an intent to kill unlawfully, a killing in the belief that one is acting lawfully

is not malicious. The statutory definition of implied malice does not contain similar language, but we have extended the imperfect self-defense rationale to any killing that would otherwise have malice, whether express or implied.... (citing *People v. Blakeley, supra*, 23 Cal.4th at p. 89.)" (*People v. Anderson, supra,* 28 Cal.4th at p. 782, all emphasis in original.) So, even after the definition of malice was changed to take away the awareness of the duty to act within the law, this Court recognized that one who thinks he has to kill in self-defense does not act with malice.

Thus, the express language in *Flannel* stating that imperfect self-defense applies as long as the belief in the need to defend is actual, "[n]o matter how the mistaken assessment is made," remains fully applicable. (*People v. Flannel, supra,* 25 Cal.3d at p. 679; see also *People v. Uriarte* (1990) 223 Cal.App.3d 192, 197 ["Nowhere does *Flannel* suggest that only 'reasonably unreasonable' defendants may avail themselves of its rationale. A defendant's mental state is the same when he kills in the honest-but-mistaken belief that the victim was reaching for a gun whether such belief is the product of a delusion or a mistaken interpretation of the victim's reaching for his car keys."].) Also still good law is *Flannel's* rejection of the Attorney General's argument that an actual belief in the need to defend oneself, if unreasonably held, can be consistent with malice. (*Ibid.*)

Sixth, the Court of Appeal erroneously determined that there is nothing in Penal Code section 28 to indicate that the Legislature "has authorized evidence of delusions specifically to support an imperfect self-defense claim." (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th at p. 1454.) To the contrary, the legislative history underlying Penal Code section 28 specifically states that "to reduce murder to manslaughter, *except in the delusional self-defense kinds of cases,* there will have to be a showing of provocation, the traditional basis of manslaughter...." (*In re Christian S., supra,* 7 Cal.4th at p. 781, emphasis in original.)

The above statement of legislative intent is clear. Moreover, the text of Penal Code section 28 expressly provides that mental defect evidence is admissible to negate malice, which given the state of the law at the time, does amount to an authorization to use such evidence in support of an imperfect self-defense claim. (See *Mesler v. Bragg Management Co, supra,* 39 Cal.3d at p. 303 [the Legislature is presumed to be aware of existing judicial decisions at the time it enacts legislation].)

The *Mejia-Lenares* decision further reasoned that Penal Code section 28 would be fully operable under its ruling because evidence of mental illness, if accompanied by other objective facts that would lead a reasonable person to perceive the need for self-defense, would still be admissible to

negate malice and support a claim of imperfect self-defense. (*People v. Mejia-Lenares*, *supra,* 135 Cal.App.4th at pp. 1454-1455.) However, the language of section 28 does not state that evidence of mental illness plus some other evidence can negate malice. It says that evidence of mental illness may negate malice, and section 28 would be impermissibly altered, rather than effectuated, should this Court adopt the rule set forth in *Mejia-Lenares*.

Indeed, a defendant who kills in imperfect self-defense because of mental illness alone appropriately lacks malice just as a defendant who kills because of mental illness and/or some other circumstance lacks malice. As the concurrence in *Wright* recognized, "[w]e can cite as a limitation on imperfect self-defense the long-standing objective requirement that it be 'caused by the circumstances,' [Citations] but doing so does not necessarily solve the problem of how, without a statutory provision, we can fictionally impute malice where there is no actual malice in the defendant's delusional inner world." (*People v. Wright*, *supra,* 35 Cal.4th at p. 986.)

Seventh, the Court of Appeal determined that imposing a reasonably unreasonable requirement would not impermissibly alter the current statutory definition of malice aforethought or imperfect self-defense. (*People v. Mejia-Lenares, supra,* 135 Cal.App.4th at p. 1460.) As stated by

the Court of Appeal, "[w]e are aware of no authority showing the Legislature recognized imperfect self-defense as a defense to murder (or means of establishing voluntary manslaughter as a lesser included offense thereto) by incorporating malice into the definition of the crime when it enacted the murder statutes in 1872, or that it otherwise codified the doctrine. To the contrary, the state Supreme Court has recognized that imperfect self-defense is a judicially-developed theory of voluntary manslaughter that is not expressed in the statutory scheme at all. [Citations.]" (*Ibid.*) Contrary to the Court of Appeal's analysis, while the doctrine of imperfect self-defense did originate in the common law, this Court has now recognized that it is also grounded in statute. (*People v. Anderson, supra,* 28 Cal.4th at p. 782.)

Eighth, and finally, the *Mejia-Lenares* decision reasoned that "[t]o hold otherwise would undercut the legislative provisions separating guilt from insanity. Allowing a defendant to use delusion as the basis of unreasonable mistake of fact effectively permits him or her to use insanity as a defense without pleading guilty by reason of insanity ... If a defendant is operating under a delusion as the result of mental disease or defect, then the issue is one of insanity, not factual mistake." (*People v. Mejia-Lenares, supra*, 135 Cal.App.4th at p. 1456.) This reasoning is also misplaced.

A lack of requisite mental state at the guilt phase of a trial is not the same as a finding of insanity at the sanity phase of a trial. (See, e.g., *People v. Hernandez* (2000) 22 Cal.4th 512, 520; *People v. Saille, supra,* 54 Cal.3d at pp. 1111-1112.)

As aptly stated by the Court of Appeal in *Gutierrez*, "[m]ental illness poses a policy dilemma similar in many respects to that of voluntary intoxication. [Citation.] A defendant who pleads and proves insanity is totally absolved of criminal responsibility although subject to civil confinement. If the defendant chooses not to enter an insanity plea, or if the evidence is not sufficient to establish insanity, then sympathy toward the mentally ill defendant must be balanced against the considerations that such a person, being either legally sane or having voluntarily relinquished an insanity defense, may not be entirely blameless and may present a continuing public danger. Accordingly, the rule has developed that evidence of mental illness may be offered to show the absence of specific intent but not to prove the absence of general intent. [Citations.]" (*People v. Gutierrez* (1986) 180 Cal.App.3d 1076, 1082.)

Moreover, in enacting Penal Code section 28, the Legislature expressly incorporated the issue of mental disease or defect within the guilt phase of a murder trial. Thus, *Mejia-Lenares'* conclusion that such evidence

is appropriately reserved only for the sanity phase of a trial is misplaced. (See also *People v. Wells, supra,* 33 Cal.2d at p. 346 ["permitting the prosecution to adduce evidence to prove a specific mental state essential to the crime and at the same time precluding the defendant from adducing otherwise competent and material evidence to disprove such particular mental state, short of legal insanity (which can be heard on the trial of that issue), would, we think constitute an invalid interference with the trial process."].)

Consistent with the above authorities, a jury should first determine what crime a defendant such as appellant has committed. Thereafter, if such a defendant is convicted of an offense and chooses to enter an insanity plea, the jury can then determine whether or not to excuse that criminal conviction under the different standards applicable to an insanity trial. If the defendant voluntarily chooses not to enter an insanity plea following his conviction, which is what appellant unfortunately did in this case as observed by the Court of Appeal (Slip Opn. p. 12), then such a defendant can at least be properly convicted of the crime for which he actually committed.

///

F. Considerations Of Public Policy Also Support Application Of The Imperfect Self-Defense Doctrine

While the issue before this Court is one of statutory construction, public policy "is a relevant, albeit secondary, consideration..." (*In re Christian S., supra,* 7 Cal.4th at p. 782.)

Some cases have observed that "society has a strong interest in deterring violent and homicidal conduct by not allowing individuals to justify their acts by their own standard of conduct." (See, e.g., *People v. Ogen* (1985) 168 Cal.App.3d 611, 622.) While this is certainly a valid concern, it has limited application to the imperfect self-defense issue herein.

For example, it is difficult to deter someone from defending himself if he actually believes his life is in imminent danger. In addition, if a defendant has an actual belief in the need to defend himself due to a mental delusion, he is not setting up his own standard of conduct; he is reacting to what he actually perceives. Perhaps most importantly, the doctrine of imperfect self-defense does not justify anything; it is a matter of setting degree of guilt, and a defendant who kills in the actual, but unreasonable, belief in the need to defend himself remains guilty of the extremely serious crime of voluntary manslaughter, just not the even more serious crime of murder. This is entirely appropriate for purposes of public policy because a

defendant who kills in the actual, but unreasonable, belief in the need to defend himself does not have the same moral culpability as someone who commits a cold-blooded murder. (See *In re Christian S., supra,* 7 Cal.4th at p. 782 [recognizing the important public policy "need for legal distinctions based on moral culpability."].)

Scholars have recognized that manslaughter is appropriately viewed as a "catch-all" provision for all unlawful homicides that do not equal murder, and an appropriate "in-between" verdict between a finding of innocence and guilt of murder, and that this is the more humane view. (See *People v. Flannel, supra,* 25 Cal.3d at pp. 679-680.)

Any potential concern from the Attorney General that permitting a finding of imperfect self-defense under these circumstances will "lead to a proliferation of unfounded claims" of imperfect self-defense is best left to the Legislature. (See *In re Christian S., supra,* 7 Cal.4th at p. 783.) Moreover, the doctrine necessarily remains "narrow" and without a jury finding of an *actual* fear of *imminent* harm, "imperfect self-defense is no defense." (*Ibid.*)

In Justice Brown's view, malice should be fictionally imputed to mentally ill defendants whenever no considerable provocation appears. (See *People v. Wright, supra,* 35 Cal.4th at p. 984.) But doing so means that malice is being imputed to people even though everyone agrees that they are

not actually harboring it. This would be unjust, and society should not impute malice upon a person because he suffers from mental illness.

Ultimately, as a matter of policy, equity, and logic, it makes no sense to hold that a person who kills in the actual, but unreasonable belief in the need to use self-defense because of a severe mental illness that caused him to misperceive reality should be considered to have acted with malice, whereas a person who kills in the actual, but unreasonable belief in the need to use self-defense for any other reason that caused him to misperceive reality, such as because he has moderate mental illness and/or poor physical vision or hearing, should be considered not to have acted with malice.

G. If Penal Code Section 28 Is Ambiguous, Then Such Ambiguity Must Be Resolved In Appellant's Favor

Finally, if the current statutory scheme including Penal Code section 28 is deemed ambiguous, which appellant asserts it is not, then it must be construed in appellant's favor. """When language which is reasonably susceptible of two constructions is used in a penal law ordinarily that construction which is more favorable to the offender will be adopted."""" (*In re Christian S., supra*, 7 Cal.4th at p. 780, quoting *People v. Stuart* (1956) 47 Cal.2d 167, 175, *People v. Ralph* (1944) 24 Cal.2d 575, 581.)

///

///

CONCLUSION

For the foregoing reasons, and in the interests of justice, appellant respectfully requests this Court find that the doctrine of imperfect self-defense applies when the defendant's actual, but unreasonable, belief in the need to defend himself was based solely on a psychotic delusion, and to therefore reverse the Court of Appeal's decision that it does not and remand this case to the Court of Appeal for further proceedings consistent with this Court's Opinion.

Dated: 5/18/11

Respectfully submitted,

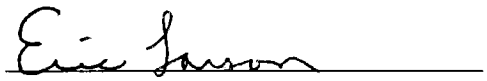
Eric R. Larson
Attorney for Defendant and
Appellant Charles Elmore

By Appointment of the Supreme
Court of California

CERTIFICATE OF WORD COUNT

I, Eric R. Larson, hereby certify pursuant to California Rules of Court, rule 8.520, subdivision (c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Appellant's Opening Brief On The Merits contains a total of 7,097 words.

Executed this 18th day of May, 2011, in San Diego, California.



Eric R. Larson, SBN 185750
330 J Street, # 609
San Diego, CA 92101
(619) 238-5575

Eric R. Larson, #185750
330 J Street, # 609
San Diego, CA 92101

Supreme Court No.: S188238
Court of Appeal No.: B216917
Superior Court No.: TA090607

DECLARATION OF SERVICE BY MAIL

I, Eric Larson, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, #609, San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 18th day of May, 2011, I caused to be served the following:

APPELLANT'S OPENING BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

California Appellate Project
520 S. Grand Avenue, 4th Floor
Los Angeles, CA 90071

Clerk, Los Angeles Superior Court
200 W. Compton Blvd.
Compton, CA 90220

Office of the Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Office of the District Attorney
200 W. Compton Blvd, 7th Floor
Compton, CA 90220

Charles Elmore, #G68412
CSP – Lancaster
P.O. Box 8457
Lancaster, CA 93539

Second District Court of Appeal
Division Seven
300 S. Spring Street
Floor 2, N. Tower
Los Angeles, CA 90013-1213

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 18, 2011, at San Diego, California.

Eric Larson

Eric Larson