IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION EIGHT

THE PEOPLE OF THE STATE OF CALIFORNIA,	)
	) Court of Appeal
Plaintiff and Respondent,	) No. B257249
	)
v.	) Superior Court
	) No. SA073898
CARL E. CHAPMAN,	)
	)
Defendant and Appellant.	)
	)

APPEAL FROM THE SUPERIOR COURT
OF LOS ANGELES COUNTY

The Honorable James R. Dabney, Judge

APPELLANT'S OPENING BRIEF

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INTRODUCTION

For years Brian Chapman had been threatening to kill his father Carl. But on March 2, 2007, appellant shot and killed Brian in the home where appellant lived, moments after one witness saw Brian enter through a back door without knocking and another heard sounds of an argument. The jury was presented with two motives for the shooting: Appellant told the police he had no choice but to shoot Brian after he burst through the laundry room door carrying a mallet, intent on assaulting appellant's girlfriend. The prosecution wanted the jury to believe appellant was a cocaine addict who murdered his son and planted the mallet in his hand so he could take the estate Brian had inherited when appellant's wife died.

After several hours of deliberations, the jury posed questions to the court which suggested it believed self-defense was appellant's primary reason for shooting Brian, but that money was "part of" his motivation.

Both the state of the evidence and the jury's questions provide good reason to believe that erroneous instructions on self-defense and the financial gain special circumstance made the difference in this case. Based on a misreading of Penal Code section 198, the instructions told jurors that if they believed appellant killed Brian in self-defense, they still had to find him guilty of murder unless he acted "only" from fear. In reality, California law does not, and constitutionally cannot, impose such a requirement on

someone who reasonably believes he must kill his assailant to save his own life. (Arg. I.) And even if self-defense could be limited in this way, the killer would nevertheless lack malice and so the homicide would be voluntary manslaughter rather than murder. (Arg. II.)

While the instructions defined self-defense too narrowly, the jury got an overly-broad definition of the special circumstance. Contrary to the ordinary, accepted meaning of the term "for financial gain," the jury was allowed to find the allegation true even if appellant would have killed Brian in self-defense regardless of any financial benefit. The Due Process Clause, as manifested in the rule of lenity, prohibits such an expansive reading of a criminal statute. (Arg. III.)

The improper admission of evidence of appellant's conduct, motive, and intent was just as damaging as the instructional errors. The prosecution was unable to produce credible evidence that appellant misappropriated money from the estate or that his drug use drove him to kill. It relied instead on testimony that appellant was using cocaine months before the shooting as well as Brian's accusations that appellant was draining the estate to feed his drug habit and had told him to make a will naming appellant as the primary beneficiary. This testimony formed the basis of what would otherwise have been a groundless theory that Brian was killed because he confronted appellant about his misdeeds. (Arg. IV & V.)

STATEMENT OF APPEALABILITY

Appeal is authorized by Penal Code section 1237.

STATEMENT OF THE CASE

An information alleged that on March 2, 2007, appellant murdered Brian Chapman. (1CT:48; Pen. Code, § 187, subd. (a).) It was further alleged that the murder was committed for financial gain and that appellant personally discharged a firearm causing death. (1CT:48-49; Pen. Code, §§ 190.2, subd. (a)(1) & 12022.53, subs. (b)-(d).)

A jury trial was held, and appellant's defense was that he shot Brian in self-defense and in defense of appellant's girlfriend, Raquel Perry. (3RT:935; 7RT:3391-93.) The standard CALCRIM instructions on murder, self-defense/defense of another, imperfect self-defense/defense of another, and heat of passion were given. (2CT:419-24.)[1]

The jury convicted appellant of first degree murder and found the financial gain special circumstance and firearm enhancements true. (2CT:442-43; 7RT:3102-04.)

[1] Though appellant's claims apply equally to self-defense and defense of another, for ease of reading appellant will refer only to self-defense. (See *People v. Randle* (2005) 35 Cal.4th 987, 997-999 (overruled on another point of law); Pen. Code, § 197, subs. (1) & (3).)

The trial court sentenced appellant to life without parole plus 25 years, awarding 2673 presentence credits. (2CT:482-83.)

Appellant filed a timely notice of appeal. (2CT:484.)

STATEMENT OF FACTS

A. Family history and Brian's reputation for violence:

Appellant and his wife Judy Chapman lived at 9135 Larke Ellen Circle in the Beverlywood neighborhood of Los Angeles, where they raised their two sons, Brian and Cary. (3RT:1000, 1003; 6RT:3021.) Appellant made his living as a civil engineer and attorney. (6RT:2764-65, 3020.)

In the early to mid-1990s, when Brian was in his late teens and early twenties, he was seen regularly by clinical psychologist Michael Peck. (6RT:2711-13, 2741.) Peck continued seeing Brian off-and-on in the early 2000s, and communicated with him by telephone after that. (6RT:2711-13, 2741.)

Brian often told Peck that he was going to kill his parents, saying such things like, "I'm going to kill Judy," "I'm going to kill Carl," and "I'm going to kill Carl and Judy." (6RT:2713, 2716-17.) Brian had a lot of paranoid ideas about what his parents had done to him and spoke of getting revenge. (6RT:2717.) When Peck would ask Brian if he had a particular

plan, however, he would reply, "No, not yet," and so Peck never reported the threats. (6RT:2713.)

Brian had admitted to Peck that he once beat a former boyfriend because "he deserved it." (6RT:2718, 2722.) Judy also reported to Peck that Brian had been violent. (6RT:2719.) When Brian was between 19 and 21 years old, he beat his sleeping brother with a baseball bat. (6RT:2719.)

Peck said there was "no question" Brian was a violent person who would not hesitate to inflict physical harm on others if he believed they stood in his way. (6RT:2719, 2722.) Brian also lied a great deal and had no qualms or guilt about doing so. (6RT:2722, 2726.) Peck diagnosed Brian as a psychopath, but could not say one way or another whether he was violent or psychotic in 2007. (6RT:2723, 2749.)

According to appellant, Brian's anger had always been "off the charts," and he had been treated by mental health professionals since he was five. (6RT:3022.) Brian was violent with other family members, including Cary and Judy. (6RT:3022, 3025-26.) Judy gave up on Brian after he beat her up in 1991. (6RT:3022.) After that point Brian was no longer welcome in the Larke Ellen home. (6RT:3023.)

Appellant said he continued to give Brian money and made sure he had a place to live. (6RT:3024.) When Judy and appellant were separated for a three year period, appellant let Brian live with him. (6RT:3024.)

Between 2002 and 2005 there were a number of encounters in which Brian pushed and shoved appellant. (6RT:3027.) Brian would also frequently threaten him, saying "I'm gonna get you. I'm gonna kill you." (6RT:3027.) More than half the time Brian would turn back, smile, and say, "I'm joking." (6RT:3027.)

Appellant was also aware of Brian's violence toward those outside the family. (6RT:3028.) Brian told appellant that while he was living in Montreal, he and a female friend would rob and beat up gay people, though appellant did not know if these stories were true. (6RT:3029.) Cary's girlfriend said Brian had beaten her up. (6RT:3029.) Brian had also expressed pride about an incident in which he threw a drink in a girl's face at a 7-11. (6RT:3030.) In 2005, Brian beat up his then-boyfriend, Michael, who was forty-five years old and suffered from Parkinson's disease. (6RT:3031.)

Hospital records showed Brian admitted himself to Glendale Memorial Hospital's mental health unit on December 13, 2004 and was discharged on December 24, 2004. (5RT:2500-02.) He admitted himself again on January 5, 2005 and was housed there until January 18, 2005. (5RT:2503-04.) Brian was abusing methamphetamine, benzodiazepines, and was depressed and suicidal. (6RT:2722-23.) During these hospitalizations he made numerous threats to kill his parents, but did not

express any immediate intent or disclose any plan, and on one occasion followed a threat by saying he was joking. (6RT:2715-16.)

In response to being asked how he would kill his parents, Brian listed possibilities such as making them overdose on medication or causing a mechanical problem with their car. (6RT:2717.) Brian claimed he would be able to cover up the murder because he had been diagnosed as a criminal mastermind at age fourteen. (6RT:2716.) The doctor concluded Brian was improving and discharged him in "very good condition." (6RT:2737.)

According to Brian's boyfriend Simon Ryan and Brian's Alcoholics Anonymous sponsor Paul Schulte, as of March 2007 Brian had been sober for two or three years. (3RT:1299-1300, 1310; 4RT:1514-15.) Ryan and Schulte said they never witnessed Brian being violent. (3RT:1306; 4RT:1515.)

The prosecution also called a Jesuit priest, Father William Fulco, who knew Brian from Alcoholics Anonymous and as his advisor at Loyola Marymount University. He saw Brian almost daily in 2007. (4RT:1537; 6RT:3006, 3010.) Fulco said Brian was a "nerd," unathletic and very interested in academics, and that he liked to please. (4RT:1540-41.) He never witnessed Brian being violent while at LMU. (6RT:3006.) Fulco was unaware of whether his 250-pound student played hockey, baseball, and had a brown or black belt in karate. (4RT:1542, 1806; 6RT:3026.)

For six or seven weeks, Brian was a student in a class taught by Sister Mary Elizabeth Ingham. He never came to her class while under the influence and appeared thoughtful and engaged. (3RT:1024-26.) Ingham never saw Brian with a weapon or hitting anyone. (6RT:3050.)

B. Events from Judy's death until March of 2007:

Judy was sick in the last years of her life and passed away on January 17, 2006. (6RT:3021, 3031.) Appellant continued to live in the Larke Ellen house, where he also maintained his office. (6RT:3019, 3032.) In February of that year, appellant and his two sons took Judy's will to the office of estate attorney Charles Shultz. (4RT:1566.) The will was witnessed by appellant and gave the Larke Ellen house to Brian and a duplex equally to Brian and Cary. (4RT:1571, 1579.) All of Judy's assets were split between the sons, leaving nothing to appellant. (4RT:1571.)

Shultz testified the gross value of the estate would have been $2.4 million in real estate and $50,000 to $75,000 in cash; he did not know about the estate's liabilities but knew its net value was less than $2,000,000 (5RT:2154, 2156.)

Although Shultz told the Chapmans that the will could easily be attacked because it was not a "natural disposition," all of them, appellant included, were emphatic that it expressed Judy's intentions and no one wished to challenge the will. (4RT:1569-70.) Brian was named executor of

the estate but asked that Shultz communicate through appellant. (4RT:1570, 1572.)

In December of 2006, Brian made a holographic will leaving his interest in Judy's real property to appellant and his personal property to Ryan. (3RT:1302; Peo. Ex. 11.) According to Ryan, Brian said it was appellant who told him to make the will. (4RT:1302-03.) Appellant testified he did not tell Brian to make the will. Rather, Brian had asked appellant how to make a will, and appellant told him how to do so after explaining that if he had no will, appellant would inherit everything. (6RT:3075-76.)

Schultz made several unsuccessfully inquiries to appellant in an attempt to get values for the property in the estate, which Schultz needed to complete the probate process (4RT:1571-73.) Shultz said it was not out of the ordinary that he did not have the necessary information by March 2, 2007, and that probate commonly takes longer than a year to conclude. (4RT:1585.)

After Judy's death, appellant began dating a much younger African-American woman named Raquel Perry. (3RT:1252, 3059.) Appellant loaned Perry between $7,500 and $9,000, bought her a $2,500 dog and took her on a trip to Las Vegas. (3RT:1253; 6RT:3059.) Appellant acknowledged spending money on Perry, but said it was not money from

the estate. (6RT:3059.) Perry would frequently stay at the Larke Ellen house. (6RT:2021.)

After meeting Perry, appellant began using cocaine. (3RT:1254; 6RT:3055-56.) Over a period of several months in 2006, he lost between thirty and forty pounds, though he said this was due to exercise and not drug use. (3RT:1010-11, 1251; 6RT:3078-79.) During this same period of time, a next-door neighbor named Clive Hoffman noticed unfamiliar cars coming and going from appellant's house, sometimes as late as midnight. (3RT:1011.)

Appellant testified he was using cocaine recreationally, not on a daily basis, and was not spending hundreds of dollars a week on it. (6RT:3076-78.) Warren Korkie, a friend who lived with appellant for a few months in 2006, never saw him use cocaine but once saw a white substance around his nostrils. (3RT:1250-51, 1254.) Appellant told Korkie that cocaine was "the greatest drug ever invented." (3RT:1261.)

Several people said Brian referred to Perry as a "crack whore" and a "nigger crack whore." (3RT:1313-14; 4RT:1814; 6RT:2718.) More than once, Brian told Peck he was going to have to get rid of Perry, whom he believed was responsible for spending Brian's money. (6RT:2717.) Brian also expressed disapproval of appellant's spending money on Perry. (6RT:2749.)

According to appellant, Brian would speak poorly of Perry on an almost daily basis. (6RT:3034.) He would say, "I want your nigger crack whore out of my mom's house, out of my mom's bed, not prancing around in front of my mom's ashes." (6RT:3034.) Brian threatened to physically remove Perry from the Larke Ellen house. (6RT:3035.)

Brian told appellant that one time he snuck into the house and, while Perry was sleeping, grabbed her by the hair, pulled her out of the house and said, "Get the hell out of my mother's house. This is strike one. Next time is strike two." (6RT:3038.)

Around the end of 2006 appellant told Korkie that he had begun carrying a gun with him at all times. (3RT:1256.)

Brian told several people that appellant had been "draining" and mismanaging the estate since Perry had come into the picture. Brian claimed appellant was "burning through money really fast" as a result of his "lifestyle," and he worried that "a significant amount of money was missing from the estate." Brian claimed he had been humiliated when checks bounced, that the mortgage had not been paid in two months, and that the house might be taken by the bank. (3RT:1304-05, 1317; 4RT:1516-21; 1538-39, 1541, 1810-13; 6RT:3052.) Brian also accused appellant of being a drug addict and said he feared him because appellant was "usually on

drugs and somewhat irrational," and was "a very angry man." (5RT:1541; 6RT:3007-08.)

Appellant's friend Ira Candib testified that appellant borrowed $15,000 from him in February of 2007, saying he needed the money to pay expenses related to the estate. (4RT:1804, 1807.) Appellant denied having borrowed money to pay expenses related to the estate at that time. (6RT:3059.) That same month, appellant asked Korkie if he wanted to buy hockey tickets, saying he could really use the money for the weekend. (3RT:1254-55.)

On March 1, appellant spoke to Candib on the phone and sounded panicked and frustrated. (4RT:1808-09.) Appellant explained that Brian was going to get someone else to manage the estate, which appellant did not believe was necessary. (4RT:1809-10, 1813.) Appellant asked Candib to speak to Brian, which he did. (4RT:1811.) Brian expressed to Candib his belief that appellant was draining the estate. (4RT:1810-11, 1813.) During that conversation Brian again referred to Perry as a "nigger crack whore," and expressed concerns about her influence on appellant. (4RT:1814-15.)

C. On the evening of March 2, 2007, Brian was shot and killed by appellant in the Larke Ellen house; his body was found by police minutes later holding a mallet.

Appellant testified he saw Brian at the bank on the morning of March 2, and they discussed signing loan papers so that Brian could have

money for the estate. (6RT:3040, 3056-57.) When appellant returned home from the bank he heard yelling and screaming. (6RT:3038, 3040.) He went inside he saw Brian holding a shortened hockey stick like a billy club and pounding it on the door to the master bedroom. (6RT:3040.) The door was dead-bolted and Perry was behind it yelling and screaming. (6RT:3040.) Brian was screaming, "This is strike two. The next time I come back will be strike three. Get this nigger crack whore out of my house or I'm coming back and I'm going to take her out." (6RT:3038, 3040.) Brian then threatened appellant before leaving. (6RT:3038.)

Appellant testified that Brian also threatened him over the phone a couple of times during the day. (6RT:3057.) Over the course of that day, Brian and appellant exchanged several text messages and phone calls. (4RT:1939-41.)[2]

At some point during the day, Brian left a message for Fulco saying he was going to stop by appellant's house to talk to him about his concerns regarding the finances. (4RT:1539.)

[2] Appellant mentioned the threats to Detective Umansky while being interrogated after the shooting and Umansky assured appellant he would review the messages on appellant's and Brian's phones. (2CT:403.) Umansky testified that he could have listened to the voicemails and viewed or preserved the text messages, but he did not to do so. (4RT:2110, 2114; 5RT:2253-54; 6RT:3098.)

At around 11:00 a.m., Brian spoke with Sister Ingham and told her he was afraid of appellant because appellant had been abusing drugs and alcohol, his "behavior was unpredictable" and Brian "never knew what his reactions would be." (6RT:3050.) Brian told Ingham he was wondering whether he should go see appellant that afternoon and talk to him about appellant's spending money on drugs and alcohol. (6RT:3052.)

At around 1:00 p.m., Brian phoned Shultz and expressed frustration with the speed at which probate was proceeding. (4RT:1517, 1575; 5RT:2152.) Shultz told Brian to come in for a meeting on Monday, March 5, so he could continue the probate process without having to wait on appellant. (4RT:1517, 1575.)

Officer Paul Corralejo went to the Larke Ellen house at 1:30 p.m. in response to a report of a "female disturbance." (4RT:1634-36; 6RT:3071.) Appellant answered the door. He seemed upset and wondered why officers were at the house. (4RT:1636.) He told the officers he was having a problem with his "biological ex-son" involving probate, but did not mention anything about Brian threatening him. (4RT:1636-38, 1641; 6RT:3057.) Appellant testified that it was Cary who had called the police and so appellant was complaining to the officers about Cary. (6RT:3082.)

Brian went to the dentist that afternoon, leaving the dentist's office between 4:00 and 4:30 p.m. (3RT:1274, 1278.) Hoffman came home from

work at 4:50 or 4:55 p.m., and saw Brian park his car across the street at the same time. (3RT:1001-02, 1004.) Appellant's car was parked in the driveway. (3RT:1003.)

Brian then walked to the house "with purpose," and looking "determined," which was atypical for him. (3RT:1006, 1018.) Hoffman did not notice anything in Brian's hands. (3RT:1006.) Without knocking, Brian entered through the back door, which was ajar. (3RT:1006, 1018-19.)

About five minutes later, Hoffman heard three gunshots in rapid succession, about a minute of silence, then two more gunshots. (3RT:1007.) Arturo Aquino, who was working at a nearby property, heard three gunshots within fifteen seconds of each other. (5RT:2201.)

According to Virgilio Vallesteros, who was also working at a nearby property, the sound of gunshots was preceded by loud arguing coming from appellant's house. (5RT:2507-08.) The argument was between two men, one of whom was appellant. (5RT:2509-10.) Vallesteros confirmed the shots were heard at around 5:00 p.m. (5RT:2506.)

After the gunshots, Perry and appellant's elderly maid, Esperanza Roldan, ran out of the house. (3RT:951; 1007-08.)

Other than appellant, Roldan was the only testifying witness who had been in the house at the time of the shooting and her account was

hampered by her mental and physical infirmities. She could not remember that she had testified at the preliminary hearing and had difficulty understanding questions and seeing photographic exhibits which were presented to her. (3RT:937, 939.) She also appeared unsure if she recognized appellant in court, though he had been her employer. (3RT:938.)

Roldan testified that at 3:00 p.m. or 3:30 p.m., Brian entered the house and asked for appellant. (3RT:964-68.) Roldan told him appellant had gone out with Perry and then went about her cleaning while Brian stayed in the house. (3RT:965-66.) At around 3:30 p.m. or 4:00 p.m. she heard a single gunshot and ran into the dining room area, where she saw Brian's body in a bedroom close to the kitchen, lying on his side. (3RT:942-43; 962.) She did not see anything in his hands. (3RT:944, 991.) Roldan recalled that she and Perry then ran out of the house, and about five minutes later she heard three or four more gunshots. (3RT:962, 979; 5RT:2216.)

An officer recalled that Roldan was upset and appeared confused after the incident. (5RT:2129, 2135.) In her initial interview, Roldan did not mention seeing appellant when she discovered Brian's body, and said the last time she had seen him was when he left with Perry earlier in the day. (3RT:989; 5RT:2209, 2214.)

Roldan was interviewed again at the District Attorney's office shortly before trial, and appeared unfocused and unable to stay on topic. (5RT:2209-10.) During that interview, she said for the first time that she had seen appellant standing near Brian, holding a gun. (5RT:2211, 2216-17.) Roldan believed the gun she saw was yellow in color. (5RT:2211, 2217.)

According to appellant, before the shooting Brian had called and said he was coming over. (6RT:3060.) Appellant was out of the house, and when he returned with Perry at around 4:50 p.m., Brian was inside. (6RT:3062-63.) Brian shoved a pawn ticket in appellant's face which showed Cary had pawned Judy's jewelry. (6RT:3062.) Brian was angry because appellant had not told him Cary had done that. (6RT:3062.) The two got into a yelling match, and Brian said, "This is strike three," then walked out the door. (6RT:3063.)

Appellant next heard the sound of a car, followed by the metal gate outside opening, followed by the sound of a door. (6RT:3063, 3072.) Appellant grabbed a .38 semi-automatic from the nightstand, and soon after saw Brian coming through the laundry room toward the dining room, carrying a mallet. (6RT:3041, 3060-61, 3072-73; Peo. Ex. 50.) Appellant was in fear for himself and Perry because based on what had happened earlier he thought Brian had returned to attack Perry. (6RT:3042.)

Appellant wanted to use the gun to scare Brian, and had not chambered a round. (6RT:3041.) When Brian saw the gun, however, he became enraged and raised the mallet. (6RT:3041.) Appellant instantaneously pulled back the slide and accidently fired a shot which did not hit Brian. (6RT:3041, 3064, 3082.)

The second shot was fired after Brian turned and hit appellant on the head with his elbow while they were in the dining room. (6RT:3043, 3082.) Appellant believed the shot went through Brian's shoulder and chin. (6RT:3043, 3064.) Brian retained the mallet. (6RT:3043.)

The third shot was fired while in the kitchen; Brian was in a "baseball batter's" position, ready to knock appellant's head off, and the bullet hit Brian in the side and back. (6RT:3043, 3065.) After appellant fired that shot, he saw Brian go into the laundry room and appellant followed. (6RT:3044, 3065-66.)

Appellant momentarily lost sight of Brian while clearing a jam in the gun, then saw him in the dining room, heading straight for Perry. (6RT:3044-45, 3065-66.) Brian was between Perry and appellant, holding the mallet. (6RT:3047.) Appellant was in fear and fired two final shots in rapid succession from about seven feet away, hitting Brian in the face and causing him to collapse. (6RT:3047, 3066.) Appellant's eyes were closed when he fired the final shots. (6RT:3067, 3085.) Appellant believed it was

a life and death situation for both Perry and him, and but-for those last two shots, appellant would be dead. (6RT:3042, 3048, 3067.)

Someone in the house called 9-1-1 at 5:03 p.m. (5RT:2434.) After Brian collapsed, appellant tried to get his pulse and also spoke with the dispatcher for just over a minute-and-a-half. (6RT:2767, 3048, 3073.) Police arrived within five or ten minutes of the last shot being fired. (3RT:1010; 5RT:2202.)

D. The police arrested appellant and entered the house.

While the police were preparing to make an entry, appellant came out of the house and was taken into custody. (3RT:1040.) Hoffman saw appellant being arrested five to seven minutes after he heard the last shot. (3RT:1010.) Appellant was crying but was cooperative with officers. (3RT:1224, 1226.)

Appellant had a .22 caliber magazine in his pocket, but told officers he was not armed and that the gun was inside the house. (3RT:1041-43.) According to appellant, he had previously removed the magazine from a .22 pistol after receiving threats from Brian in order to ensure the pistol wasn't used against anyone in the house. (6RT:3081.)

An officer later observed a bruise on appellant's head. (5RT:2434.)

Officers entered the house and found Brian lying on his back in the laundry room area. (5RT:2176; Peo. 17.) He was dead and blood was pooling from his head. (5RT:2127, 2183.) Brian held the mallet in his right hand, which had a bloody towel lying on top of it. (3RT:1290-91; 4RT:1621, 1829; 5RT:2130, 2177.) Appellant said the towel had fallen on Brian's hand after appellant became physically sick while taking his pulse. (6RT:3073.) A vial of muscle relaxants which had been prescribed to Judy was in Brian's pocket. (4RT:1624.) Brian's phone was on the kitchen table and appellant had his own phone in his pocket. (5RT:2222-24.)

Appellant's blue steel .38 caliber semi-automatic handgun was on the kitchen floor. (3RT:1283; 4RT:1847; 5RT:2219, 2237.) An open bottle of Simple Green cleaning fluid was nearby, which appellant said had been left there by Roldan. (5RT:2177, 3087.) There was a circular divot in the floor near Brian's head. (5RT:2225.)

An expended shell casing was found underneath Brian's lower left back. (4RT:1621, 1823.) Another was underneath a nearby dog bed and a third was found in the dining area. (4RT:1621, 1844.) An unspecified number of casings were found in the laundry room. (4RT:1853.) The refrigerator and a kitchen window had bullet holes in them. (5RT:2185-86, 2188.) Bullet fragments were also found in the dining room. (4RT:1824;

5RT:2181.) A single live round was recovered from the kitchen floor. (4RT:1846.)

The cause of death was multiple gunshot wounds. (4RT:1893.) There were five wounds in total: One was from a bullet which entered at the front part of the left ear and would have been instantly fatal. (4RT:1893-97.) Two wounds, to the left shoulder and undersurface of the chin, were "grazing," and could have been caused by a single bullet. (4RT:1905-07; 1914.) A fourth wound was caused by a bullet entering the back of the left cheek near the jawline and exiting the right cheek. (4RT:1899-1900.) The remaining wound was from a bullet entering the left side of the body and exiting the lower left chest. (4RT:1903.) With regard to these last two wounds, the medical examiner said they were potentially but not rapidly fatal, and Brian would not have been facing the shooter. (4RT:1901-03.)

It could not be determined in what order the wounds were sustained, except that the instantly fatal wound likely would have occurred last. (4RT:1893-95, 1911.) This wound could have, but not necessarily would have, caused Brian to drop the mallet; about 20% of people who are found dead after shooting themselves in the head still have a gun in their hand. (4RT:1898, 1915.)

There was no soot or stippling on the body, suggesting the shots came from at least two or three feet away. (4RT:1904-05.) Had Brian been on the floor when he was shot there could have been "pseudo stippling," but no such pseudo stippling existed. (4RT:1916.)

On March 22, 2007, Cary called Detective Umansky and asked him to remove guns and drugs from the Larke Ellen house. (5RT:2451-52.) Umansky went by the next day and found various ammunition, a shotgun, and a woman's purse which contained cocaine residue. (5RT:2453-56, 2463, 2466, 2479-85.)

E. Forensic analysis was performed on some pieces of physical evidence but not others.

There were fingerprints on the mallet in Brian's hand and they were not appellant's. (4RT:1931-33; 5RT:2119-20.) Because the coroner "botched" the fingerprint lift from Brian's body, no comparison could be made to determine if the prints were Brian's. (5RT:2119.) No DNA testing was done on the mallet. (4RT:1831, 1835.)

Although an impression was made of the divot near Brian's head, no comparison was ever done to determine whether it was made by a bullet. (4RT:1855-60; 5RT:2146.) The investigator who made the impression did not notice any tissue or bone which could have indicated the divot was made by an exit wound. (4RT:1871.) He did not document seeing any tile

chips in the area. (4RT:1876.) A forensics firearm examiner testifying for the defense said it could not be determined whether the divot was made by a bullet. (6RT:2704-07.) While it was possible it could have been, one would expect to find the bullet under or near the body and blood and tissue or brain matter on the floor. (6RT:2708-09.)

A toxicology screen of Brian's blood did not reveal the presence of any illegal drugs. (5RT:2158-61.)

F. Appellant waived his *Miranda* rights and spoke with the police about the incident.[3]

Appellant was interviewed by the police about three-and-a-half-hours after the shooting. (6RT:3095.)

The day before the shooting, Brian had been upset because Cary had told him that an uncle had given appellant $12,000 and appellant had spent it all on drugs. (2CT:321.) In reality, Cary had spent that money. (2CT:321.) Brian was really agitated and threatened to sell the house. (2CT:322.) Brian text messaged appellant maybe thirty times that night, threatening to take everything away from him. (2CT:327.) He also threatened appellant on the phone, and appellant replied via text message that if Brian killed Perry, appellant would do the same thing to Brian in

[3] The interview was initially suppressed due to a *Miranda* violation but was introduced in rebuttal after appellant testified. (2RT:F1-F2.)

defense of her. (2CT:341-42, 380.) Appellant told Brian he had a legal right to live at the Larke Ellen house until probate closed and to have guests there for his own benefit. (2CT:342.)

Brian had assaulted appellant plenty of times when Brian was on methamphetamine; the last time was two years before the shooting. (2CT:377.)

On the morning of March 2, appellant and Brian met at the bank to sign refinance papers. (2CT:322-23.) Brian continued to the Larke Ellen house to pick up one of the checks appellant gave him every month so he could live as a student. (2CT:323.) When appellant arrived at the house, Brian was pounding on the bedroom door with a hockey stick, yelling at Perry. (2CT:323-24.) He was saying, "You fucking nigger crack whore, get the fuck out of this house." Appellant asked Brian, "What the hell are you doing?" (2CT:324.) Brian told appellant, "If you don't get that fucking nigger out of here, I'm going to hit her." (2CT:325.) Brian threw the hockey stick at appellant but did not hit him. (2CT:325.)

Before Brian left, he turned to the locked door which stood between him and Perry, and said, "So that's strike two. The next strike you'll get the fuck out of here if I have to take you out." (2CT:328.)

Brian called appellant at some point during the day and said "strike three" was coming. (2CT:382-83.) He also called to say he was coming over to physically remove Perry from the house. (2CT:384, 399.)

When Brian later entered the house with the mallet, he came in quick, angry, and loud, and appellant thought he was coming for Perry. (2CT:332, 347.) Appellant did not know what the weapon was that Brian was holding. (2CT:355.) Appellant had been in his bedroom and grabbed the pistol when he heard Brian enter. (2CT:362.) They first ran into each other in the dining room. (2CT:332-33.)

Brian raised his weapon to appellant, and appellant did the same to Brian. (2CT:334.) Brian then went toward the kitchen before turning to hit appellant, at which point appellant fired. (2CT:334-35.) He did not remember firing any warning shots. (2CT:359-60.) Appellant did not fire anywhere that would seriously hurt Brian and hoped it would just cause him to leave. (2CT:335.) He thought the first two rounds hit Brian but was not sure where. (2CT:335.) The gun malfunctioned once during the altercation. (2CT:363-64; 369.)

Appellant thought Brian would leave out the back door but instead he turned to go after Perry. (2CT:336.) Appellant followed Brian from about two or three feet away until Brian turned again and appeared ready to

strike with a baseball swing. (2CT:338-39, 350.) Appellant fired two times and that was it. (2CT:340.)

Brian was on his back and appellant did not flip him over. (2CT:344.) Appellant was very upset and he freaked out. (2CT:340.) He immediately told Perry to call the police and got a towel to clean up the blood that was all over. (2CT:340, 344, 371.)

Appellant acknowledged he had done a line of cocaine that day. (2CT:367.)

He explained that Judy's will gave the property to the children to protect appellant's interests, because everything had been put into Judy's name when appellant filed for bankruptcy. (2CT:385.)

ARGUMENT

I. Under California law and the United States Constitution, a person who holds an honest and reasonable belief he must kill in self-defense is justified in doing so regardless of whether he harbors other motives as well. The requirement stated in CALCRIM No. 505 that the defendant act "only" because of that belief is therefore contrary to law.

Two possible motives were put forth by the parties in this case: the prosecution's theory was that appellant killed for financial gain while the defense said he killed in self-defense. A question posed by jurors during deliberations strongly suggests they thought self-defense was appellant's primary reason for shooting Brian, but that he was also partly motivated by financial gain. (2CT:434.) As appellant explains below, the law requires a defendant be acquitted in such circumstances. Based on a misinterpretation of Penal Code section 198, however, CALCRIM No. 505 prejudicially misstated the law by precluding an acquittal unless the defendant acted "only" because of his fear.

A. The claim is cognizable on appeal.

The instructions misstated the law and as a result they lowered the prosecution's burden of negating malice and infringed on appellant's ability to present a complete defense. (*California v. Trombetta* (1984) 467 U.S. 479, 485; *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.) No objection is

required to preserve such claims. (*People v. Valdez* (2012) 55 Cal.4th 82, 151; Pen. Code, § 1259.) Furthermore, to the extent the trial court was bound to follow contrary Court of Appeal decisions, any failure to object must be excused for that reason as well. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6.)

B. The error in CALCRIM No. 505 is based on ambiguous language in Penal Code section 198.

CALCRIM No. 505, the standard instruction on self-defense, says in relevant part:

> The defendant must have believed there was imminent danger of death or great bodily injury to himself or someone else. Defendant's belief must have been reasonable and *he must have acted only because of that belief*. (2CT:420 (emphasis added).)

The bench notes suggest the highlighted language is meant to convey that the defendant "must act under [the] influence of fear alone" and cites as authority Penal Code section 198. That statute, however, provides:

> A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite *the fears of a reasonable person*, and the party killing must have acted under the influence of *such fears* alone. (Emphasis added)

It is telling that CALCRIM No. 505's bench notes omit the word "such," from the citation to Penal Code section 198, because that word makes the statute susceptible to two plausible constructions, and

determining which one the Legislature intended is crucial in this case. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172 [where statutory language is susceptible to more than one reasonable interpretation, courts must construe the statute to carry out the Legislature's intent.)

Though it would be inconsistent with the common law rule and would render the word "such" superfluous, the phrase "such fears alone" could mean that the defendant must have acted "only from fear," as CALCRIM No. 505 suggests. (*People v. Trevino* (1988) 200 Cal.App.3d 874, 878-879 [assuming this is what Pen. Code, § 198 means]; cf. 2 LaFave, Substantive Criminal Law, (2d ed. 2003) Self-Defense, § 10.4(c), pp. 149-150 ["if [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself"].) On the other hand, consistent with the statute's title, *Justifiable Homicide; sufficiency of fear*, "such fears alone" could be meant to explain that "reasonable fears alone," as opposed to unreasonable fears, are sufficient to justify a homicide. (*People v. Glover* (1903) 141 Cal. 233, 239 [approving of instructions which are consistent with this construction].) Because the statute's plain meaning does not compel one reading or the other, relevant canons of statutory construction must be applied. (*Garcia, supra,* 28 Cal.4th at p. 1172 ["[I]f the statutory language permits more than one reasonable interpretation, courts may

consider various extrinsic aids, including the purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute"].)

C. Rules of statutory construction compel the conclusion the Legislature did not intend to eliminate the right of self-defense for persons who kill based upon a reasonable belief in the need to defend themselves, but who harbor other motives as well.

Penal Code section 198 was based on earlier enactments and was ultimately intended to codify the common law right to self-defense. As will become apparent, there are myriad reasons one can be confident the Legislature did not intend for that right to be limited in the way CALCRIM No. 505 suggests.

i. It is implausible that the Legislature intended the unjust results which would obtain from the rule CALCRIM No. 505 suggests.

Although there is ample affirmative evidence the Legislature did not intend Penal Code section 198 to restrict self-defense in the way CALCRIM No. 505 suggests, an evaluation of the relative merits of the two possible constructions must also be informed by the policy implications of the competing rules. (*In re Mitchell* (1898) 120 Cal. 384, 386 [Where a statute "is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity, and the other consistent with justice, sound sense, and wise policy, the former should be rejected, and the latter adopted"].) To

this end, appellant asks that this court consider what result the Legislature would have intended from the following scenarios:

1. After putting up with years of her husband's physical abuse, Amy decides to fight back one night while receiving an especially brutal beating, fatally wounding her husband in the process. When interviewed by the police, Amy says she resisted in order to stop the beating she was receiving at the time, but also to prevent her husband from ever abusing her like that in the future. Is Amy guilty of murder because she was partly motivated by a desire to prevent future harm? (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1082 [Fear of future harm will not justify a killing].)

2. Barry has been hired to guard a celebrity at a red carpet event. He sees two knife-wielding men spring from the crowd, one of whom runs toward his client, the other toward a different celebrity. Only having time to stop one attacker, Barry shoots the one headed for his client, later admitting he made that decision because if he'd failed to protect his client he would have been fired. Did Barry's interest in keeping his job mean he committed murder by thwarting the attack on his client?

A rule which says that a defendant who reasonably believes she has to kill to save her own life must also be free of any other motive would make murderers of these people who, through no fault of their own, were placed in a situation where deadly force was necessary to thwart an

imminent threat of great bodily injury or death. The implausibility that the Legislature could have intended such results should give this court confidence that Penal Code section 198 was meant to distinguish between reasonable and unreasonable fears, not to make self-defense unavailable whenever a person harbors some other motive in addition to fear.

ii. Penal Code section 198 is intended to recodify section 30 of the Crimes and Punishments Act of 1850 ("the 1850 Act") without substantive change, and section 30 of the 1850 Act did not limit self-defense in the way CALCRIM No. 505 suggests.

The Penal Code was enacted in 1872 as an attempt to bring the various state criminal laws into one volume, and though the language of many existing statutes was changed in the process, it was the explicit intention of the Legislature that the substantive law remain the same. (*People v. Herbert* (1882) 61 Cal. 544; Pen. Code, § 5 ["The provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof, and not as new enactments"].) Penal Code section 198 is meant to recodify section 30 of the 1850 Act without changing that statute's meaning. (Pen. Code, § 5; see Haymond, et al, Code Commissioners, Penal Code of California, Published under Authority of Law (1872) § 198, p. 56 [citing 1850 Act, § 30 as the basis for Pen. Code, § 198].)

Section 30 of the 1850 Act provided:

> A bare fear of any of these offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge.[4]

Since the Legislature meant for Penal Code section 198 to be a recodification of the 1850 Act's section 30, to the extent one can determine what section 30 was intended to mean, one has necessarily discovered what Penal Code section 198 means.

One will immediately notice upon reading section 30 that while it explains that a "reasonable fear," but not a "bare fear," is sufficient to justify a homicide, it mentions nothing about whether the killer must act *only* because of fear. Though one might be tempted to think the "such fears alone" language in Penal Code section 198 is meant to convey the same principle as the "not in a spirit of revenge" clause from the 1850 Act's section 30, that assumption would be wrong.

We know by looking at other states which used the same "not in a spirit of revenge" language that the phrase was understood as referring to situations where there was *no* imminent peril at the time of the killing, not

[4] "These offences," refers to the offenses listed in section 29 of the 1850 Act, which was recodified as Penal Code section 197. (*Herbert, supra*, 61 Cal. at pp. 546-547.)

where a person killed *both* out of fear of imminent harm and to avenge some past wrong. According to early decisions from several state courts, the term "not in a spirit of revenge" was meant to make clear that a past harm, even if it would have justified a killing at the time, would not justify a killing after the danger had passed. (See e.g., *Farmer v. State* (Ga. 1893) 91 Ga. 720, 18 S.E. 987, 989 ["An instance of justifiable homicide . . . is the killing of a man to prevent him from attempting or consummating an impending adultery with or seduction of his wife, but not to avenge a past adultery with her, for the killing after the act is done, which would have been justifiable homicide to prevent, would be to kill in a spirit of revenge, which the law would not justify"]; *Davis v. State* (Neb. 1891) 31 Neb. 240, 47 N.W. 851 ["While a person has the right, when assaulted by another in such a manner as to excite in him a reasonable belief that he is in danger of losing his life or receiving great bodily injury, to resist the attack by using such force as is apparently necessary to defend himself, yet if, after he has secured himself from danger, he takes the life of his assailant in the spirit of revenge, he cannot claim exemption from punishment on the ground of self-defense]; *Fitzpatrick v. State* (Ark. 1881) 37 Ark. 238, 1881 WL 1485, *10 ["His firing, under such circumstances, was certainly not in necessary self defense, for he was in no danger at the time. Had there been no previous quarrel and he had fired at the retreating Tujague on the provocation of his having fired the first shot, and killed him, or, by

misadventure, Tool, it would not have been murder. But the jury doubtless believed that he fired repeatedly and recklessly at and after Tujague in a spirit of revenge engendered by the previous quarrel"].)

It is therefore apparent why there was no need to include in Penal Code section 198 any qualification that a killing committed "in the spirit of revenge" was not justified. It is because Penal Code section 197 already made clear that only an imminent threat, and not a threat already passed, could justify a killing. (*Humphrey, supra,* 13 Cal.4th at p. 1082.) In light of how the term "spirit of revenge" was understood, the most reasonable inference is that the clause was left out of Penal Code section 198 simply because it was redundant. (*People v. Cruz* (1996) 13 Cal.4th 764, 775 ["The words of a statute are to be interpreted in the sense in which they would have been understood at the time of the enactment"].)

iii. Section 30 of the 1850 Act should be construed consistently with the nearly identical Georgia Penal Code statute, which does not preclude a defendant from claiming self-defense when he harbors other motives in addition to fear.

The origin of the 1850 Act's section 30 also shows it was not intended to mean that a defendant who kills in reasonable self-defense loses that privileged whenever he harbors another motive as well. The 1850 Act was the result of the Legislature's first session, and so "its precedents were necessarily drawn from the common law, as modified in certain respects by the Constitution and by legislation of our sister states." (*Keeler v. Superior*

Court (1970) 2 Cal.3d 619, 625 (superseded by statute on another point of law).) In the instance of section 30, the precedent appears to have been (former) Division 4, section 13 of the Georgia Penal Code, whose language California's section 30 copies nearly verbatim. (*Howell v. State* (Ga. 1848) 5 Ga. 48, 1848 WL 1531, *4.)[5] Georgia's statute was derived from the common law rule, and was cited by other states around the time California's Legislature drafted the 1850 Act. (See *Lander v. State* (Tex. 1854) 12 Tex. 462, 1854 WL 4430, *5 [The language from the Georgia Penal Code which is replicated in 1850 Act, § 30 is reflective of the common law].)

When a statute is patterned after another state's statute, it "should be given, insofar as the language is the same, the same construction as that given to the [other state's] statutes by the courts of [that state]." (*Erlich v. Municipal Court of Beverly Hills Judicial Dist*. (1961) 55 Cal.2d 553, 558.) As a result, section 30 of the 1850 Act must be construed consistently with Georgia's nearly identical provision.

[5] Georgia's statute read: "a bare fear of any of those offences, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable man, and that the party killing, really acted under the influence of those fears and not in a spirit of revenge." (*Howell, supra,* at *4.) California's statute substitutes "these" offenses for "those" offenses and reasonable "person" for reasonable "man."

As already mentioned, Georgia courts interpreted killings committed in "a spirit of revenge" and those committed under the influence of reasonable fear of imminent harm as describing two distinct factual scenarios, not potentially concurrent mental states. (*Farmer, supra,* 91 Ga. 720, 18 S.E. at p. 989.) But Georgia's courts went one step further by explicitly recognizing that one who kills in a reasonable belief that he needs to defend himself is not liable for murder, regardless of what other motives drive him to kill. Between the enactment of the 1850 Act and the passage of California's Penal Code, the Georgia Supreme Court held that, "[o]ne may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account. This principle is too plain to need amplification." (*Golden v. State* (Ga. 1858) 25 Ga. 527; 1858 WL 1991, *5.) It must therefore be presumed that section 30 of the 1850 Act, and therefore Penal Code section 198, were not meant to limit a claim of self-defense to those situations where the threatened defendant is free from any less noble motives. *(Erlich, supra,* 55 Cal.2d at p. 558.)

iv. The common law rule which Penal Code section 198 is meant to reflect does not contain any caveats about the defendant acting "only" because of fear.

A related canon of statutory construction requires that, since section 30 of the 1850 Act and Penal Code section198 were meant to "reflect[] the common law" rules of self-defense (*People v. King* (1978) 22 Cal.3d 12, 26 [Pen. Code, §§ 197 & 198 reflect the common law]; *Lander*, *supra*, 12 Tex. 462, 1854 WL 4430, *5 [Language from Georgia Penal Code which is replicated in 1850 Act, § 30 is reflective of the common law]), they must be "construed as was the rule by that law." (*Baker v. Baker* (1859) 13 Cal.87, 95.) The common law is fully consistent with the Georgia Penal Code in that it imposes no requirement that a person claiming self-defense must have been acted only from fear.

Though *Golden* found the common law principle that fear need not be the defendant's only motive "too plain to need amplification," other courts and commentators have done so anyway. The Missouri Supreme Court, citing *Golden*, held that, "If . . . the right of self–defense existed, it was wholly immaterial whether its exercise was voluntary or involuntary. Existing the right, the animus which prompts and accompanies its enforcement could not toll that right." (*State v. Rapp* (Mo. 1898) 142 Mo. 443, 44 S.W. 270, 271.) And as the West Virginia Supreme Court put it half a century later, again citing *Golden*, "The right of self-defense is not

impaired by malice upon the part of an accused against a deceased or by mere intention or preparation by an accused to kill a deceased or inflict great bodily harm upon him if such malice, intention, or preparation is not accompanied by overt acts which are indicative of a wrongful purpose or are calculated to provoke an attack." (*State v. Bowyer* (W.Va. 1957) 143 W.Va. 302, 313.) Modern commentators continue to affirm this rule. (2 LaFave, Substantive Criminal Law, *supra*, § 10.4(c), pp. 149-150 ["if [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself"]; MPC § 3.04 cmt. 2(b) & n.13, at p. 39 (Official Draft 1962) [highlighting the intentional omission of any "sole motivation" requirement].)

While more often than not the "*Golden* rule" went unstated, it was nevertheless implied in nineteenth century cases articulating the common law requirements for justified homicide, which consistently omit any requirement that fear be the only motive for the killing. In *United States v. Wiltberger* (E.D. Pa. 1819) 28 F.Cas. 727, for example, the court set forth the three requirements for self-defense, explaining: "In this definition of justifiable homicide, the following particulars are to be attended to[:]" First, "The [deceased's] intent must be to commit a felony . . . next . . . the intent to commit a felony must be apparent, . . . lastly . . . it must appear that the

danger was imminent, and the species of resistance used, necessary to avert it." (*Id.* at pp. 729-730.) This simple standard, that "if a man kill another, really and honestly *believing* himself to be in great danger of death or great bodily injury, it is neither murder nor manslaughter, but self-defense; and he will be held excusable . . . ," was restated again and again prior to Penal Code section 198's enactment, without any indication the privilege was limited in the way CALCRIM No. 505 suggests. (*People v. Pond* (Mich. 1860) 8 Mich. 150, 1860 WL 2630, *11 (emphasis original) [citing various cases which "fully sustain" this doctrine].)

If Penal Code section 198 was intended to narrow the scope of self-defense from where it stood at common law, the Legislature would have explicitly said so. "[T]here is a presumption that the legislature does not intend to enact any legislation in contravention of existing public policy." (*Interinsurance Exchange of Auto. Club of Southern Cal. v. Ohio Cas. Ins. Co.* (1962) 58 Cal.2d 142, 152 (internal quotation marks omitted).) This is an especially unyielding rule of statutory construction since, "[w]ithout the most cogent and convincing evidence, a court will *never* attribute to the Legislature the intent to disregard or overturn a sound rule of public policy." (*Ibid.* (emphasis added); see *Parsley v. Superior Court* (1973) 9 Cal.3d 934, 938-939 [where statutes are a codification of the common law, they may reasonably be interpreted as limited by the common law rules].)

The absence of any such evidence, especially when combined with the Legislature's expressed intent to reflect the common law rule of self-defense, precludes reading into Penal Code section 198 a caveat that the defendant act only from fear. (*King*, supra, 22 Cal.3d at p. 26.)

v. The titles of both Penal Code section 198 and the 1850 Act's section 30 show the Legislature was not concerned with the purity of a person's motives.

"[I]t is well established that chapter and section headings of an act may properly be considered in determining legislative intent [citation], and are entitled to considerable weight." (*People v. Hull* (1991) 1 Cal.4th 266, 272] (internal quotation marks omitted).) The titles of both section 30 of the 1850 Act and Penal Code section 198 show the Legislature's concern was with whether a person's fear was sufficient to justify the killing, not whether fear was his only motive. Section 30 of 1850 Act is entitled, "Bare fear not sufficient justification," while Penal Code section 198 is labeled, "Justifiable homicide; sufficiency of fear." It is unlikely the Legislature intended to codify a significant limitation to the common law rule of self-defense by inserting a caveat that fear had to be the defendant's only motive yet twice chose to leave all reference to that change out of the laws' titles. (*Interinsurance Exchange of Auto. Club of Southern Cal., supra,* 58 Cal.2d at p. 152.)

vi. Appellant's reading harmonizes Penal Code section 198 with the plain language of other simultaneously-enacted self-defense statutes.

Several other self-defense statutes were codified along with Penal Code section 198, were also intended to reflect the common law, and do not contain the caveat CALCIM No. 505 inserts into Penal Code section 198. (*King, supra,* 22 Cal.3d at p. 26 [Pen. Code, §§ 693 & 694 are reflective of the common law].) In the same year it codified Penal Code section 198, the Legislature passed Penal Code sections 692-694, which allow resistance "sufficient to prevent" certain offenses, and Civil Code section 50, which allows the use of "any necessary force" to protect against specified injuries. That these laws contain no caveat that the defendant must act only from fear should give this court pause before it assumes the Legislature intended such a requirement for Penal Code section 198. (*People v. Caudillo* (1978) 21 Cal.3d 562, 585 [similar statutes should be construed in light of one another, especially when the statutes are passed or amended simultaneously] (disapproved on other grounds).)

vii. Consistent with the California Constitution's recognition of the inalienable right to self-defense, courts should avoid statutory constructions which restrict that right.

The very first provision of the California Constitution guarantees an "inalienable right" to "defending life and liberty." (Cal. Const. Art. I, § 1.) Penal Code section 198 must be harmonized with that guarantee. (*People v. Superior Court (Zamudio)* 23 Cal.4th 183, 193 [wherever possible, we will

"interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute"] (internal quotation marks omitted).) The reading appellant suggests is more consistent with the guarantee of an inalienable right to self-defense than a construction which eliminates the right whenever the threatened person cannot claim to have been free of any motives besides fear.

viii Appellant's reading harmonizes the rule of reasonable self-defense with the rule of imperfect self-defense, which is that malice cannot coexist with a belief in the need to defend oneself against an imminent and unlawful threat of great bodily injury or death.

CALCRIM No. 505's assertion that a defendant who kills his assailant in self-defense is guilty of murder unless he acts only because of his fear is necessarily premised on the notion that one can believe in the need to defend oneself against an imminent and unlawful threat of great bodily injury or death and still harbor malice. (Pen. Code, § 187, subd. (a) [murder is the unlawful killing of a human being with malice aforethought].) If it is true that a person can harbor malice despite having a *reasonable* belief in the need to defend against such a threat, then it logically follows that one who harbors an *unreasonable* belief can also harbor malice. (See *In re Christian S.* (1994) 7 Cal.4th 768, 773, fn. 1 [because ordinary self-defense may not be invoked by one who, through his own wrongful conduct, has created the circumstances under which his adversary's attack or pursuit is legally justified, "It follows, a fortiori, that

the imperfect self-defense doctrine cannot be invoked in such circumstances"].)

The California Supreme Court has repeatedly held, however, that malice, "cannot coexist with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*People v. Rios* (2000) 23 Cal.4th 450, 461; *Randle, supra,* 35 Cal.4th at p. 995 [quoting *Rios* for this proposition in the context of unreasonable defense of another] (overruled on another point of law); *People v. Elmore* (2014) 59 Cal.4th 121, 134 ["A person who actually believes in the need for self-defense necessarily believes he is acting lawfully"] (quoting *People v. Anderson* (2002) 28 Cal.4th 767, 782 & *Christian S., supra,* at p. 778).) This is because, "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* (1979) 25 Cal.3d 668, 679 (partially superseded by statute); see *Christian S., supra,* at p. 773, fn. 1 [recognizing an exception where the assailant is lawfully acting in response to a danger created by the defendant's unlawful conduct].) Thus, in the context of imperfect self-defense, the California rule mirrors the common law: As long as the assailant's own use of force was not justified by the defendant's unlawful conduct, "[w]hen 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 cannot be convicted of murder." (*Christian S., supra,* 7 Cal.4th at p. 783.) Logically, the rule cannot be any different when the jury finds the defendant killed based on a reasonable belief he was in such danger. (*Id.* at p. 773, fn. 1.)

The lack of any caveat limiting imperfect self-defense to situations where the defendant is motivated only by fear is not the result of the California Supreme Court's failure to consider or apply Penal Code section 198; quite the opposite is true. The court's earliest modern articulation of the imperfect self-defense rule came in *Flannel*, which quotes Penal Code section 198, including the "such fears alone" clause, as part of its discussion of imperfect self-defense. (*Flannel, supra,* 23 Cal.3d at p. 675.) There is every reason to believe that the court meant what it said, and by implication that Penal Code section 198 does not limit self-defense in the way CALCRIM No. 505 suggests.

ix. The rule of lenity and the doctrine of constitutional avoidance support adopting appellant's view.

If this court is unable to ascertain what the Legislature intended when it passed Penal Code section 198, then the rule of lenity requires that the construction more favorable to appellant be adopted. "This rule is particularly pertinent here, where one of the proposed constructions would

impose absolute criminal liability and make a felony of an act that involves no culpability whatever." (*People v. Stuart* (1956) 47 Cal.2d 167, 175.) As is evidenced by the fact that materially identical statutory language has been interpreted in the way appellant suggests by another state's supreme court, at the very least the two competing interpretations are in relative equipoise, and so the rule of lenity must be applied. (*People v. Nuckles* (2013) 56 Cal.4th 601, 611-612 [explaining applicability of rule of lenity]; *Golden*, *supra*, 25 Ga. 527; 1858 WL 1991, *5.)

The doctrine of constitutional avoidance also compels adopting appellant's view. "If a statute is susceptible of two constructions, one of which will render it constitutional and the other unconstitutional in whole or in part, or raise serious and doubtful constitutional questions, the court will adopt the construction which, without doing violence to the reasonable meaning of the language used, will render it valid in its entirety, or free from doubt as to its constitutionality, even though the other construction is equally reasonable." (*Miller v. Municipal Court of City of Los Angeles* (1943) 22 Cal.2d 818, 828.) As Subsection E, *infra*, explains, interpreting Penal Code section 198 as limiting the right to self-defense in the way CALCRIM No. 505 suggests raises serious doubts about the statute's constitutionality, and so that construction must be avoided.

D. The weight of post-Penal Code section 198 authority holds or at least strongly suggests that a defendant who reasonably believes he must kill in self-defense does not lose that right whenever he also harbors other motives.

Though early cases frequently cited the "such fears alone" language from Penal Code section 198, they did not explain what the term means in any way which would favor either of the two plausible interpretations. (See e.g., *People v. Hecker* (1895) 109 Cal. 451, 461; *People v. Iams* (1880) 57 Cal. 115, 119.) Despite this, the term's meaning can be readily inferred from its *absence* in those cases where other language was held to have properly instructed the jury on the requirements for self-defense. A good example is *People v. Lynch* (1894) 101 Cal. 229, in which the California Supreme Court considered the following instruction, which did not contain the phrase "such fears alone":

> The bare fear that the said T. O'Connor, if defendant had had such fear, was going to inflict bodily injury upon the person of the defendant, would not justify defendant in attempting to take the life of the said T. O'Connor, if he did so attempt; but there must have been some act or acts of the said T. O'Connor such as would induce an ordinarily prudent man to believe that he was in great and immediate danger of death or great bodily injury at the hands of the said T. O'Connor; and, unless you so find, you will find the defendant guilty. (*Id.* at p. 231.)

If, as appellant suggests, "such fears alone" is meant to distinguish reasonable fears from unreasonable ones, then this instruction accurately states the law because that principle is expressed in the passage reading, "such as would induce an ordinarily prudent man to believe that he was in

great and immediate danger. . .” If, however, “such fears alone” is meant to require that the killing be motived *only* be fear, then the instruction is clearly deficient for failing to so state. The California Supreme Court did not believe the instruction left anything out, calling it “entirely correct.” (*Ibid.*)

Less than a decade later, the Supreme Court again praised as “clearly express[ing] the law,” an instruction which said that if a defendant acted under a reasonable fear then he must be acquitted, without any qualification that he act only from that fear. (*Glover, supra*, 141 Cal. at p. 239.) The approved-of instruction read as follows:

> A person may repel force by force in defense of person, property, or life against one who manifestly intends or endeavors by violence or surprise to commit a known misdemeanor or felony, or either, or to do great bodily injury to his person; and the danger which would justify the defendant in the act charged against him may be either real or apparent; and the jury are not to consider whether the defendant was in actual peril of his life or property, but only whether the indications were such as to induce a reasonable man to believe that he was in such peril of person or property. And *if he so believed reasonably (and had sufficient cause so to believe), and committed the act complained of under such belief, even though it should appear that the deceased was not armed, you should acquit the defendant.* (*Ibid.* (emphasis added).)

As with the charge in *Lynch*, this instruction is only correct if the omitted “such fears alone” language is meant to convey the same thing as the italicized portion that was given; if “such fears alone” means

"motivated only by fear," then the instruction did not correctly state the law, and the *Glover* court was mistaken.

A few decades later, the Second District Court of Appeal considered competing self-defense instructions which were submitted by the prosecution and the defense, respectively. (*People v. Hatchett* (1944) 63 Cal.App.2d 144, 156-158.) Both instructions comported with appellant's reading of Penal Code section 198. The defense's proposed instruction, which *Hatchett* said "correctly stated the law," and the prosecution's instruction, which "[did] not incorrectly state the law," emphasized the defendant's belief had to be reasonable without saying anything about fear being her only motive. (*Ibid.*) The defense had asked for the jury to be told, in relevant part:

> If you believe from the evidence here that defendant, Inez Hatchett, acted in self–defense from real and honest conviction as to the character of the danger induced by the existence or reasonable circumstances, or if you have a reasonable doubt as to whether she did or did not, then it will be your duty to find that her said act was justifiable even though you might further believe from the evidence that she was mistaken as to the extent of the danger, and it would then be your duty to find her not guilty. (*Id.* at p. 157.)

The Court of Appeal held this instruction was improperly refused. (*Ibid.*) The jury was instead charged with the prosecution's proposed instruction, which also lacked any reference to the "such fears alone" clause. Notably, the prosecution's version *did* include the 1850 Act's "spirit

of revenge" language, meaning that clause does not add anything which was not already conveyed by the defense's equally correct instruction. The prosecution's instruction read:

> To justify a homicide committed by one in resisting or repelling an assault or battery committed or attempted to be committed upon his person by another, it must appear to the slayer as a reasonable person that the danger threatened, if any, was immediate and sufficient to excite the fears of a reasonable person that he or she was in danger of receiving death or great bodily harm, and that he or she acted under the influence of such fears and not in a spirit of revenge. . . (*Id.* at p. 157.)

Identical language was used for the self-defense instruction in *People v. Emrick* (1918) 38 Cal.App. 36, which the Court of Appeal said "sufficiently defined" the proper circumstances under which self-defense could be claimed. (*Ibid.*) It is apparent, then, that for at least the first seventy-two years after Penal Code section 198's passage, courts understood its substance was completely and accurately conveyed by instructions which explained that the defendant's fear had to be reasonable but said nothing about her acting only from fear. (See *District of Columbia v. Heller* (2008) 554 U.S. 570, 605 [examination of decisions evincing the public understanding of a legal text in the period after its enactment is critical to determining the text's meaning].)

Though more than a century after Penal Code section 198's passage three Court of Appeal decisions assumed that the phrase "such fears alone" was meant to imply fear must be the defendant's only motive, those

opinions were based on nothing more than just that – an assumption. (*Trevino, supra,* 200 Cal.App.3d at pp. 878-879; *People v. Shade* (1986) 185 Cal.App.3d 711, 716; *People v. Levitt* (1984) 156 Cal.App.3d 500, 509 (superseded on another point of law).) None of these cases considered whether the statutory language supported another construction, the law's history, cases such as *Lynch*, *Glover* and *Hatchett*, or the policy and constitutional implications for limiting self-defense in such a manner. (See, *Trevino, supra,* at pp. 878-879; *Shade, supra,* at pp. 716-717; *Levitt, supra,* at pp. 509-510.)

In fact, *Trevino* is the only case of the three to devote more than a single sentence to the issue. All that court did was cite, without discussion or analysis, cases which either quote Penal Code section 198's language or say that instructions which include that section's language correctly state the law; none of the authorities upon which *Trevino* relies says that a defendant who acts under the influence of a reasonable fear loses his privilege if he also harbors other motives. (*Trevino, supra,* at p. 879, citing *Flannel, supra,* 25 Cal.3d at pp. 674-675; *Jackson v. Superior Court* (1965) 62 Cal.2d 521, 529 [quoting Pen. Code, § 198]; *People v. Jones* (1961) 191 Cal.App.2d 478 [instruction parroting Pen. Code, § 198 was given]; *People v. Rowland* (1929) 207 Cal. 312, 313 [rejecting an unspecified claim of instructional error which was based on language from *People v. Vernon*];

People v. Vernon (1925) 71 Cal.App. 628, 629 [instruction's "fear alone" language was proper because Pen. Code, § 198 "limits the right to take the life of another in self-defense to cases where the act is done under the influence of fear of the danger designated"].) Indeed, the lack of depth to *Levitt et. al.'s* analysis is demonstrated by the fact they all cite *Flannel's* quotation from Penal Code section 198's "such fears alone" language without any apparent appreciation for the fact that not only does *Flannel* fail to say that term means fear must be the defendant's only motive, but the rule the *Flannel* court established for imperfect self-defense leaves out any such requirement. (*Trevino, supra,* at p. 879; *Shade, supra,* 185 Cal.App.3d at p. 716; *Levitt, supra,* 156 Cal.App.3d at p. 509; *Flannel, supra,* 23 Cal.3d at p. 679.)

It is telling that our Supreme Court has had thirty years to agree with *Levitt* that a person can harbor malice when he kills based on his belief he must defend himself against an imminent and unlawful threat of great bodily injury or death, and as of 2014 it has yet to do so. (See *Elmore, supra,* 59 Cal.4th at p. 134.) Moreover, other than *Trevino's* citation to *Shade,* it appears that no published decision has cited any of the three cases for the proposition that Penal Code section 198 imposes a requirement that fear be the defendant's only motive. (See *Trevino, supra,* 200 Cal.App.3d at p. 880.) The *Levitt* line of decisions is simply contrary to law, and since

those cases do not provide any justification for their construction of Penal Code section 198, they have neither authoritative nor persuasive value when it comes to appellant's arguments. (*People v. Gilbert* (1969) 1 Cal.3d 475, 482, fn. 7 [court's decision interpreting a regulation was not authoritative with regard to constitutional issues which had neither been presented to nor considered by the court].)

In sum, both rules of statutory construction and the weight of authority support appellant's view that Penal Code section 198 imposes no requirement that a person who reasonably kills in self-defense must satisfy the additional requirement that he be free of any motivation besides fear. Furthermore, as the following section explains, if Penal Code section 198 did impose such a requirement, it would be unconstitutional.

E. CALCRIM No. 505's requirement that the defendant must have acted only because of a belief he was in imminent danger impermissibly infringes upon the constitutionally guaranteed right to self-defense.

The right to self-defense is a fundamental liberty interest, and infringements on that right are subject to heightened scrutiny. If Penal Code section 198 were limited in the way CALCRIM No. 505 suggests, it would impose a significant burden on the exercise of the right to self-defense which could not be justified by any sufficiently weighty government interest.

i. The right to self-defense is a fundamental liberty interest protected by the United States Constitution.

The right to self-defense is a fundamental right which pre-existed the founding of our Nation, and represents a law of nature which may not be abridged. (*McDonald v. City of Chicago, Ill.* (2010) 561 U.S. 742, 767 (plur. opn., Alito, J.) ["Self-defense is a basic right, recognized by many legal systems from ancient times to the present day"]; *Iams*, *supra,* 57 Cal. at p. 118 ["The right of self-defense of a party violently assaulted by another, to repel such attack and fully protect himself, is a law of nature. It antedates all written enactments, and is fully recognized in the laws and regulations of all civilized people"]; Prosser on Torts (2d. ed. 1955) ch. 4, § 19, p. 86 ["since about 1400 the privilege [of self-defense] has been recognized and it is not disputed, in the law of torts as well as the criminal law"] .)

The right to self-defense includes the right to use deadly force to protect one's own life. (*McDonald*, *supra*, at p. 768 [2nd Amend. demands citizens must be permitted "to use handguns for the core lawful purpose of self-defense"], quoting *Heller*, *supra,* 554 U.S. 570, 639; *Lander*, *supra,* 12 Tex. 462, 1854 WL 4430, *3 ["The law of nature gives us the right to take life in defense of our own; and the municipal law in no country attempts to restrict this right. Everywhere is it allowed to slay when it becomes necessary to protect our life from the person we kill. This is the universal

principle, and prevails everywhere"].) The notion this right is protected by the federal constitution is so well-understood that its existence was never seriously questioned, even before *Heller* explicitly recognized it as the core right guaranteed by the Second Amendment. (*Heller, supra,* 554 U.S. at p. 628 ["the inherent right of self-defense has been central to the Second Amendment right"]; see *Taylor v. Withrow* (6th Cir. 2002) 288 F.3d 846, 853 [finding the constitutional right to an instruction on self-defense was clearly established for AEDPA purposes despite the absence any United States Supreme Court case expressly recognizing it].)

The right to self-defense is necessarily protected as a matter of substantive due process since, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' [Citation.]" (*Washington v. Glucksberg* (1997) 521 U.S. 702, 720-721; *McDonald, supra,* 561 U.S. at p. 768 ["*Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition'" and citing *Glucksberg*].) And as *Heller* explains, the Second Amendment right to bear arms is in essence a means of ensuring the right to self-defense is not abridged. (*Heller, supra,* at p. 635 [2nd Amend. "elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"].) There can be no question then that a state law which categorically restricts

the right to defend oneself against a mortal threat, even in one's own home, infringes upon a fundamental constitutional right. The only issue is whether the infringement CALCRIM No. 505 finds in Penal Code section 198 would be constitutional, and the answer is that it would not.

ii. The restriction CALCRIM No. 505 suggests would have to survive heightened scrutiny.

"[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." (*Reno v. Flores* (1993) 507 U.S. 292, 301-302 (emphasis original).) Because the right to self-defense is such a fundamental liberty interest, any restrictions must satisfy this strict scrutiny standard. (*McDonald, supra,* 561 U.S. at p. 768; *Glucksberg, supra,* 521 U.S. at pp. 720-721.)

To the extent the right to self-defense is embodied in the Second Amendment's right to bear arms rather than substantive due process, any restriction is nevertheless subject to heightened scrutiny, the level of which "should depend on (1) 'how close the law comes to the core of the Second Amendment right,' and (2) 'the severity of the law's burden on the right.'" (*United States v. Chovan* (9th Cir. 2013) 735 F.3d 1127, 1138, quoting *Ezell v. City of Chicago* (7th Cir. 2011) 651 F.3d 684, 703.) If strict

scrutiny did not apply, the restriction would be subject to intermediate scrutiny, which requires "the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." (*Chovan, supra*, at p. 1139.) In either case, the burden is on the government, not appellant, to identify the interest and show the restriction is appropriately tailored to meet that objective. (*United States v. Chester* (4th Cir. 2010) 628 F.3d 673, 683 ["intermediate scrutiny places the burden of establishing the required fit squarely upon the government"].) The restriction CALCRIM No. 505 places on defendants exercising their right to self-defense cannot withstand either level of scrutiny.

iii. There is no apparent governmental interest in imposing CALCRIM No. 505's restriction on the right of a person who reasonably believes he must kill his assailant to save his own life. Moreover, any such restriction would place a substantial burden on persons who have no choice but to exercise their right to self-defense.

Appellant is not aware of any asserted justification for limiting the right to self-defense in the way CALCRIM No. 505 suggests and it hard to imagine what sufficiently weighty interest the state would have in preventing someone who reasonably believes he needs to kill in order to save his own life from doing so simply because he has other motives as well. The lack of any compelling or even important interest is enough by

itself to render the restriction unconstitutional. (*Flores, supra,* 507 U.S. at pp. 301-302; *Chovan, supra,* 735 F.3d at p. 1138.)

Contrasted with the lack of any weighty justification for the rule, the burden it would place on persons who find themselves with no choice but to exercise their right to self-defense would be significant. First of all, in many if not most self-defense cases, the circumstances of the homicide will support an inference that the defendant was influenced by other motives in addition to fear, regardless of whether this was in fact the case. (*Trevino, supra,* 200 Cal.App.3d at p. 879 [recognizing many justified killings occur in circumstances in which it would be unreasonable to expect the defendant not to harbor other feelings toward the assailant besides fear of imminent harm].) The practical effect of a sole motive requirement is that persons who are forced to exercise their right to self-defense would find themselves subjected prosecution regardless of whether they actually harbored additional motives, merely because the circumstances of the killing might support an inference that they did. This danger would be especially pronounced when the person is one whom law enforcement may be predisposed to believe would harbor additional motives.

The other serious problem with demanding that a person be free from all other motives is that as a practical matter it is unrealistic to expect a person who has suddenly found herself in a kill-or-be-killed situation to

quickly and accurately search her mind for the presence of other possible motives before deciding how to respond to the imminent threat to her life. (*Brown v. United States* (1921) 256 U.S. 335, 343 ["Detached reflection cannot be demanded in the presence of an uplifted knife"].) Indeed, it is not even clear how a person who is about to be stabbed is supposed to determine whether she is merely "feeling" hatred toward the person coming at her with a knife or whether she is "acting" in part based on that hatred. And heaven help the jury which is charged with to making that determination years later when the defendant is on trial.

For the reasons explained above, if Penal Code section 198 did require the defendant act only from fear, the federal constitution would not permit such a restriction, and so CALCRIM No. 505 would nevertheless be contrary to law. (*McDonald, supra,* 561 U.S. at p. 768; *Glucksberg*, *supra,* 521 U.S. at pp. 720-721.)

F. The misinstruction on appellant's defense violated his due process and Sixth Amendment rights.

Because the error lowered the prosecution's burden of proving malice, appellant's due process and the Sixth Amendment rights were violated. (*People v. Flood* (1998) 18 Cal.4th 470, 491[instructions relieving the prosecution's burden of proving each element violate due process and 6th Amend.]; *People v. Banks* (1976) 67 Cal.App.3d 379, 384 [the prosecution must prove beyond a reasonable doubt the absence of

justification when the issue is properly presented in a homicide case]; *Mullaney*, *supra*, 421 U.S. at p. 704.) Similarly, because self-defense constituted appellant's entire defense to the charge, the error deprived him of a meaningful opportunity to present a complete defense. (*United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1414 ["a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; *Trombetta*, *supra*, 467 U.S. at p. 485.)

G. The error requires reversal.

Because the erroneous instruction violated appellant's federal constitutional rights, reversal is required unless the state can show there is no reasonable possibility the error contributed to the verdict. (*People v. Rogers* (2006) 39 Cal.4th 826, 872 [federal constitutional standard of harmless beyond a reasonable doubt applies when error deprives defendant of the right to present a complete defense]; *People v. Mayfield* (1997) 14 Cal.4th 668, 774 [*Chapman* standard applies to an instruction that omits a required definition of or misdescribes an element of an offense]; *Chapman v. California* (1967) 386 U.S. 18, 24.) The error was prejudicial even under the more lenient reasonable probability standard, however. (*People v. Watson* (1956) 46 Cal.2d 818, 836.)

The jury was entitled to believe appellant's version of how and why he shot Brian, which was supported by Brian's history of violence, his expressed anger toward both appellant and Perry, Hoffman's testimony that he saw Brian walking to the house with purpose and entering through a back door without knocking, and the fact that minutes after the shooting Brian's body was found holding a weapon which bore the fingerprints of someone other than appellant. (3RT:1006, 1018-19, 1290; 5RT:2119.) There were no witnesses to the shooting, and the only person who directly contradicted appellant's account was Roldan, whose highly-suspect testimony was refuted or disproved outright in several important respects.[6] There was ample basis, then, for the jury to have found appellant acted in self-defense. (*People v. McDonnell* (1917) 32 Cal.App. 694, 705 ["To appreciate the probable prejudicial effect of the instruction we must, of course, view the evidence from appellant's standpoint. We must, in other words, assume that the jury believed his story, since there is nothing inherently improbable about it."].)

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[6] Roldan mistakenly thought appellant shot Brian with a yellow gun and that he did so between 3:30 and 4:00 in the afternoon. (3RT:942-43; 5RT:2211, 2217.) She also said Brian's 250 pound body was lying in a bedroom, but it was found minutes later in the laundry room and there was no evidence it had been moved. (3RT:943; 5RT:2176; Peo. Ex. 17.) Roldan's claim that she heard a single shot, found Brian lying on the floor, then heard the remaining shots several minutes after she and Perry had left the house was likewise contradicted by other accounts. (3RT:962, 979, 1007-08; 5RT:2216, 2201.)

The record does not just support the notion that the jury *could* have found appellant acted in self-defense, however. It affirmatively suggests the jury *did* so find, but convicted him because financial gain was also "part of" the reason for his actions. The jury was presented with two competing explanations for why appellant shot Brian: the prosecution said he did it for money while the defense argued he acted out of fear that Brian was going to kill him and Perry. (7RT:3331-32, 3393-94.) Having been presented with these two possible motives, the jury asked the court whether it could find the financial gain special circumstance true if financial gain was not appellant's primary motive, but was only part of the reason he killed. (2CT:434.) In light of the issues the jury had to decide, the most reasonable explanation for why it asked that question is that jurors believed appellant's testimony about shooting Brian in self-defense, but thought he was also motivated in part by money. That is, the jury likely would have found the killing was justified had the instruction not wrongly said that appellant had to have acted only because of fear. (*People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 [questions about the difference between kidnapping and being held against one's will showed deliberations were close].) Though the ample evidence supporting appellant's defense is enough to warrant reversal, the jury's question suggesting it found self-defense was appellant's primary motive belies any claim that the error did not contribute

to the verdict. (*Chapman, supra,* 386 U.S. at p. 24; *Watson, supra*, 46 Cal.2d at p. 836.)

II. Even assuming appellant was not entitled to an acquittal if he acted both from fear and from some other motive, such a killing would have constituted voluntary manslaughter, not murder. The instructions wrongly implied appellant could be convicted of murder under these circumstances.[7]

Even assuming Penal Code section 198 does not allow for complete exoneration when the defendant acts from another motive in addition to fear, it does not follow that such a killing is murder. Because a person does not harbor malice when he kills based on his belief he must defend himself against an imminent and unlawful threat of great bodily injury or death, a "mixed motive" killing constitutes voluntary manslaughter. The instructions, however, implied that appellant was guilty of murder if he reasonably believed he had to kill in self-defense but did not act only because of that fear. Because the error may well have caused the jury to find appellant guilty of murder despite his lacking malice, the conviction must be reversed.

A. The error is cognizable on appeal.

The instructions misstated the law and as a result they lowered the prosecution's burden of negating malice and infringed on appellant's ability to present a defense. (*Trombetta*, supra, 467 U.S. at p. 485; *Mullaney*,

[7] This argument is made in the alternative to Argument I.

supra, 421 U.S. at p. 704.) No objection is required to preserve such claims. (*Valdez*, *supra*, 55 Cal.4th at p. 151; Pen. Code, § 1259.)

B. The instructions erroneously allowed appellant to be convicted of murder even if he lacked malice due to his reasonable belief he had to kill Brian to defend against an imminent and unlawful threat of great bodily injury or death.

Even if Penal Code section 198 does say that a killing perpetrated in self-defense is not justified when the defendant is partly motivated by something other than fear, it does not follow that the Legislature intended for such a killing to be murder. This is borne out by the fact that the other type of unjustified killing referenced in Penal Code section 198, one which is committed in response to an *un*reasonable fear, most certainly does not constitute murder. (*Christian S.*, *supra*, 7 Cal.4th at p. 783.) Regardless of whether a "mixed motive" killing is justified, it does not constitute murder unless the defendant harbored malice. (Pen. Code, § 187, subd. (a).)

Malice generally "cannot coexist with an actual belief that the lethal act was necessary to avoid one's own death or serious injury at the victim's hand." (*Rios*, *supra*, 23 Cal.4th at p. 461.) The exception to this rule is when the defendant's own unlawful conduct has caused someone to justifiably use deadly force against him. (*Christian S., supra,* 7 Cal.4th at p. 773, fn. 1.) For example, since a felon has no right to "defend" himself against the officers who are lawfully trying to capture him, he acts with malice when he uses deadly force to effectuate his escape. (*Ibid.*)

Combining these principles, when a defendant believes he must kill his assailant to defend against an imminent and unlawful threat of great bodily injury or death, the defendant is deemed to have acted without malice and cannot be convicted of murder. (*Christian S., supra,* 7 Cal.4th at p. 783; Pen. Code, § 187, subd. (a).)

It follows that such a homicide must be voluntary manslaughter. (*Rios, supra,* 23 Cal.4th at p. 460 [A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of voluntary manslaughter]; *Flannel, supra,* 25 Cal.3d at p. 679 [manslaughter is a "catch-all" concept, covering all homicides which are neither murder nor innocent]; Pen. Code, § 192 ["Manslaughter is the unlawful killing of a human being without malice"].) Thus, a person who kills in the reasonable belief he needs to defend himself against his assailant's unlawful aggression, but who does not act only from that fear, is guilty of voluntary manslaughter rather than murder. (See *Levitt, supra,* 156 Cal.App.3d at p. 509 ["if the degree of force used was influenced by any motivations aside from a belief in the necessity to act in self-defense, then manslaughter was an appropriate verdict on that ground alone"].)

Though the cases speak of imperfect self-defense voluntary manslaughter as involving an "unreasonable" belief in the need to kill in self-defense (see e.g., *Christian S., supra,* 7 Cal.4th at p. 783),

unreasonableness is not an element which the jury must find to return a voluntary manslaughter verdict. (*Rios, supra*, 23 Cal.4th at p. 462 ["Provocation and imperfect self-defense [. . .] cannot be elements of voluntary manslaughter when murder and voluntary manslaughter are under joint consideration"].) The jury in this case therefore should have been instructed that if appellant believed he had to kill Brian to defend himself against an imminent and unlawful threat of great bodily injury or death, then the killing was justified if it satisfied the requirements specified in CALCRIM 505 or constituted voluntary manslaughter if it did not. (*Rios, supra,* at p. 463 ["a conviction of voluntary manslaughter can be sustained under instructions which require, and evidence which shows, that the defendant killed intentionally and unlawfully"].)

The pattern instructions in this case, namely CALCRIM Nos. 505, 520 and 571, however, wrongly implied that if appellant *reasonably* believed he needed to kill to save his own life, but did not act only because of that fear, then he was guilty of murder. (2CT:420-21, 424.) CALCRIM No. 505 said such a killing is unlawful, meaning the killing would have been committed with express malice as defined by CALCRIM No. 520. (*Id.* ["the defendant acted with *express* malice if he unlawfully intended to kill"] (emphasis original).) And CALCRIM No. 571, which allows a killing to be reduced to voluntary manslaughter when committed in imperfect self-

defense, did not apply; that instruction's unambiguous terms only allow a voluntary manslaughter verdict when the defendant's belief was *un*reasonable. (*Id.* ["The defendant acted in imperfect self-defense or imperfect defense of another if: [. . .] 3. At least one of those beliefs was unreasonable"].) As a result, the instructions improperly allowed appellant to be convicted of murder even though he lacked malice due to his reasonable belief he needed to defend himself against Brian's unlawful aggression. (*Rios, supra,* 23 Cal.4th at p. 461; *Christian S., supra,* 7 Cal.4th at p. 783.)

C. The instructions violated appellant's due process and Sixth Amendment rights.

Because the instructions lowered the prosecution's burden of proving malice, the error violated due process and the Sixth Amendment. (*Flood, supra,* 18 Cal.4th at p. 491; *People v. Thomas* (2013) 218 Cal.App.4th 630, 646 [refusal to instruct on heat of passion voluntary manslaughter relieved the prosecution of its burden to prove malice was not negated]; *Mullaney, supra,* 421 U.S. at p. 704.) Similarly, because self-defense constituted appellant's entire defense to the charge, the error deprived him of a meaningful opportunity to present a defense. (*Sayetsitty, supra,* 107 F.3d at p. 1414; *Trombetta, supra,* 467 U.S. at p. 485.)

D. The error requires reversal.

Because the instructions allowed appellant to be convicted without proof of malice and infringed on his right to present a complete defense, the error is subject to *Chapman* review. (*Thomas*, *supra*, 218 Cal.App.4th at p. 644 [failure to instruct on voluntary manslaughter was reversible error under *Chapman* standard]; *Rogers*, *supra*, 39 Cal.4th at p. 872; *Mayfield*, *supra*, 14 Cal.4th at p. 774.)

The prejudice analysis is identical to that for Argument I, the only difference being that in the present argument appellant claims the error denied him a potential voluntary manslaughter verdict rather than an outright acquittal. Appellant therefore incorporates Argument I, Section G by reference. (See *supra*, at pp. 61-64.)

III. Since Penal Code section 190.2, subdivision (a)(1)'s ordinary, accepted meaning requires proof the defendant would not have killed but-for the prospect of financial gain, the Due Process Clause requires that construction be adopted. The trial court therefore erred in responding to a jury question by saying that financial gain did not need to be appellant's primary motive but could be only "part of the reason" for the killing.

The United States Supreme Court recently made clear that the rule of lenity, a manifestation of the due process right to notice and fair warning, prohibits a court from interpreting a criminal statute in a manner which is inconsistent with its ordinary, accepted meaning and which disadvantages the defendant. Since in plain, ordinary English one does not say a murder was carried out "for financial gain" unless the financial motive was a but-for cause of the killing, the rule of lenity precludes interpreting Penal Code section 190.2, subdivision (a)(1) as requiring a lesser showing. The trial court's response to a jury question in which the court told jurors the prosecution did not have to prove that financial gain was appellant's primary motive but that it could be only part of the reason he killed therefore lowered the prosecution's burden of proof and warrants reversal.

A. Proceedings below:

During deliberations, the jury sent the following note to the trial court:

> To convict of First Degree Murder to [sic] we have to find the financial gain and firearm allegations true? [¶] Can we convict for first degree if we don't find the financial allegation true? (2CT:436.)

After consulting with counsel, the court answered "No" to the first question and "Yes" to the second. (2CT:436, 440.) The jury then asked:

> With regards to the special circumstances: financial gain we request further clarification as to the meaning of the law. [¶] 1) Does the primary reason for the killing have to be for financial gain or can financial gain be only part of the reason the killing was carried out? (2CT:434, 442)

After consulting with counsel, the court answered:

> Does the financial gain have to be the primary reason for the killing? No. [¶] Can financial gain be only part of the reason? Yes. (2CT:434, 442.)

The jury returned a verdict shortly thereafter. (2CT:442.)

B. The error is cognizable on appeal.

The trial court's erroneous response led the jury to believe the prosecution did not need to prove that financial gain was the but-for cause of the killing. Because the error relieved the prosecution of its burden on this element, it affected appellant's substantial rights and so was not forfeited by the failure to object. (*People v. Butler* (2009) 46 Cal.4th 847, 876-877, 882, fn. 18 [Even absent an objection, a trial court's instructional response to a jury note is not forfeited if the instruction affected the defendant's substantial rights]; Pen. Code, § 1259.) Furthermore, to the

extent California Supreme Court decisions compelled the trial court's response, any failure to object must be excused for that reason as well. (*Birks, supra,* 19 Cal.4th at p. 116, fn. 6.)

C. Since Penal Code section 190.2, subdivision (a)(1)'s ordinary, accepted meaning requires proof the defendant would not have killed but-for the prospect of financial gain, the Due Process Clause requires that construction be adopted.

"[I]n the interpretation of a criminal statute subject to the rule of lenity, [Citation.], [courts] cannot give the text a meaning that is different from its ordinary, accepted meaning, and that disfavors the defendant." (*Burrage v. United States* (2014) 571 U.S. ___ [134 S.Ct. 881, 891].) Applying this principle, *Burrage* held that a federal statute requiring a 20-year mandatory minimum sentence when a person distributes a controlled substance and "death or serious bodily injury results from the use of such substance," must be read to require proof that the drug was a but-for cause of the harm. (*Id.* at pp. 888, 890-891; 21 U.S.C. § 841, subd. (b)(1)(C).) *Burrage* made clear this principle prohibits adopting another interpretation regardless of whether a court believes doing so "might accord with good policy." (*Id.* at p. 892 (internal quotation marks omitted).)

The rule of lenity is rooted in the Due Process Clause's guarantee of notice and fair warning (*United States v. Lanier* (1997) 520 U.S. 259, 266-267), so *Burrage's* holding is a rule of federal constitutional law which is binding on the states. (*Chesapeake & O. Ry. Co. v. Martin* (1931) 283 U.S.

209, 221 [U.S. Supreme Court's interpretation of federal law is "binding upon the state courts, and must be followed, any state law, decision, or rule to the contrary notwithstanding"]; U.S. Const., Amend. XIV; see *State v. Nicoletto* (Iowa 2014) 845 N.W.2d 421, 427 [citing *Burrage* as authority that Iowa's criminal statutes must be strictly construed] (superseded by statute).) As a result, to the extent Penal Code section 190.2, subdivision (a)(1) has an ordinary, accepted meaning, it must be construed consistent with that meaning if the alternative construction would disfavor the defendant. (*Burrage, supra,* 134 S.Ct. at pp. 891-892.)

By its terms, subdivision (a)(1) does not apply unless the murder was "carried out for financial gain." The word "for" in this context is used to indicate purpose and is synonymous with "because." (Random House Webster's College Dictionary (1997) p. 507; Merriam-Webster's Dictionary of Synonyms (1984) pp. 93, 349.) In ordinary speech, when we say someone did an act "for" some purpose or "because of" some motivation, we mean that the act would not have been committed but-for that motive. (*United States v. Miller* (6th Cir. 2014) 767 F.3d 585, 591-593].) For this reason, *Miller*, applying the rule of lenity as it was used in *Burrage*, held a federal hate crime statute which applied when the defendant committed a crime "because of" the victim's religion required proof the defendant would not have committed the crime but-for the

victim's religion. (*Miller, supra,* 767 F.3d at p. 593; 18 U.S.C. § 249, subd. (a)(4)(A).)

The same construction is compelled by Penal Code section 190.2, subdivision (a)(1)'s plain language. When a law firm flies an associate to New York to appear in court, we do not say she is going to the city "for a Broadway show," even if the prospect of seeing a musical was part of her motivation for accepting the assignment. Likewise, one would commonly understand the accusation that Anna Nicole Smith married a billionaire octogenarian "for his money" as suggesting she would not have married him but-for his wealth, not that his money was just "part of" what attracted her.

In common English, then, a murder is not committed "for financial gain" unless the monetary incentive was a but-for cause; it is not enough that the prospect of financial enrichment provided some additional motive for a killing that would have occurred regardless. As a result, the Due Process Clause requires Penal Code section 190.2, subdivision (a)(1) be read to require proof that the defendant would not have killed but-for the expectation of financial gain. (*Burrage, supra,* 134 S.Ct. at pp. 891-892; *Lanier, supra,* 520 U.S. at pp. 266-267.)

The California Supreme Court decisions holding that "the relevant inquiry is whether the defendant committed the murder in the expectation

that he would thereby obtain the desired financial gain" (*People v. Howard* (1988) 44 Cal.3d 375, 409), regardless of whether financial gain was a but-for cause of the killing (*People v. Noguera* (1992) 4 Cal.4th 599, 635), cannot be squared with *Burrage*. *Howard* arrived at its holding by contrasting the wording of the current version of the financial gain special circumstance with the previous iteration, which applied only when the murder was "carried out pursuant to agreement by the person who committed the murder to accept a valuable consideration for the act of murder." (*Howard, supra*, at pp. 408-409; Stats. 1977, ch. 316, p. 1257.) The *Howard* court inferred from the change that "the [current] statutory language . . . was intended to cover a broad range of situations." (*Howard, supra,* at p. 410.) What *Howard* did *not* say is that the Legislature intended for the statute to apply to defendants who would have killed regardless of the financial incentive. (*Id.* at pp. 409-410.)

Noguera, which held that a defendant's financial gain motive did not have to be "a 'dominant,' 'substantial,' or 'significant' motive for the murder," simply relied on *Howard* and *People v. Edelbacher* (1989) 47 Cal.3d 983, 1025. (*Noguera, supra,* at pp. 635-636.) *Edelbacher* was likewise based on a citation to *Howard* and did not involve any significant independent analysis of the statute. (*Edelbacher, supra,* at p. 1025.) Importantly, *Noguera* did not consider whether its construction was

consistent with the statute's ordinary, accepted meaning, and so is not authoritative on the issue before this court. (*Noguera, supra*, at pp. 634-637; *Gilbert, supra,* 1 Cal.3d at p. 482, fn. 7 [court's decision interpreting a regulation was not authoritative with regard to constitutional issues which had neither been presented to nor considered by the court].)

Though appellant concedes *Howard* correctly determined that the Legislature intended to broaden Penal Code section 190.2, subdivision (a)(1)'s scope from covering only "contract killings" to reach those in which "the defendant committed the murder in the expectation that he would thereby obtain the desired financial gain" (*Id.* at p. 409), *Noguera* took this principle a step too far. A court's ability to construe a statute "broadly" ends at the point where the reading becomes inconsistent with the statute's ordinary, accepted meaning and operates to a defendant's detriment. (*Burrage, supra,* 134 S.Ct. at pp. 891-892.) Since the ordinary, accepted meaning of murder "for financial gain" does not include a killing which would have been committed regardless of any financial incentive (see *Miller, supra,* 767 F.3d at pp. 591-593), *Noguera's* reading cannot be correct as a matter of federal constitutional law. (*Burrage, supra,* at pp. 891-892.)

In short, *Burrage*'s interpretation of the due process-based rule of lenity is controlling and so Penal Code section 190.2, subdivision (a)(1)

must be read as requiring proof that the defendant's financial gain motive was a but-for cause of the murder. (*Chesapeake & O. Ry. Co. supra,* 283 U.S. at p. 221.) Applying this principle to the present case, if the jury found appellant's primary motive for killing Brian was his the desire not to have his skull crushed by a mallet, and therefore he would have killed regardless of any financial incentive, the special circumstance had not been proved.

D. The erroneous response to the jury request violated appellant's due process and Sixth Amendment rights.

By misleading the jury into thinking the prosecution did not have to prove that financial gain was a but-for cause of the killing, the court's response eliminated an element of the special circumstance allegation, thereby violating appellant's "right under the federal Constitution to a jury determination of 'any fact on which the legislature conditions an increase in their maximum punishment.'" (*People v. Bolden* (2002) 29 Cal.4th 515, 560; quoting *Ring v. Arizona* (2002) 536 U.S. 584, 589.)

E. The error requires reversal.

Because the court's response effectively eliminated an element of the financial gain allegation, it is subject to *Chapman* analysis. (*Bolden, supra,* at p. 560.) Reversal is therefore required unless "the court determines beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Ibid.,* citing *Neder v. United States* (1999)

527 U.S. 1, 7-10.) Such an error cannot be deemed harmless if "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding." (*Neder, supra,* at p. 19.) The mere fact appellant contested the financial gain special circumstance and a reasonable jury could have found the motive element lacking is therefore reason enough to compel reversal. (*Ibid.*; *People v. Mil* (2012) 53 Cal.4th 400, 418.)

There is, however, considerable additional support for the notion the error was prejudicial, most notably that the jury's questions suggest it did not believe financial gain was appellant primary motive. (*Pearch*, *supra*, 229 Cal.App.3d at p. 1295.) That the erroneous response was important to the verdict is further borne out by the fact that the jury had been deliberating for nearly seven hours over three days when it posed the question yet was able to return a verdict shortly after being told it did not need to find financial gain was the primary motive. (*People v. Thompkins* (1987) 195 Cal.App.3d 244, 252-253 ["there is no category of instructional error more prejudicial than when the trial judge makes a mistake in responding to a jury's inquiry during deliberations"]; *People v. Markus* (1978) 82 Cal.App.3d 477, 480-482 [that the jury returned a verdict shortly after the court answered its question about an element of the offense

suggests the court's answer was decisive] (disapproved of on another point of law); 2CT:410-411, 440-442.)

Because the evidence readily supported a finding that financial gain was not a but-for cause of the killing and especially in light of the jury's expressed skepticism that financial gain was appellant's primary motive, it is at least reasonably possible the error contributed to the verdict and so reversal is necessary. (*Bolden*, *supra*, at p. 560.) Indeed, as the jury's questions affirmatively demonstrate the error likely influenced the verdict, the error was prejudicial even under *Watson*. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

IV. The trial court erred in allowing the prosecution to introduce evidence of appellant's cocaine use as proof of motive.

Lacking hard evidence appellant had been taking money from the estate or that he sought to gain financially from killing Brian, the prosecution settled for making appellant look like the kind of person who would kill his own son for money. The inadmissible evidence that appellant was using cocaine several months before the shooting and the prejudicial inferences it allowed the prosecution to argue about appellant's character were likely key to securing a conviction and so warrant reversal.

A. Proceedings below:

Before the prosecution called appellant's neighbor Clive Hoffman to the stand, the defense objected to any testimony that several months before the shooting he had noticed cars coming and going from appellant's house at all hours and that appellant had lost weight. (3RT:992-98.) The defense argued the testimony, which was meant to suggest appellant had been using cocaine, was irrelevant, prejudicial and constituted inadmissible evidence of uncharged crimes. (Evid. Code, §§ 210, 352, & 1101; 3RT:993, 995.) The prosecutor replied that the evidence suggested appellant was spending money on drugs which "is why the murder occurred." (3RT:994-95.)

The trial court found Hoffman's observations were not character evidence, and were "being used to establish motive" rather than to "dirty

[appellant] up." (3RT:996.) The court said it conducted an Evidence Code section 352 analysis and found "the probative value exceeds whatever prejudice because I see the prejudice as being minimal." (3RT:996.)

Hoffman was allowed to testify that in late October or early November of 2006, appellant lost thirty to forty pounds and that a lot of cars were showing up at appellant's house around that time, sometimes as late as midnight. (3RT:1010-11.) This coincided with Hoffman's first noticing Perry at the house. (3RT:1013.)

The day after Hoffman testified, the defense objected to yet more evidence appellant had used cocaine several months before the shooting, this time from appellant's friend Warren Korkie. (3RT:1208, 1215.) The defense argued the proffered testimony would be "excessively prejudicial," was not probative, constituted evidence of uncharged crimes and bad character, and was inadmissible under Evidence Code section 352. (3RT:1209-1210, 1215.)

When the court said the evidence was relevant because the prosecution was alleging appellant's motive was money, defense counsel disagreed that this was enough, saying the prosecution has "got to be able to show a link [. . .] She's got to be able to show that this killing is somehow linked to cocaine use and she can't do it." (3RT:1211.)

The prosecutor suggested the evidence was relevant because, "the People's argument is . . . the motive for the killing was financial gain because the defendant needed the money for his girlfriend and his cocaine use." (Evid. Code, § 1101, subd. (b); 3RT:1212.) She further argued the evidence was relevant to prove Brian's state of mind because Brian supposedly told Father Fulco appellant was "ripping off the estate and he's doing it because he's using cocaine and hanging out with this woman Raquel [Perry]." (Evid. Code, § 1250, subd. (a); 3RT:1214.)

The trial court found the evidence was admissible to establish motive and survived an Evidence Code section 352 analysis. (3RT:1218.) The court also found that Brian's statements regarding appellant's cocaine use might be relevant to explain his reason for going to the house on March 2. (Evid. Code, § 1250, subd. (a); 3RT:1217.)[8]

Korkie testified that he stayed at the Larke Ellen house around mid-June through August or mid-September of 2006. (3RT:1250-51.) Appellant lost thirty pounds in the three months Korkie lived there. (3RT:1251.) Appellant told Korkie that Perry had introduced him to cocaine, which appellant said was "the greatest drug ever invented." (3RT:1254, 1261.)

[8] As explained in Argument V, this was not a valid basis for the admission of Brian's statements.

Though Korkie never saw appellant use cocaine, he once saw a white substance around his nostrils. (3RT:1254.)

Over objection, Fulco testified that relatively close to the time of the shooting, Brian told him that appellant was a drug addict. (4RT:1541-42.) This evidence was admitted only as proof of Brian's state of mind. (4RT:1541.)

At the end of the prosecution's case-in-chief, again over objection, Detective Umansky testified that twenty days after appellant had been arrested, his son Cary called Umansky and asked that he remove guns and drugs from the Larke Ellen home. (5RT:2451.) Umansky went to the home the next day, where he was greeted by Cary, and found a woman's purse which contained cocaine residue. (5RT:2453, 2456, 2466; see *People v. Francis* (1969) 71 Cal.2d 55, 71 [no substantial evidence of defendant's drug possession where drugs were found in an area over which defendant did not exercise dominion or control].)

Ultimately, the prosecution rested without producing any evidence of how much money appellant spent on cocaine or even that he was still using cocaine in 2007.

Forced to confront the allegations he was a cocaine addict, however, appellant acknowledged in his own testimony that he used cocaine recreationally. (6RT:3078; see *People v. Turner* (1990) 50 Cal.3d 668, 704,

fn. 18 [defendant did not waive claim on appeal that evidence was inadmissible when his counsel elicited the evidence himself in an attempt to mitigate the damage].) Because appellant testified, the prosecution was allowed to introduce audio of the interrogation in which he admitted to having done a line of cocaine on March 2. (2CT:367.)

After the jury convicted appellant, the defense moved for a new trial based in part on the improper admission of his cocaine use, which the defense reasserted constituted improper character and other crimes evidence, lacked substantial probative value, had a substantial prejudicial effect. (Evid. Code, §§ 352 & 1101; 2CT:458-459.) That motion was denied. (7RT:4212.)

B. Admitting the evidence of appellant's cocaine use was an abuse of discretion.

"Narcotics use must have a *direct* probative value to establish motive before its admission is permitted." (*People v. Felix* (1994) 23 Cal.App.4th 1385, 1393 (emphasis original).) What this means, according to the California Supreme Court, is that "admission of evidence of an accused's drug addiction [is appropriate] where obtaining narcotics was the direct object of the crime or where a violation of Health and Safety Code was charged;" but, "[i]n cases where the object of the offense was to obtain money for drugs [. . .] evidence of the accused's drug use has been found to

be inadmissible." (*People v. Holt* (1984) 37 Cal.3d 436, 450, citing *People v. Cardenas* (1982) 31 Cal.3d 897, 906.)

For this reason, the *Cardenas* court held it was error to allow the prosecution "to introduce evidence of appellant's narcotics addiction to establish a financial motive for the attempted robbery of [a] 7-Eleven store." (*Cardenas, supra,* at p. 907.) There was a significantly stronger connection between the defendant's drug use and the crime in *Cardenas* than there was in this case. The *Cardenas* defendant was arrested five days after the robbery, and appeared to be under the influence of drugs. (*Id.* at pp. 902-903.) He had track marks which showed he had been addicted for some time, and it appeared he had been using frequently. (*Id.* at p. 903.) An officer estimated his habit cost between $25 and $75 a day. (*Ibid.*)

The Supreme Court held the drug evidence should have been excluded because it tended "only remotely" to prove the crime and "was substantially outweighed by the inflammatory effect of the testimony on the jury." (*Cardenas, supra,* at p. 907.) According to the High Court, the inflammatory effect of such evidence is "catastrophic," because, "[i]t cannot be doubted that the public generally is influenced with the seriousness of the narcotics problem ... and has been taught to loathe those who have anything to do with illegal narcotics in any form or to any extent." (*Ibid.* (internal quotations marks omitted).)

In the few instances where courts have approved of the admission of a defendant's drug use as being probative of motive the defendant either admitted he committed the crime to get money for drugs (*Felix, supra*, 23 Cal.App.4th at pp. 1391, 1393-1394), or the defendant immediately went out and used the proceeds from the crime to get high. (*People v. Chatman* (2006) 38 Cal.4th 344, 371.) Even in this latter instance, admission was strictly circumscribed to avoid undue prejudice. In *Chatman*, the court held that while evidence the robbery/murder defendant *immediately* bought and used drugs after the crime was admissible to show he had a preexisting motive to steal, the court emphasized that "generalized" evidence of the defendant's drug use had been excluded at trial, and said the trial court "properly admitted this limited evidence of drug use while excluding more generalized evidence not directly connected with the crime." (*Ibid.*)

Against this background, the trial court's decision to allow evidence of appellant's cocaine use to establish a motive for the crime was an abuse of discretion. (*People v. Hovarter* (2008) 44 Cal.4th 983, 1007-1008 [a trial court's decision to admit evidence is reviewed for abuse of discretion].) The prosecution did not claim, much less make any offer of proof, that appellant killed Brian to get quick cash which he would have immediately used to get high. Indeed it could not even offer any admissible evidence appellant was still using cocaine in 2007, though it tried to imply as much

based on residue found in a woman's purse which was recovered three weeks after appellant was arrested. (See *Francis, supra,* 71 Cal.2d at p. 71.) The very nature of the alleged financial gain motive made any "quick score" theory untenable, since the prosecution claimed appellant was already draining money from the estate and the purported benefit he stood to gain from killing Brian was that he would avoid losing control of the estate at some point in the future. (7RT:3337-38.) As a result, the drug use evidence in this case was unlike that in *Felix* or *Chatman,* but was instead inadmissible under *Cardenas* and *Holt*. (*Holt, supra,* 37 Cal.3d at p. 450; *Cardenas, supra,* 31 Cal.3d a p. 906.)

C. Admission of the evidence violated due process.

Given that there was no evidence of how much appellant spent on cocaine or that killing Brian was going to enable him to immediately procure more drugs, the inference the evidence supported was utterly irrational except to the extent it demonstrated appellant's "evil" character. Admission therefore violated due process. (*McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1384 [admission of evidence which only tends to prove guilt by demonstrating bad character violates due process]; *Spencer v. Texas* (1967) 385 U.S. 554, 563-564 ["the Due Process clause guarantees the fundamental elements of fairness in a criminal trial."]; cf. *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence

will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair."].)

D. The error requires reversal.

Appellant's cocaine use was used to portray him as an evil, selfish man, the kind of man who would kill his own son for money. As the prosecutor put it:

> Five times Carl Chapman had the opportunity to say, my son or coke, Raquel and the money. Five times. Instead he decided that lifestyle was more important than his own son. (7RT:3331-32.)

And:

> Evil. Plain and simple evil. He chose money. He chose Raquel. He chose cocaine. He chose a lifestyle over his son. That's what this case is all about. (7RT:3396.)

Had appellant become involved with a fifty-year-old widow who introduced him to the expensive hobby of antiquing, one doubts the prosecution could have made much traction with the argument appellant killed Brian in order to continue to live that "lifestyle." Instead, appellant's cocaine use helped the prosecution paint an innuendo-laden portrait of a man who just a few months after his wife's death had begun partying and using cocaine with a much younger woman whom he had met at a bar in the Beverly Wilshire Hotel. (3RT:1252.) This image played upon several commonly-held prejudices, including the one recognized in *Cardenas*, and so served as highly inflammatory evidence appellant was just the sort of

"evil" man who would raid his dead wife's estate and kill his own son to fund his illegal and immoral pursuits. (See *Cardenas, supra*, 31 Cal.3d at p. 907.)

Absent the drug use evidence and its likely influence on the jury, it is at least reasonably probable, and therefore also reasonably possible, a more favorable result would have obtained. (*People v. Welch* (1999) 20 Cal.4th 701, 749-750 [admission of evidence defendant was a drug dealer analyzed under *Watson*]; *Watson, supra,* 46 Cal.2d at p. 836; cf. *Chapman, supra,* 386 U.S. at p. 24.) First of all, the jury questions referenced in previous arguments show jurors thought the evidence of a financial gain motive was far from overwhelming. (*Pearch*, *supra,* 229 Cal.App.3d at p. 1295.) Objectively speaking, they were right: Appellant was a practicing attorney and civil engineer, meaning there was little reason to believe the few thousand dollars he spent on Perry would have been beyond his means. (6RT:2764-65.) It is therefore telling that although the prosecution had seven years to muster proof appellant had been misappropriating funds, the most it could show was that he asked a friend for a $15,000 loan to pay expenses related to the estate and tried to sell hockey tickets to a friend to get some cash for the weekend. (3RT:1254-55; 4RT:1804, 1807; Evid. Code, § 412 ["If weaker and less satisfactory evidence is offered when it

was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust"].)

Moreover, in addition to the affirmative evidence that Brian was violent and was the aggressor in this instance, the killing simply did not look anything like a pre-planned murder for financial gain. Though appellant lived alone, he shot Brian while two witnesses were in the house. (3RT:942, 1008.) The altercation spanned three rooms, resulted in a bruise on appellant's head, the shots were fired from several feet away, and one or more of them only grazed Brian. (4RT:1824, 1844, 1853, 1904-05; 5RT:2434.) All of this suggests a struggle rather than a prepared ambush. (*People v. Marks* (2003) 31 Cal.4th 197, 230 [a close-range shooting without any provocation or evidence of struggle demonstrates premeditation and deliberation].) Someone inside the house called 9-1-1 immediately, so any efforts to make the crime look like self-defense would have had to have been completed during the few minutes when appellant was not on the phone with the dispatcher and before he walked outside to be arrested. (3RT:1010; 5RT:2202, 2434; 6RT:2767.)

Indeed, the only reason there would have been *any* opportunity to cover up a crime was because Roldan and Perry ran out of the house. (3RT:1007-08.) The prosecution never explained how it thought appellant

had planned to make the killing look like self-defense if the two witnesses had stayed.

Finally, appellant was crying when he was taken into custody minutes after the shooting, meaning the prosecution's theory depended on his being a fine actor in addition to a cold blooded murderer. (3RT:1224, 1226.) It is also worth remembering that just a year earlier appellant was insisting that Judy's will, which he had witnessed, accurately expressed her wishes and that he had no interest in challenging the disposition, even though he easily could have done so. (4RT:1569-70.)

In sum, there was no direct evidence appellant killed Brian for financial gain and the circumstantial evidence was weak and amenable to contrary inferences. The inflammatory evidence of appellant's cocaine use therefore may well have made the difference and the error requires reversal under any standard. (*Watson, supra*, 46 Cal.2d at p. 836; *Chapman, supra*, 386 U.S. at p. 24.)

V. Evidence of prejudicial assertions Brian made about appellant's conduct and character should have been excluded under Evidence Code sections 352 and 1250, subdivision (b).

Over the defense's objection, the prosecution was allowed to introduce evidence of statements Brian made to several people in which he claimed: 1) appellant was draining money from the estate to support his cocaine addiction; 2) appellant told Brian to make a will naming appellant as the primary beneficiary; and 3) Brian feared appellant because his constant drug and alcohol use had made him irrational, unpredictable and "a very angry man." Although the assertions were admitted as circumstantial evidence of Brian's state of mind, logically they could not have supported any relevant inferences about Brian's mental state unless the jury accepted them as true. The evidence was therefore necessarily admitted for its truth in violation of Evidence Code section 1250, subdivision (b). Moreover, because the statements lacked probative value for their asserted purpose and posed a substantial risk of being improperly used as proof of appellant's conduct, motive and intent, failure to exclude them under Evidence Code section 352 was an abuse of discretion.

A. In analyzing the admissibility of evidence of a declarant's state of mind, there is a crucial distinction between assertions which are relevant regardless of their truth and those whose relevance depends upon the truth of the asserted facts.

When it comes to admissibility, not all state of mind evidence is created equal, as the Court of Appeal explained in *People v. Ortiz* (1995)

38 Cal.App.4th 377. (See *People v. Riccardi* (2012) 54 Cal.4th 758, 822-823 [citing *Ortiz* with approval].) *Ortiz* began by dividing state of mind evidence into two categories: Where the declarant's state of mind is directly at issue, statements which directly declare a mental state (e.g., "I am afraid of John") constitute hearsay but are admissible for their truth under Evidence Code section 1250, subdivision (a)'s exception to the hearsay rule. (*Ortiz, supra,* at p. 389.) "In contrast, a statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind." (*Ibid.*) This latter category would include a statement such as "John is dangerous," which is inadmissible as evidence the defendant is *in fact* dangerous, but may be admissible as circumstantial evidence the declarant *believes* the defendant is dangerous. (*Id.* at pp. 389-390; Evid. Code, § 1250.)

The *Ortiz* court made yet another distinction between two kinds of circumstantial evidence of the declarant's state of mind: One variety of such evidence includes statements whose truth is irrelevant, such as "John keeps calling my house and hanging up when I answer," which is a "statement reflect[ing] a conclusion by the declarant which is manifestly

unsupported by personal knowledge." (*Ortiz, supra,* 38 Cal.App.4th at p. 390.) "If offered to prove a fearful state of mind of the declarant, what is important is not whether John actually engaged in the conduct, but that declarant *believes* he did," and as a result, "[a] clear limiting instruction can, in large part, dispel prejudicial misuse of such evidence." (*Ibid.* (emphasis original).)

Appellant's complaint, however, involves the other sort of circumstantial evidence - the kind which does not support the relevant inference about the declarant's state of mind unless the jury believes his assertion about the defendant. This sort of circumstantial evidence encompasses statements in which the declarant is expressly or impliedly asserting personal knowledge, rather than mere belief, of the fact which supports an inference about his state of mind. (*Ibid.*) An example of such a statement would be, "John has beaten me many times." If such evidence is offered to prove the declarant feared John and therefore acted in conformity with that fear, "the statement only has the proffered evidentiary value if the declarant is truthful when describing the event. If the statement is a lie, it cannot constitute circumstantial evidence of fear." (*Ibid.*) With such evidence, it is "more difficult to fashion, and more demanding to expect the jury will follow, a limiting instruction." (*Ibid.*) This category of statements therefore "presents an elevated danger of prejudice if the jury is unable to

distinguish between the truth of the matters asserted and the inferences concerning the declarant's state of mind." (*Riccardi, supra,* 54 Cal.4th at p. 823.)

Such evidence provides an exception to the general rule that courts may simply assume that the potential for unfair prejudice will be cured by a limiting instruction. (*Riccardi, supra,* 54 Cal.4th at p. 825; *Ortiz, supra,* 38 Cal.App.4th at p. 390.) Indeed, it is logically impossible for a jury to follow a limiting instruction which tells it not to consider such evidence for its truth. (*Williams v. Illinois* (2012) 567 U.S. ___ [132 S.Ct. 2221, 2268-2269] (dis. opn., Kagan J.) [where a statement's utility is dependent upon its truth, the factfinder must necessarily assess whether the statement is true]; *People v. Hamilton* (1961) 55 Cal.2d 881, 896 ["Logically, it is impossible to limit the prejudicial and inflammatory effect of this type of hearsay evidence"] (abrogated by Cal. Const., Art. 1, § 28, subd. (d)).)[9]

[9] *Ortiz* recognized *Hamilton's* rule that "*all* statements of a deceased victim were inadmissible to show the victim's state of mind, even if that state of mind was in issue, if the statement referred solely to past conduct of the accused" was abrogated by the "Truth-in-Evidence" provision. (*Ortiz, supra,* 38 Cal.App.4th at pp. 387-389 (emphasis added).) But since Evidence Code section 1250, subdivision (b) prohibits the admission of state of mind evidence for the truth of the facts asserted, *Hamilton* was not abrogated with regard to the sort of state of mind evidence which is necessarily admitted for its truth. Moreover, the *Ortiz* court recognized that, "even though *Hamilton* no longer controls the question of admissibility, the concerns articulated in *Hamilton* are among the factors trial courts must consider in ruling on the evidence" under Evidence Code section 352 (*Ortiz, supra,* at p. 392.)

With this type of evidence, the danger for prejudice from the jury's inability to follow a limiting instruction will therefore frequently warrant exclusion under Evidence Code section 352. (*Riccardi, supra,* 54 Cal.4th at p. 825 ["If a statement bears little relevance or trustworthiness, or presents significant danger of prejudice by describing a defendant's conduct, a trial court presumably will refuse to admit such evidence of the victim's state of mind"]; *Ortiz, supra*, 38 Cal.App.4th at p. 390.)

State of mind evidence whose value depends upon the truth of the declarant's assertions is, moreover, inadmissible under Evidence Code section 1250, subdivision (b), which makes clear that the state of mind exception "does not make admissible evidence of a statement of memory or belief to prove the fact remembered or believed." Although the *Ortiz* court only acknowledges that that juries will likely have "difficulty" avoiding using such evidence for its truth (*Ortiz, supra,* at p. 390), recent decisions from the California and United States Supreme Courts go further by saying that when the value of certain evidence relies on the truth of a predicate fact, the predicate fact has necessarily been admitted for its truth. (*People v. Dungo* (2012) 55 Cal.4th 608, 627 (conc. opn., Werdegar, J.); *Williams, supra,* 132 S.Ct. at pp. 2256-2257 (conc. opn., Thomas, J.) ["There is no meaningful distinction between disclosing an out-of-court statement so that

the factfinder may evaluate the expert's opinion and disclosing that statement for its truth"], 2268-2269 (dis. opn., Kagan, J.).)[10]

Though *Dungo* and *Williams* deal with expert basis evidence, their reasoning applies with equal force when the jury must determine whether a declarant's assertion is true before the assertion can support an inference about the declarant's state of mind. As a result, in addition to being subject to Evidence Code section 352, claims like "John has beaten me many times" are necessarily offered for their truth and are inadmissible under Evidence Code, section 1250, subdivision (b).

B. Over objection, Brian's claims about appellant's conduct and character were admitted as circumstantial evidence of Brian's state of mind.

i. Though there was ample direct evidence of why Brian went to the Larke Ellen house on March 2, the trial court also admitted various accusations he made about appellant on the theory they constituted circumstantial evidence of Brian's state of mind.

The prosecution wanted to establish that Brian went to the Larke Ellen house on March 2 to discuss his concerns about how appellant was handling the estate, and it was allowed to do so through the admission of direct evidence of Brian's state of mind. This included: Father Falco's

[10] Justice Werdegar's concurrence garnered the support of a majority of the California Supreme Court. (*Dungo, supra,* 55 Cal.4th at p. 627.) Between Justice Thomas' concurrence and Justice Kagan's dissent, a majority of the United State Supreme Court agreed that expert basis evidence is admitted for its truth. (*Williams, supra,* 132 S.Ct. at pp. 2255, 2264.)

testimony that on March 2 Brian told him he was going to stop by the house to talk to appellant about his concerns regarding the finances (4RT:1539), Sister Ingham's testimony to the same effect (6RT:3052), attorney Charles Shultz's testimony that on March 2 Brian expressed frustration with the pace of probate and set a meeting for March 5 to move the process forward without appellant's involvement (4RT:1575; 5RT:2152), and testimony from Brian's Alcoholics Anonymous sponsor Paul Schulte which corroborated Shultz's account (4RT:1517). The above testimony proved Brian's state of mind and explained his conduct on March 2, and did so without requiring the jury to make any determinations about appellant's conduct. (*Ortiz, supra,* 38 Cal.App.4th at 390; Evid. Code, § 1250, subd. (a).) Appellant does not quibble with the judge's decision to admit the above evidence. Its admission did, however, mean there was negligible probative value to the following evidence about which appellant does complain:

Brian told his former boyfriend, Simon Ryan, that in December of 2006 appellant asked him to draft a will which left his interest in Judy's real property to appellant. (3RT:1302-03.) Brian also accused appellant of "taking money from the estate," telling Ryan that as a result he was "running out of money." (3RT:1304-05) Brian claimed appellant was "burning through money really fast." (3RT:1317.)

Brian told Schulte that appellant was mismanaging the estate. He claimed "the mortgage for the house had not been paid in two months" and he was afraid the house was going to be taken by the bank. (4RT:1516-17.) Brian further claimed he had been "humiliated" when checks had bounced. (4RT:1520.)

Fulco repeated Brian's claims that appellant was "draining the resources of the estate," it was appellant's "lifestyle" which "was responsible for the draining of the finances," and that appellant was a "drug addict." (4RT:1538-39, 1541.) Brian explained that he feared appellant because appellant was "usually on drugs and somewhat irrational," and was "a very angry man." (6RT:3007-08.)

Brian told Candib he was concerned that "a significant amount of money was missing" from the estate. (4RT:1810, 1813.) Brian was also concerned about appellant's drug use and the influence Perry was having on him. (4RT:1814-15.)

Finally, about six hours before being shot Brian told Ingham that he wanted to talk to appellant about "the way [appellant] was spending money [. . .] on drugs and alcohol and wanted to see if he could reason with him to get him to stop that behavior." (6RT:3050, 3052.) During that same conversation Brian claimed he feared appellant because appellant had been

abusing drugs and alcohol, his "behavior was unpredictable," and Brian "never knew what his reactions would be." (6RT:3050.)

ii. The trial court overruled objections that the evidence constituted inadmissible hearsay and that the jury would be unable to follow a limiting instruction, ruling that the statements survived an Evidence Code section 352 analysis.

Early in the trial, appellant objected to evidence of appellant's drug use as being irrelevant and unduly prejudicial. (3RT:1209-11.) The prosecutor steered the discussion to the broader subject of whether Brian's claims that appellant was using cocaine and taking money from the estate were admissible under Evidence Code section 1250 because they went to Brian's "state of mind." She represented to the court that the evidence would show Brian told people, "That [appellant] was taking money from the estate . . . because he's using cocaine and hanging out with this woman Raquel [Perry]." (3RT:1213-14.) Defense counsel expressed his disagreement with the prosecutor's view that such statements were admissible for that purpose. (3RT:1214.)

It was at this point that the court ruled, "[I]f, in fact, these facts are true . . . if the jury concludes this is, in fact, true, then I think [the prosecutor] is free to argue that as a result of these things, that's evidence that [appellant] was pilfering the estate and that was, in fact - - that she has evidence to suggest that was the reason why the decedent went to the house on that date in that instance." (3RT:1216.)

The defense replied that there was no such admissible evidence, saying, "You can't - - she can't get there, your honor. She cannot get there without statements of Brian Chapman, okay? She can't get there. And those statements are hearsay." (3RT:1217; see *People v. Scalzi* (1981) 126 Cal.App.3d 901, 907 [when "evidence is totally devoid of any nonhearsay probative value, [an] 'inadmissible hearsay' objection suffices to preserve appellate review" of hearsay statements which ostensibly come in for a nonhearsay purpose].)

The court responded, "There is an argument that could be made that those statements really don't have to go to the truth of the matter asserted [. . .] so if those statements are introduced to explain [Brian's] conduct in going to the house, I think they would be admissible. And they may be admissible to establish his state of mind at the time under [Evid. Code, §] 1250 as well." (3RT:1217.) The court went on to say that the evidence survived an Evidence Code section 352 analysis and so the court was going "to allow this line of testimony." (3RT:1218.) The court took care to note that appellant had made a sufficient record for appellate review on this issue. (3RT:1218.)

The defense later made a specific hearsay objection to Ryan's testimony about the will (3RT:1267, 1303.) The defense also unsuccessfully objected to evidence Brian told Ryan he had "heard from

lawyers that oversaw the estate that . . . he was running out of money" and that appellant was the one taking the money. (3RT:1305.) The court told the jury this statement was admitted only as evidence of Brian's state of mind. (3RT:1305.)

The defense also made an objection that the jury would not be able to follow a limiting instruction with regard to statements Brian made to Fulco about appellant taking money from the estate, arguing, "It's awful hard for the jury to have these gymnastics of, well, does that mean they had financial need or not? So a statement by Brian that he was worried about finances doesn't show that there's any financial problem. That's something I don't think they will be able to understand. [The prosecutor] doesn't have any evidence of a financial problem. She's only relying on Brian's statements." (4RT:1532, 1534-35; *Ortiz, supra,* 38 Cal.App.4th at p. 390 [Evid. Code, § 352 requires exclusion of such evidence where it is unlikely the jury will be able to follow a limiting instruction]; *Hamilton, supra*, 55 Cal.2d at p. 896 [a jury will not be able to follow a limiting instruction when it must necessarily assess the truth of the matter asserted]; *People v. Morris* (1991) 53 Cal.3d 152, 188 [No particular form of objection is required under Evid. Code, § 353; "it is sufficient that the presentation contain a request to exclude specific evidence on the specific legal ground urged on appeal"] (disapproved of on another point).)

The court said the evidence was only relevant to establishing what Brian believed and "whether they actually had financial problems or not is an entirely different story, but that's why I'm giving the limiting instruction." (4RT:1535.) During the prosecution's examination of Fulco, the court overruled an objection to Brian's claim that appellant was "to the best of his knowledge" a drug addict, telling the jury the evidence was admitted only for Brian's belief rather than the truth of the matter asserted. (4RT:1541.)

C. Because the state of mind evidence was irrelevant unless it was true, it should have been excluded under Evidence Code section 1250, subdivision (b). Because the evidence had negligible probative value and carried a significant risk of being used as proof of appellant's conduct, motive, and intent, it should also have been excluded under Evidence Code section 352.

Evidence of the deceased's mental state is not directly relevant in a murder prosecution, and so the complained-of evidence was only relevant to the extent: 1) there was a dispute about whether Brian's actions were consistent with those of someone who believed his father was a drug addict who had been misappropriating money from the estate; and 2) the resolution of that issue was material to the issues the jury had to decide. (*Noguera, supra,* 4 Cal.4th at p. 621.) In determining whether the evidence was properly admitted, it is important to remember that because evidence of a decedent's state of mind is "not admissible to prove *the defendant's* conduct or motive (state of mind)," Brian's beliefs were not admissible as

circumstantial evidence that appellant was the aggressor or had the motive or intent to kill him. (*Id.* at p. 622, quoting *People v. Ruiz* (1988) 44 Cal.3d 589, 609 (emphasis original).) As explained below, the complained-of evidence had no relevance unless it was true, and if true it still said little if anything about Brian's state of mind which not already established by the direct evidence. On the other hand, to the extent the jury was unable to avoid considering Brian's accusations for their truth, they constituted highly persuasive proof appellant murdered his son in order to use money from the estate to fund his drug addiction.

Unlike statements like "someone keeps calling and hanging up," Brian's accusations either explicitly asserted personal knowledge of the declared facts or implied as much by virtue of the nature of the accusations and the evidence Brian regularly interacted with appellant. For this reason, the evidence only supported an inference about Brian's state of mind if the jury first accepted that he was telling the truth, and so the evidence was inadmissible under Evidence Code section 1250, subdivision (b). (See *Dungo, supra,* 55 Cal.4th at p. 627.) Moreover, the danger the jury would not be able to follow a limiting instruction weighed against its admission under Evidence Code section 352. (*Riccardi, supra,* 54 Cal.4th at p. 825; *Ortiz, supra,* 38 Cal.App.4th at p. 390.)

Even for their asserted purpose as state of mind evidence, however, Brian's claims lacked probative value. There was already undisputed testimony from a priest and a nun that Brian said he was going to the Larke Ellen house to discuss his concerns about how appellant was handling the estate, and additional testimony from Brian's lawyer and his Alcoholics Anonymous sponsor that Brian had set up a meeting to move probate along without appellant's involvement. (4RT:1539, 1517, 1575; 5RT:2152; 6RT:3052.) The circumstantial evidence of Brian's state of mind added nothing on this point, which is yet more reason it should have been excluded. (*People v. Partida* (2005) 37 Cal.4th 428, 426, fn. 2 [under Evid. Code, § 352 analysis, probative value of evidence is diminished when it is cumulative].)

The only way Brian's *beliefs* about appellant's conduct would have had significant probative value was if they somehow supported an inference that Brian would not have assaulted appellant and Perry, thereby refuting appellant's claim that the killing was justifiable self-defense. (*Noguera, supra,* 4 Cal.4th at p. 621 [statements of a victim's state of mind are irrelevant except to the extent the victim's conduct in conformity with that state of mind is in dispute].) Other than Brian's claims that he feared appellant because appellant's drug and alcohol use had made his behavior erratic and unpredictable, which were precisely the sort of assertions *Ortiz*

said are likely to be used as proof the accusations are true (*Ortiz, supra,* 38 Cal.App.4th at p. 390), none of the state-of-mind evidence supported such an inference. That is, that Brian believed appellant was robbing the estate blind in order to buy cocaine for himself and Perry in no way supported an inference that Brian was *less* likely to act aggressively toward them when he went to the house to discuss how the estate was being managed. Even as state of mind evidence, then, these accusations of appellant's wrongdoing did not support any relevant inference which furthered the prosecution's case. (*Noguera, supra,* 4 Cal.4th at p. 621.)

On the other hand, to the extent the jury believed Brian's assertions were true, they served as highly persuasive evidence that appellant killed him so that he could continue to drain the estate to fund his cocaine addiction and support his girlfriend. The prosecution's theory depended on the notion that appellant was *in fact* taking money from the estate to support his drug habit, not just that Brian *believed* he was. Not only was Brian the only one who claimed appellant was stealing money or was a cocaine addict, but he also had closer ties and more intimate knowledge of appellant's activities than anyone who testified at trial. Thus, the state of mind evidence had huge probative value – but only to the extent it was used for the improper purpose of proving *appellant's* conduct, motive and intent. (*Noguera, supra,* 4 Cal.4th at pp. 621-622.)

In sum, contrasted with the negligible probative value, there was a huge potential for undue prejudice to the defense from the jury's being unable to follow the limiting instruction. (*Riccardi, supra,* 54 Cal.4th at p. 825; *Ortiz, supra,* 38 Cal.App.4th at p. 390.) This potential was exacerbated because the assertions which served as the basis for Brian's belief directly overlapped with the disputed issues at trial, and therefore carried "a substantial risk the jury would consider [the declarant's] out-of-court statements as independent proof of what happened the night of the shooting." (*People v. Miller* (2014) 231 Cal.App.4th 1301 [180 Cal.Rptr.3d 638, 647 [upholding exclusion under Evid. Code, § 352 of defendant's statements to his psychiatrist which were used as the basis for expert opinion about his state of mind]; *People v Bell* (2007) 40 Cal.4th 582, 607-609 [same, and emphasizing that even though the statements were not especially inflammatory, the potential for prejudice was exacerbated because they related to the crimes].)

The temptation to accept Brian's accusations at face value also would have been heightened given the circumstances and frequency with which they were made. That is, we tend to believe people are telling the truth when they repeat the same story to a priest, a nun, an Alcoholics Anonymous sponsor and a boyfriend. (See *People v. Greenberger* (1997) 58 Cal.App.4th 298 ["the most reliable circumstance [for hearsay

statements] is one in which the conversation occurs between friends in a noncoercive setting that fosters uninhibited disclosures"].) Fulco even lent additional credibility by saying he and Brian "confided in one another" and to his knowledge Brian had never lied to him. (4RT:1537; 6RT:3007.) Because the evidence lacked significant probative value and carried a great potential for undue prejudice if the accusations were used as proof of appellant's conduct, motive and intent, admission was an abuse of discretion. (*Riccardi, supra*, 54 Cal.4th at p. 825; *Ortiz, supra*, 38 Cal.App.4th at p. 390; *Hamilton, supra,* 55 Cal.2d at p. 896; Evid. Code, §§ 352 & 1250, subd. (b).)

D. Admission of the evidence denied appellant his right to a fair trial.

The state of mind evidence was irrelevant except to the extent it proved appellant was in fact stealing money from the estate, and therefore had the motive and intent to murder Brian when confronted about his misdeeds. Admission therefore violated due process. (*McKinney, supra,* 993 F.2d at p. 1384; *Spencer, supra,* 385 U.S. at pp. 563-564.) The admission of such damaging hearsay by a declarant who could not be cross-examined and who was not present in court also denied appellant his right to a meaningful opportunity to present a defense. (*Crane v. Kentucky* (1986) 476 U.S. 683, 690 [Due Process Clause and Sixth Amendment

guarantee defendants a meaningful opportunity to present a complete defense].)

E. The error requires reversal.

As explained in Argument IV, the admissible evidence appellant killed Brian for financial gain was thin, and so the ability of the prosecution to fill in the blanks with inadmissible hearsay evidence from the deceased likely contributed significantly to its ability to secure a guilty verdict. (See *supra*, at pp. 89-92.) The prosecutor encouraged the jury to use Brian's assertions for their truth by conflating Brian's *belief* appellant was draining the estate with proof appellant was *in fact* draining the estate. For example, she said that Ryan knew "Brian was scared about his financial situation. His father was draining his personal accounts. He was not paying the bills." (7RT:3344.) While there was evidence appellant was spending money and borrowed $15,000 to pay expenses related to the estate, there was no evidence that bills were going unpaid or that appellant was taking money from the estate for himself, save for Brian's accusations. (3RT:1254-55; 4RT:1804, 1807.)

The prosecutor also emphasized "evidence that [Brian] was truthful" (7RT:3347), a fact which would have been irrelevant if the assertions he made were not being used for their truth.

Finally, in the context of discussing the proof appellant killed Brian for financial gain, the prosecutor asked, "Who benefits from the death of Brian Chapman? Again, what was the concern of the victim? What was going on during this time period? What was everybody upset about? Money. Money. Money. Money." (7RT:3351.) That Brian was *concerned* about appellant's management of the estate would have been irrelevant to the prosecutor's line of argument unless his concerns were grounded in reality – she was not claiming appellant shot Brian after being falsely accused of draining money from the estate. The prosecutor's argument made the already difficult task of partitioning Brian's accusations all but impossible, virtually assuring they would be used as substantive evidence of appellant's conduct, motive, and intent.

Given that this was a closely balanced case in which the victim had a long history of violence toward his family, no one witnessed the shooting, and there was only the thinnest of circumstantial evidence appellant was taking money from the estate, it is reasonably probable this highly prejudicial evidence made the difference in the jury's decision. The error therefore requires reversal under any standard. (*Watson, supra,* 46 Cal.2d at p. 836; cf. *Chapman, supra,* 386 U.S. at p. 24.)

VI. The cumulative effect of the errors resulted in a denial of due process and warrants reversal.

Even when no single error requires reversal, the cumulative effect of the errors may render a trial unfair, resulting in a denial of due process and compelling reversal. (*Spencer, supra,* 385 U.S. at pp. 563-564 ["[T]he Due Process Clause guarantees the fundamental elements of fairness in a criminal trial."]; *People v. Kronemyer* (1987) 189 Cal.App.3d 314, 349 ["[T]he litmus test [for cumulative error] is whether the defendant received due process and a fair trial."].) In this case, the instructional errors lowered the prosecution's burden of proof for both the murder charge and the financial gain special circumstance, while the evidentiary errors unfairly bolstered the prosecution's theory that appellant murdered Brian so he could continue to use money from the estate to feed his cocaine addiction. The combination of these errors rendered the trial fundamentally unfair and compels reversal. (*People v. Jablonski* (2006) 37 Cal.4th 774, 832 [considering prejudice from cumulative error under both *Chapman* and *Watson* standards]; *Morris*, *supra*, 53 Cal.3d at p. 216 [applying *Chapman* standard to cumulative error] (overruled on another point of law).)

CONCLUSION

For the reasons stated in Arguments I, II, and IV through VI, appellant's murder conviction must be reversed. For the reasons stated in Arguments III through VI, the true finding on the financial gain special circumstance must be reversed.

Respectfully submitted,

January 5, 2015

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WORD COUNT CERTIFICATION

I certify that this document was prepared on a computer using Microsoft Word, and according to that program this document contains 25,461 words.

/s/David Andreasen_____
DAVID ANDREASEN

PROOF OF SERVICE BY MAIL

Re: Carl E. Chapman, Court Of Appeal Case: B257249, Superior Court Case: SA073898

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On January 6, 2015, I served a copy of the attached Appellant's Opening Brief on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 6th day of January, 2015.

Eric Vanderville
(Name of Declarant)

(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Carl E. Chapman, Court Of Appeal Case: B257249, Superior Court Case: SA073898

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 22 Alta Dr., Petaluma CA. On January 6, 2015 a PDF version of the Appellant's Opening Brief described herein was transmitted to each of the following using the email address indicated or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 6th day of January, 2015 at 17:56 Pacific Time hour.

Eric Vanderville

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(Signature of Declarant)