No. _____

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

_____

ARTHUR LEW, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

_____

ON PETITION FOR A WRIT OF CERTIORARI TO
THE CALIFORNIA COURT OF APPEAL,
FIRST APPELLATE DISTRICT, No. A149775

_____

PETITION FOR A WRIT OF CERTIORARI

SEEKING SUMMARY DISPOSITION (RULE 16.1)

Michael P. Goldstein
Counsel of Record for Petitioner

PMB 9122
5000 MacArthur Blvd.
Oakland, CA 94613
Telephone: (510) 910-7220
mpgoldstein@earthlink.net

QUESTION PRESENTED

In aggravated assault prosecutions where self-defense is at issue, California juries are instructed that state law requires only a danger of a battery or bodily injury to justify the use of force adequate to repel the attack. In unpublished dispositions of routine sufficiency-of-the-evidence challenges to convictions under that rule, the state's Courts of Appeal sometimes affirm with rote use of language drawn from the state's justifiable-homicide cases, holding that juries could have found an absence of a danger of great bodily injury or death (which is required to justify a killing). Does upholding a verdict which a jury did not render, on an issue which the parties did not litigate, and on a basis more favorable to the prosecution, comport with the a state's constitutional duty to provide criminal defendants due process of law and trial by jury?

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ARTHUR LEW, Petitioner,

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STATE OF CALIFORNIA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

ARTHUR LEW respectfully prays that a writ of certiorari issue to review the decision of the California Court of Appeal, First Appellate District, which affirmed his conviction. He further prays that this Court summarily vacate the judgment and remand with directions to reconsider whether the evidence was sufficient to support his conviction, given the prerequisites for a self-defense claim which were litigated at his trial.

OPINION BELOW

The unpublished Court of Appeal opinion is reprinted in the appendix. App. 1.

JURISDICTION

The judgment of the California Court of Appeal was rendered on July 28, 2018. App. 1. A timely petition for rehearing was denied August 22, 2018. App. 23. The California Supreme Court

denied a petition for review November 14, 2018, after granting leave to file an untimely petition. App. 24–26.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment provides, in pertinent part, "No state shall . . . deprive any person of life, liberty, or property, without due process of law . . . ."

The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

STATEMENT OF THE CASE

Petitioner Arthur Lew seeks review of a California Court of Appeal order affirming a conviction of assault with a deadly weapon, which resulted in a 14-year prison term.

Events Giving Rise to the Criminal Charge[1]

On March 8, 2016, Matthew Hamilton, seeing Arthur Lew at the home of Nicole Scrogings, an ex-girlfriend with whom Hamilton wanted to reconcile, shouted obscenities, forced his way in, threw a box-cutter at Petitioner, tried to or did grab (and then drop) a bat to hit him with, and then advanced on Petitioner, who had run from him but had no farther to go. A fight ensued, in which Petitioner used the knife that Hamilton had thrown. It ended as soon as Hamilton, finally noticing that he had been very seriously cut, stopped punching Petitioner. App. 2–3; Reporter's Transcript ("RT") 93, 97–98, 100, 109, 111–114, 131, 134–135, 150–152, 155, 164, 168, 188, 345, 479, 482, 485, 490–491, 503, 574.

[1]Facts stated here are from the record of the trial. They were undisputed, except where otherwise noted in footnotes. The footnoted statements show how there was a stronger case for self-defense than the opinion of the Court of Appeal might suggest, but none of the differences need to be resolved for this Court's disposition of the matter.

Only Petitioner was charged with an offense. As Respondent put it on appeal,

> There was no dispute that when Hamilton punched appellant, appellant had every right to defend himself. The only disputed issue for the jury to resolve was whether the force appellant used was "no more force than was reasonably necessary to defend against that danger." (CALCRIM No. 3470 [official pattern jury instruction on self-defense].)

Respondent's Brief on appeal ("RB") 32.

The fight was preceded, in the days before it took place, by:

- A lengthy, erratic series of texts from Hamilton to Scrogings, showing his upset at their breakup even though he was still seeing a woman he had taken up with before the breakup, RT 79, 86–87; Exhibits G, H, R
- Texted threats from Hamilton to Petitioner, such as "You're a target," as well as from Hamilton's brother, App. 2; RT 399–404, 460–461
- Hamilton driving at a high rate of speed into the parking lot of a homeless shelter where he believed Petitioner was staying, leaving his vehicle and shouting threats regarding Petitioner (about which witnesses later warned Petitioner) until told to leave by staff, App. 2; RT 84, 347, 353, 418–420, 464, 471.

The day of the fight, Scrogings picked up her 12-year-old adopted son from Hamilton's new place. The two argued, and Hamilton pulled a duffle bag, which he thought was Petitioner's, from her car and started throwing things out of it. RT 86–91, 191 145–146, 472–475,477. Shortly afterward he had their other two children, ages 9 and 11, get in his car, and he drove to Scrogings's home. App. 2. The nine-year-old testified that she "was scared, because I knew something was going to happen, because I know my dad. . . . [H]e has, like, kind of anger issues." RT 191. Hamilton had both marijuana and a prescribed opiate pain killer in his system. RT 144.

He knocked at the door, saying he just wanted a furniture pad, but when he glimpsed Petitioner near the doorway, he began shouting curses and forced his way in, in the face of Scrogings's protests and resistance.[2] App. 2; RT 156–167, 186, 192, 203, 478–479. Petitioner retreated to the back of the small house, near a sliding glass door. RT 93, 97–98, 100, 150–152, 155, 168; Court Exhibit 3, p. 5. As noted above, Hamilton threw a box-cutter at him, tried to or did grab a bat kept behind the door, decided he just wanted to use his fists, in which he had plenty of confidence , Ct. Ex. 3, p. 4–5; RT 164, and advanced on Petitioner empty-handed but with another knife on a necklace he always wore (RT 111, 215).

Hamilton and Petitioner had been friends, and, after first "rush[ing]" Petitioner (Hamilton's description), he opened his arms and purported to offer to end the hostilities with a hug. App. 2–3; Court Exhibit 3, p. 5. He then punched Petitioner in the face or the side of his head[3] and roughly shoved Scrogings, who was between them, into the adjacent kitchen. App. 3; RT 206–207, 215–216, 491–493, 522. She saw the two exchanging what she thought were punches, with Petitioner semi-crouched against the sliding glass door and Hamilton over him,[4] but at some point Petitioner

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[2]As the Court of Appeal notes, Hamilton testified that Scrogings let him in because Petitioner was shouting, "Let the motherfucker in," while Scrogings and the children testified that he forced his way in. App. 2. Because of their testimony, Hamilton's on cross-examination, RT 156–167, and his prior statement boasting that Petitioner was "scared" and "didn't want to fight," Court Exhibit 4, p. 1, the prosecutor conceded that he lied about how he entered. RT 571.

References to Court Exhibits, as in the preceding paragraph of this footnote, are to transcripts of the sound track of videotaped interviews played to the jury.

[3]The Court of Appeal mentions that Hamilton testified that he actually intended to hug Petitioner, but that the latter pushed and stabbed him, while Scrogings testified as described above. App. 3. The 12-year-old corroborated Scrogings, and the prosecutor later conceded in argument, "Obviously [Hamilton] didn't want to give him a hug; [he] was trying to get closer so he could punch him." RT 206–207, 215–216, 570.

[4]The Court of Appeal states that Scrogings contradicted her testimony about Petitioner being against the sliding glass door on cross-examination. App. 6. The opinion omits that the prosecutor (continued...)

was using the box-cutter that Hamilton had thrown and possibly another knife.[5] App. 3, 6; RT 107–108, 206, 493–495, 522, 541. In doing so, Petitioner injured Hamilton badly. The latter received three long cuts to the face and neck, cutting both an artery and a vein, and he would probably have died of blood loss if he had not quickly gotten to a hospital and undergone emergency surgery. He had four less serious cuts, to his chest, arms, and face. App. 3–4; RT 111–114, 188.

Hamilton did not relent until he noticed that he was badly cut and bleeding heavily. At that point he withdrew. As soon as he did, the fight was over—Petitioner stayed where he was. App. 3, 27; RT 111–114, 188, 206–208, 496.

It was unclear whether Petitioner suffered any injuries. Photos taken of him fully clothed after he turned himself in to authorities showed no wounds or bruises, but there was no testimony that he was examined further either by officers or by medical personnel. App. 6.

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[4](...continued)
first established that she did not mention the detail in a police interview (where she said the men punched each other but was not asked the positions of the parties); that he then asked a leading and compound question, asserting that the men started punching each other *and* "so he didn't fall against the slider," as if the two propositions were contradictory; that her one-word affirmative answer thus may have been about the punching; that she reaffirmed on redirect that Petitioner was backed against the glass with Hamilton hovering over him; and that the prosecutor did not return to the matter during his recross-examination. RT 522–523, 541, 542; see also RT 536–537.

Hamilton had told police, "I caught him with one and rocked him and had him over by the sliding glass door." RT 168, Court Exhibit 3, p.5.

[5]As the Court of Appeal notes, Hamilton testified that he saw Petitioner using two knives App. 3), but he also testified that he thought Petitioner was only punching him the whole time. RT 104–108. It is true, as the opinion indicates, that one of the children saw a second knife, but it was in Petitioner's back pocket. RT 207–208; Court Exhibit 5, p. 28. Another child, who entered the house as the melée ended, only saw Petitioner holding one bloody knife behind his back. RT 188–189. The medical testimony described no wounds deeper than what the box-cutter could have inflicted. See RT 331–341.

Proceedings Below

Issue at Trial

Petitioner pleaded not guilty to a charge of assault with a deadly weapon (Cal. Pen. Code § 245, subd. (a)(1)), and the case was tried to a jury. App. 1.

It was undisputed that the person found to be the victim of Petitioner's assault was the initial aggressor. As noted previously, Respondent agreed on appeal that "[t]here was no dispute that when Hamilton punched appellant, appellant had every right to defend himself." RB 32; see also RT 576 (prosecution summation). On the issue of self-defense, the jury was instructed, pursuant to an official pattern instruction (CALCRIM No. 3470, "Right to Self-Defense or Defense of Another (Non-Homicide"), that the defendant must have "used no more force than was reasonably necessary to defend against . . . [an] imminent danger of suffering bodily injury or . . . of being touched unlawfully." App. 30. The jury was also instructed that the prosecution bore the burden of disproving, beyond a reasonable doubt, Petitioner's self-defense claim. Clerk's Transcript ("CT") 124.

The prosecutor conceded the elements of a self-defense claim other than whether Petitioner used unnecessary force. See RT 575 (prosecutor, taking the jury through the elements of self-defense: "The defendant reasonably believed that he was in imminent danger of suffering bodily injury. I don't disagree with that"), 576 (continuing, "The defendant reasonably believed that . . . the immediate use of force was necessary to defend against that danger; yeah . . . I agree"); 571(earlier: "(A]ll you really need to figure out is one simple thing, whether the amount of force the defendant used was reasonably necessary"). He argued that defending against Hamilton's attack by fists did not require inflicting seven cuts, some very serious, on the assailant. E.g., RT 596. The jury, apparently agreeing, convicted. App. 4.

Issue on Appeal.

On appeal, Petitioner contended that there was insufficient evidence to convict under *Jackson v. Virginia*, 443 U.S. 307 (1979). He noted the prior threats, which the jury was instructed it could consider, CT 130, and summarized the evidence that the enraged Hamilton was completely out of control and had Lew in a dangerous situation, by or against the sliding glass door.[6] Appellant's Reply Brief on Appeal ("ARB") 26. Framing his argument around the law and instruction regarding reasonably necessary force, i.e., the sole element of self-defense which Respondent contested at trial (see p. 6, above), his contention was that Hamilton's own testimony (App. 27–29), corroborated by other witnesses, was that the fight ended as soon as Hamilton finally noticed his wounds and retreated. I.e., Petitioner left his attacker alone when the latter left him alone.

What was reasonably necessary to stop the attack, Petitioner argued, was therefore clear: it took every cut inflicted to do so, and Petitioner used no more force after that end was attained. His resort to a knife after Hamilton discarded most of his weapons, though surprising in the abstract, turned out to reflect an accurate judgment regarding what it would take to fend off his enraged assailant. Therefore, Petitioner argued, no reasonable jury could find beyond a reasonable doubt that he had used more force than necessary. Appellant's Opening Brief on appeal ("AOB") 32–34; ARB 18–19, 25–26.

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[6]". . . Hamilton was a raging bull who perhaps as recently as the night before had been running around the shelter where he thought Lew was — shouting threats — and the next day or soon after packed up his children in the car, forced his way into Scrogings's home, pushed her against a wall, threw a box-cutter at Lew, picked up and then discarded a bat and/or an umbrella, charged at Lew, threw Scrogings into the kitchen, and was getting the best of Lew in a fight where Lew was no longer fully upright and was either pinned against a sliding glass door or very close to it, all while his children were nearby. His dangerously altered state was so evident that nine-year-old Myah knew on the ride over that something bad was going to happen." ARB 26.

Respondent agreed with what the issue was but disputed Petitioner's analysis, RB 28–33, concluding that the force Petitioner used "was not force that was 'reasonable under the circumstances.' [Citation.]" RB 33.

The Court of Appeal opinion affirming the conviction did not address either party's arguments, instead focusing on a different element of a self-defense claim, one which was not disputed by the prosecution at trial. Such a claim permits acquittal only if a doubt remains as to all three elements addressed by the prosecutor in the remarks quoted on page 6, above, i.e., a reasonable belief regarding an imminent danger of bodily injury or unlawful touching, a reasonable belief in the necessity of force to defend, and the use of only such force as was reasonably necessary to defend. See App. 30 (jury instruction). The reviewing court held that a jury could have found the element concerning the danger faced by Petitioner to have been disproved by the prosecution. In doing so, rather than framing the issue as whether Petitioner faced a danger of unlawful touching or bodily injury, which the prosecutor had conceded he had, RT 575 (quoted on p. 6, above), the court held, "Once the fight began, defendant engaged in conduct—stabbing with a box cutter and/or knife—likely to cause great bodily injury. The only justification for such conduct is if defendant reasonably believed he was at risk of *great* bodily injury." App. 6, emphasis added.

Neither party had propounded —at trial or on appeal— a rule requiring a risk of great bodily injury, which, as will be shown below, applies only to California cases where the original assailant was killed. The Court of Appeal concluded, "The record does not establish defendant either faced such a risk or could reasonably believe he faced such a risk" and affirmed. App. 6.

Lower Court Review of the Issues Raised Here

Petitioner sought rehearing in the Court of Appeal on several grounds, including that he "should have an opportunity to brief whether his jury trial right is violated when a court upholds a

conviction on a basis on which the jury could have convicted but did not" and "whether upholding a conviction on a basis regarding which he had no pre-trial notice—and thus did not defend against—would violate his rights to due process."[7] Petition for Rehearing, pp. 8–9, capitalization omitted. Citing other Court of Appeal cases in which the same error had been made, he sought discretionary review by the California Supreme Court, raising those two issues. Petition for Review 33–34. Before that court he also asserted the third issue raised later in this petition:

> A defendant has a constitutional right to reversal of his or her conviction if there was insufficient evidence for a reasonable fact-finder to have found the crime proved beyond a reasonable doubt. (*Jackson v. Virginia* (1979) 443 U.S. 307.) By applying the wrong standard [for what constitutes self-defense], reviewing courts may uphold convictions which were actually based on insufficient evidence, which is what petitioner submits happened here.

Id. 33–34. Both petitions were denied. As is their custom, neither court explained the basis for its orders. App. 23–25.

REASONS FOR GRANTING THE WRIT

IN A LARGE JURISDICTION WHICH CURRENTLY INCARCERATES 220,000 PEOPLE,[8] AN ISSUE THAT ARISES FREQUENTLY IS BEING ADJUDICATED ON APPEAL IN A MANNER THAT IS PATENTLY UNCONSTITUTIONAL, A SITUATION WHICH THIS COURT CAN EASILY AND APPROPRIATELY CORRECT SUMMARILY

Cases of aggravated assault under California Penal Code section 245, which penalizes both assault with a deadly weapon and assault using force likely to result in great bodily injury, arise with

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[7]The primary thrust of the arguments was not on the merits, but that rehearing should be granted to brief the questions, pursuant to Cal. Govt. Code § 68081, which mandates the grant of a petition for rehearing if an appellate court renders a decision "based upon an issue which was not proposed or briefed by any party." However, as to each contention quoted in the text above, Petitioner explained why there was a potential constitutional issue and cited, respectively, the Sixth and Fourteenth Amendments to the United States Constitution. Petition for Rehearing, pp. 8–9.

[8]Prison Policy Initiative, Correctional Control 2018: Incarceration and Supervision by State (2018) <https://www.prisonpolicy.org/reports/correctionalcontrol2018_data_ appendix.html>.

some frequency. And in cases that go to trial, self-defense is often an issue. Showing a rough idea of its prevalence, a Lexis search of California Court of Appeal cases referring both to that statute and the term *self-defense* returns 829 cases decided in the five-year period ending January 1, 2019. In a stunning display of what—at best—can be interpreted as what can happen when overloaded reviewing courts handle their caseloads by relying too heavily on analyses prepared for previous work, the California Courts of Appeal have been citing the rules regarding self-defense set forth in a published homicide case to dispose of sufficiency-of-the-evidence challenges in non-homicide cases, where the law is different. Thus in Petitioner's case, as in others, a defendant who had only to raise a doubt as to whether he used more force than was necessary to prevent some kind of injury or an unlawful touching, in order to be entitled to acquittal, had his insufficiency claim dismissed because a jury could have found that a danger of *great bodily injury* was disproved.

Petitioner understands that this matter may not be of sufficient national importance for this Court to initiate plenary proceedings. But California is the most populous state in the country, with an eighth of the U.S. population residing there and subject to its laws,[9] and the error in this common class of cases can be remedied summarily by this Court under Rule 16.1. For it is practically a no-brainer—to use the colloquial term—that the California courts' apparently not-infrequent practice of giving the prosecution a lesser burden on appeal than at trial deprives defendants of

- the sufficiency review guaranteed by due process,
- a meaningful opportunity to defend at trial, because of lack of notice of the law that may ultimately be applied, and

[9] World Population Review, California Population (2018-11-30), <http://worldpopulationreview.com/states/california/>; World Population Review, Total Population by Country 2019 <http://worldpopulationreview.com/countries/>, both viewed February 10, 2019.

- the jury-trial right, as the reviewing court "upholds" a verdict never rendered by a jury.

Certainly the California courts have not sought to justify the practice, and Petitioner doubts that Respondent will, either, as there simply can be no justification.

A. The Self-Defense Rule Overlooked by the Appellate Courts Is Correctly Applied at California Trials

As noted previously, in prosecutions for murder or manslaughter, California juries are instructed that the defendant's use of deadly force was justified under the law of self-defense only if the harm sought be be averted was reasonably believed to be death or great bodily injury. (CALCRIM No. 505, "Justifiable Homicide: Self-Defense or Defense of Another," Judicial Council of California, 1 California Criminal Jury Instructions 215 (page 287 of the linked .pdf). If no one was killed, as in the instant case, there is no such restriction. The defendant need only to have reasonably believed that there was an imminent danger of suffering bodily injury or an unlawful touching, as long as he or she used only the force reasonably necessary to defend against that danger. CALCRIM No. 3470, "Right to Self-Defense or Defense of Another (Non-Homicide)," Judicial Council of California, 2 California Criminal Jury Instructions 1001 (p. 2307 of the linked .pdf).[10] These instructions are correct. Cal. Pen. Code §§ 197 [homicide is justifiable to prevent murder, great bodily injury, or a felony], 692–694 [one may use sufficient resistance to prevent an offense against

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[10]The instruction states the pertinent conditions as,

1. The defendant reasonably believed that (he/she/ [or] someone else/ [or] <insert name of third party>) was in imminent danger of suffering bodily injury [or was in imminent danger of being touched unlawfully];

2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

the person]; *People v. Myers*, 61 Cal.App.4th 328, 335 (1998), cited with approval in *People v. Robertson*, 34 Cal.4th 156, 167 (2004) and relied on as authority for CALCRIM No. 3470 at 2 California Criminal Jury Instructions 1003; see also *People v. Johnson*, 180 Cal.App.4th 702, 709 (2009), cited for the same non-homicide principles by Respondent at RB 30.

Here Petitioner's jury was correctly instructed, App. 30–31, and he defended himself on the basis of that instruction. Yet the reviewing court, like many others considering the sufficiency of the evidence to defeat a self-defense claim, analyzed the matter as if the prosecution had the lighter burden of disproving a threat of death or great bodily injury, rather than a threat of injury or battery. App. 5–6; and see, e.g.,[11] *In re Juan R.,* 2018 WL 2010997 (April 30, 2018, No. B275826), *5; *People v. Chapman*, 2017 WL 2645309 (June 20, 2017, No. G053100), *3; *People v. Saa*, 2017 WL 604720 (February 15, 2017, No. B268810), *10; *People v. Ellis*, 2015 WL 159251 (January 13, 2015, No. F066937) , *9); *People v. Edgar R.*, 2010 WL 4705784, (Nov. 22, 2010, No. B220058) *3; see also *People v. Galvan*, 2008 WL 3868337 (Aug. 21, 2008, No. B201525), *2–3.

B. The Practice of the California Appellate Courts Is a Straightforward Due-Process Violation, in Two Different Respects

1. Reviewing Convictions by Asking if the Evidence Was Sufficient to Support a Watered-Down Element of the Offense Fails to Assure That the Reasonable-Doubt Standard Was Met

This Court has long held that the Due Process Clause of the Fourteenth Amendment permits conviction of a crime only upon proof beyond a reasonable doubt, *In re Winship*, 397 U.S. 358 (1970), that juries must be so instructed, *Cage v. Louisiana*, 498 U.S. 39 (1990), and that in the

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[11]The resources available to Petitioner's appointed counsel did not permit researching the matter anywhere near exhaustively. He stopped looking for more cases after finding enough opinions to demonstrate that the constitutional violations in Petitioner's case were not a fluke.

None of these cases was published in the official reports. Opinions of the Courts of Appeal are published only if they contribute something new to the existing body of case law or involve an issue of continuing public interest. Rule 8.1105, Cal. Rules of Court.

occasional case where a jury convicts without evidence sufficient to eliminate reasonable doubts in the mind of any reasonable juror, the conviction cannot stand, *Jackson v. Virginia*, *supra*, 443 U.S. 307.

The latter holding, that of *Jackson v. Virginia*, would be meaningless without post-conviction review of the sufficiency of the evidence. In *Jackson* the Court recognized that "a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt." 443 U.S. at 317. Without a means of correcting such a verdict, the invalidity of a conviction based on constitutionally insufficient evidence would not protect a defendant from its consequences. *Jackson* established that federal habeas corpus was one remedy, *id.* at 321, 324, but obviously that should not be the first line of attack. California, no doubt like every other state, generally provides such sufficiency-of-the-evidence review post-conviction in its own courts.

However, as this and the other cases cited above show, in an ongoing jurisprudential deviation which California's courts seemingly cannot be bothered to halt, courts are asking if jurors could have rationally found that the prosecution met not its actual burden but a less stringent one. When a jury is given accurate principles describing what the prosecution must prove or disprove, but courts use an inaccurate and easier-to-satisfy requirement when finding the verdict sustainable, there is a clear failure to assure that "when . . . a conviction [based on insufficient evidence] occurs in a state trial, it cannot constitutionally stand." *Jackson v. Virginia,* 443 U.S. at 317–318. For in reality there was simply no consideration of whether the prosecution met its actual burden or not.

Fiore v. White, 531 U.S. 225 (2001) is instructive. In *Fiore* this Court held that federal habeas corpus would lie when state reviewing courts failed to provide a remedy for lack of proof of an element of an offense. An implicit premise of this holding had to be that a state court's failure to

provide such a remedy post-conviction, see 531 U.S. at 227, violated the federal right to due process. Here, where California courts go through the motions of providing a remedy under *Jackson* while in fact failing to do so, there is a similar violation, and this Court should step in.

Petitioner's case, and the class of cases which it represents, present the flip side of the question this Court decided in *Musacchio v. United States*, 577 U.S. __, 136 S.Ct. 709, 193 L.Ed. 2d 639 (2016). In *Musacchio* the trial court's instructions to the jury had erroneously added an extra element to the offense, i.e., one that the prosecution was not legally required to prove. On appeal the defendant claimed that there was insufficient evidence to support that element. This Court held that the unwarranted instruction was irrelevant, and that the defendant had a right to reversal only if the Government failed to prove what it was legally required to prove. Here the shoe is on the other foot, albeit in a strange way. In his appeal Petitioner contended that the prosecution failed to present sufficient evidence for what it was legally required to prove, but instead of holding the prosecution to that standard, the reviewing court analyzed the matter as if the prosecution had a lighter burden. As in *Musacchio*, this Court should hold that on appellate review, both parties are entitled to the benefit that applicable law gave them at trial, no more, no less.

2. Trying Cases According to Instructions That Give Notice of Elements Different From Those That Will Be Used to Sustain Convictions Deprives Defendants of "a Meaningful Opportunity to Defend" at Trial

Even if the state appellate courts' analyses reflected a correct application of California self-defense law, the substitution of more burdensome justification requirements on appeal than those required by the theory on which the case was prosecuted unfairly deprives defendants of notice of what need ultimately be proved to convict them. This violates a "premise that has never been doubted in our constitutional system: that a person cannot incur the loss of liberty for an offense without notice and a meaningful opportunity to defend." *Jackson v. Virginia*, *supra*, 443 U. S. at 314.

The practice also violates the Sixth and Fourteenth Amendment right to the effective assistance of counsel.

Petitioner's counsel, for example, had he known that a verdict could be upheld based on the absence of a likelihood of great bodily injury or death, may well have explored more carefully whether Petitioner was against the sliding glass door. He likely would have also sought to elicit evidence about how well matched the two men were in a fight; what Scrogings and her son saw in terms of how hard Hamilton's blows were landing; and whether Hamilton, who bragged about his prowess with his fists, would stand by his claim (RT 168) that he punched only twice, at the beginning and the end of the fight, and presumably was just standing there getting cut for the rest of the time.

Moreover, attorneys' recommendations concerning possible plea bargains would sometimes be different if it were evident that the jury instruction was the first half of a bait-and-switch and that the defense burden will ultimately be higher than what will be described to the jury at trial.

The patency of the violation of the fundamental rights to notice and a meaningful opportunity to defend is another reason why summary intervention is appropriate.

B. The Practice Challenged Here Indisputably Violates the Jury-Trial Right Because Only a Reviewing Court Finds a Critical Element of the Offense Proven

Defendants in state criminal proceedings have a Sixth Amendment right, applied to states through the Fourteenth Amendment, to trial by jury. *Duncan v. Louisiana*, 391 U. S. 145, 149 (1968). California's current practice deprives defendants like Petitioner of that right.

No jury ever considered whether Petitioner faced a risk of great bodily injury. In upholding his conviction because the evidence permitted a conclusion that he faced no such risk, the court below effectively found that a hypothetical jury, instructed on that lesser prosecutorial burden, could have legitimately convicted. Thus the court hypothesized a permissible verdict, rather than upholding

one returned by an actual jury. It requires no in-depth briefing or argument to recognize a clear violation of the right to a jury trial. "[T]o hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Sullivan v. Louisiana*, (1993) 508 U.S. 275, 279. This is another reason why summary reversal is appropriate.[12]

CONCLUSION

Requiring defendants to show on appeal that no reasonable jury could have been convinced beyond a reasonable doubt that there was no threat of great bodily injury, when under state law and the jury's instructions the evidence was insufficient if the jury could not have rationally ruled out a threat of *any* injury or a battery (and the force used was necessary to resist that threat), is a blatant

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[12]There is a theoretical, but extremely remote, possibility that on remand the California courts would hold that the homicide rule applies also to non-homicide cases and that all the contrary authority is mistaken. This would mean that Petitioner, arguably like the *Musacchio* defendant, was given the benefit of an erroneous instruction enlarging the prosecution's burden. Even if such a decision could be applied to Petitioner without incurring *ex post facto* problems, there are critical differences between *Musacchio* and this case.

Thus, as to the jury-trial right, in *Musacchio* the jury found all the legally necessary elements to have been proven, on evidence the sufficiency of which the defendant did not challenge. Here there is no way of knowing what jurors thought about Petitioner faced a risk of great bodily injury: the issue was not presented to them, and conviction could not have been based on the prosecution's having met the greater burden of disproving a risk of battery or injury, because the prosecution conceded that there was such a risk. RT 575, quoted on page 6, above.

As to the opportunity to defend, in *Musacchio* there was no hint of reliance on the erroneously added element. Neither the indictment nor the only instructions proposed by either side included it, and the opinion contains no suggestion that such reliance was somehow an issue. Here the parties knew what the officially prescribed instruction was and tailored their evidence and argument around it.

Finally, as to review of whether the fact-finder's decision is reasonable under *Jackson v. Virginia*, a court is not even conducting such review if, as here, it upholds a conviction based on sufficient evidence to disprove a fact that was not the subject of trial-level litigation, rather than relating the evidence to the issue actually contested at both the trial and on appeal. There was no such problem in *Musacchio*, where what was contested at trial was what the law required and the defendant agreed on appeal that there was sufficient evidence on those elements.

violation of the rights to due process and trial by jury. It is taking place in a jurisdiction with a massive criminal-justice system and in appeals regarding a frequently-charged crime and a frequently-litigated defense.

The irrationality and unfairness is so obvious and incontrovertible that summary treatment is appropriate. Rule 16.1. A writ of certiorari should issue, along with an order vacating the judgment and remanding for proceedings consistent with the following seemingly obvious principles:

1. In general, courts reviewing claimed insufficiency of the evidence are constitutionally required to examine whether the prosecution met its burden under applicable, rather than inapplicable, state law, as set forth in the instructions given to the jury.
2. However, if the instructions did not accurately reflect the law, courts may apply the rule that "a sufficiency challenge should be assessed against the elements of the charged crime, not against the erroneously heightened command in the jury instruction," *Musacchio v. United States*, *supra*, 577 U.S. at ___, only if *Musacchio* is indistinguishable, meaning, for example, that the record establishes that the jury found all necessary elements proven, and that there is no indication that the parties may have relied on the erroneous framework expressed in the instructions in trying the case.

DATED: February 12, 2019

Respectfully submitted,

/s/

Michael P. Goldstein,
Counsel of Record for Petitioner

APPENDIX

Filed 7/26/18 P. v. Lew CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. ARTHUR NOP LEW, Defendant and Appellant.	A149775 (Solano County Super. Ct. No. FCR320190)

Following a jury trial, defendant Arthur Nop Lew was convicted of assault with a deadly weapon. He was sentenced to 14 years in state prison. Defendant asserts insufficient evidence supports his conviction because the evidence at trial demonstrates he acted in self-defense. In addition, defendant raises several purported instructional errors and other issues. We affirm.[1]

I. BACKGROUND

Defendant was charged in an amended information, filed on August 4, 2016, with assault with a deadly weapon. (Pen. Code,[2] § 245, subd. (a)(1).) In connection with the charge, the information also alleged enhancements for personal infliction of great bodily injury (§ 12022.7, subd. (a)), personal use of a deadly weapon (§ 12022, subd. (b)(1)), and various prior convictions including one strike.

[1] In a related petition for a writ of habeas corpus (case No. A151784), defendant likewise argues he received ineffective assistance of counsel and provides supporting declarations. We deny the petition today by separate order.

[2] All statutory references are to the Penal Code unless otherwise indicated.

The charge against defendant was based on a March 8, 2016 fight between him and Matthew H. Matthew and Nicole S. had been in a long-term relationship and had lived with their two children and Nicole's adopted son. Shortly after Matthew and Nicole separated, defendant began a sexual relationship with Nicole. Defendant and Matthew had been friends prior to defendant's relationship with Nicole. However, when Matthew discovered defendant's relationship with Nicole, it triggered an exchange of threatening messages between Matthew, Matthew's brother, defendant, and Nicole. In part, Matthew texted defendant, "You're a target," and Matthew's brother sent defendant a Facebook message reading, "I'm going to send the goons, punk." Matthew's brother also texted Nicole that defendant's relationship with her was "a punishable offense" and "The streets will provide justice." In response, defendant called Matthew "retarded," and told him to "choose [your] words wisely because [I] don't play" and to "Bring it."

A few days prior to the fight, Matthew went to the Mission Solano homeless shelter where defendant sometimes stayed. Witnesses at the shelter described Matthew as angry and making verbal threats against defendant. Matthew testified he wanted to speak with defendant to confront him and "get some closure," but did not make any threats. It is undisputed, however, Matthew was asked to leave and did not speak with defendant at that time.

On March 8, 2016, Matthew arrived unannounced at Nicole's residence with two of the children. When she partially opened the door, Matthew saw defendant in the house. Matthew became angry because the third child also was in the house, and he and Nicole had agreed significant others would not be around the children. Matthew testified he was able to enter the house because Nicole let him in when defendant stated, "Let the motherfucker in. Let that motherfucker in. Let him in, Nicole." Nicole and the children, on the other hand, testified Matthew forced his way into the house, despite her repeated requests that he not enter. It is undisputed that, while in the doorway, Matthew pulled out and threw a box cutter at defendant, although Matthew and Nicole dispute whether the blade was open. Matthew then admitted to entering the house and picking up an umbrella, but asserted he immediately dropped it. Nicole testified Matthew picked up

both a bat and an umbrella, and threatened defendant with them. Matthew was angry and yelling during this time.

Matthew then approached defendant. The evidence is undisputed that, by this time, Matthew's hands were empty. As he approached, Matthew stated to defendant, "It's fine. You can have her," "I just want a hug," and "I don't want to fight you." Matthew had slightly calmed down at this point. Matthew testified he intended to hug defendant, but defendant pushed and stabbed him with a knife. In response, Matthew began punching defendant, and defendant began "slicing" Matthew with at least one knife. Matthew testified he "staggered" defendant with one of his punches while being stabbed by defendant. Nicole's testimony disputed Matthew's account of the fight. While she agreed Matthew approached defendant asking for a hug, she testified Matthew triggered the fight by punching defendant.

Nicole had been between Matthew and defendant just prior to the fight, but was pushed into the kitchen when the fight began. After catching her balance, she returned to where the men were fighting, pulled Matthew away from defendant, and told him to leave. At that point, Matthew noticed the blood and lacerations, gathered his things, and left the house. Nicole told her son to give Matthew a towel. He did so, and Matthew left with the towel pressed to his neck. Matthew and Nicole's daughter, who entered the house around the time the fight ended, testified defendant stated, "Nigga, I'm going to come find you and kill you" while Matthew was leaving. She testified she saw defendant with a bloody knife, and Nicole's son and Matthew both testified they saw defendant with two knives.

The hospital activated the full trauma team in response to Matthew's injuries, a step usually taken only in instances of life-threatening emergencies. The on-call trauma surgeon, John Zopfi, testified Matthew required 40 minutes of resuscitation, intubation, and was placed on a ventilator. Matthew had emergency surgery due to certain injuries, including a 14-centimeter laceration on his neck that transected the external jugular vein, a 12-centimeter laceration along his jaw, and a 16-centimeter laceration on his forehead that went down to the skull and transected his temporal artery. Prior to surgery, Matthew

lost approximately 30 to 35 percent of his total blood volume. Dr. Zopfi opined Matthew would not have survived without the surgery, and would have died in approximately 30 or 40 minutes had the hemorrhages not been controlled.

The jury convicted defendant of assault with a deadly weapon, and found true the enhancements for personal infliction of great bodily injury and personal use of a deadly weapon. He was sentenced to 14 years in state prison. Defendant timely appealed.

II. DISCUSSION

A. *Sufficiency of Evidence for Assault Conviction*

Defendant argues insufficient evidence supports his conviction for assault "[b]ecause the prosecution's evidence showed that only the actions [defendant] took were sufficient to stave off [Matthew's] attack," and thus raised reasonable doubt on the issue of self-defense.

1. Standard of Review

Our review of any claim of insufficiency of the evidence is limited. " ' "When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." ' " (*People v. Hill* (1998) 17 Cal.4th 800, 848–849.) The same standard of review applies when a conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) An appellate court does not reweigh the evidence, reassess witness credibility or resolve factual questions. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.' " (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Given this court's limited role on appeal,

defendant bears a significant burden in claiming there was insufficient evidence to sustain his convictions.

2. Analysis

" 'To justify an act of self-defense . . . , the defendant must have an honest *and reasonable* belief that bodily injury is about to be inflicted on him. [Citation.]' [Citation.] The threat of bodily injury must be imminent [citation], and '. . . any right of self-defense is limited to the use of such force as is reasonable under the circumstances.' " (*People v. Minifie* (1996) 13 Cal.4th 1055, 1064–1065.) A person also has the right to resist a battery (i.e., an offensive touching) by using force that is reasonable under the circumstances, even if no injury is being inflicted. (*People v. Myers* (1998) 61 Cal.App.4th 328, 335 (*Meyers*).) However, " 'deadly force or force likely to cause great bodily injury may be used only to repel an attack which is in itself deadly or likely to cause great bodily injury.' " (*People v. Hardin* (2000) 85 Cal.App.4th 625, 629–630.)

Whether a defendant acted in self-defense may turn on various factual issues, which are normally resolved by the jury. For example, these may include whether the circumstances would cause a reasonable person to perceive the necessity of self-defense, whether the defendant actually acted in defense of himself, and whether the force he used was excessive. (See *People v. Clark* (1982) 130 Cal.App.3d 371, 378, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 92.) As noted above, the substantial evidence rule prohibits us from reassessing the credibility of the witnesses or resolving factual disputes.

Here, the evidence supporting defendant's self-defense claim was far from uncontroverted, and reasonable persons could differ on whether the amount of force he used was excessive under the circumstances. It is undisputed Matthew entered the house and approached defendant. Although conflicting evidence was offered regarding how the fight began, it is undisputed Matthew was not wielding any weapons while defendant possessed one or two knives.

Once the fight began, defendant engaged in conduct—stabbing with a box cutter and/or knife—likely to cause great bodily injury. The only justification for such conduct is if defendant reasonably believed he was at risk of great bodily injury. (*People v. Hardin*, *supra*, 85 Cal.App.4th at pp. 629–630.) The record does not establish defendant either faced such a risk or could reasonably believe he faced such a risk. Nothing in the record suggests Matthew's fists, alone, would cause such harm. Nor does the record suggest defendant believed Matthew's fists could cause such harm. Even Nicole, who observed the entire fight and was between Matthew and defendant for a portion of it, did not testify as to any injuries sustained by defendant. The primary "threat" to defendant that Nicole identified in her testimony was Matthew allegedly knocking defendant against a sliding door and punching defendant from above. However, on cross-examination, Nicole contradicted this testimony and conceded defendant did not fall against the sliding door and instead Matthew and defendant were punching each other. The photographs of defendant after the fight also do not disclose any obvious injuries. While it is possible defendant was bruised under his clothing, he clearly did not experience any meaningful injury to his head or face and was not bleeding apart from a minor cut on one finger.

Moreover, there is no evidence to suggest defendant attempted to first use lesser force without success. For example, there is no evidence defendant began the fight with only his fists, or threatened Matthew with the knife prior to actually using it. Rather, the record shows the fight likely lasted for less than 40 seconds and Matthew was in Nicole's residence for no more than five minutes. The extent of Matthew's injuries—within a 40-second timeframe—suggests defendant immediately utilized the knife in a manner to cause great bodily injury without attempting to first defend himself with a lesser degree of force.

Under these circumstances, the jury could have reasonably determined the prosecutor presented sufficient evidence to negate defendant's self-defense claim. The evidence, viewed most favorably to the prosecution, establishes defendant used unreasonable force in his fight with Matthew, defeating his claim of lawful self-defense.

Although Matthew threw a box cutter at defendant and initially picked up an umbrella and possibly a bat, Matthew was not holding any weapons when he approached defendant. While Matthew was able to strike defendant at least twice, it is unclear whether those punches caused any actual harm to defendant in light of the lack of any visible injuries on him. Matthew, however, suffered multiple lacerations to his face, neck, arm, and torso, including a forehead laceration that went all the way to the skull and transected the temporal artery and a neck laceration that transected the external jugular vein. Matthew's injuries would have been fatal had he not received emergency surgery, and he has ongoing physical trauma.

Drawing all logical inferences in favor of the verdict, substantial evidence supports the jury's finding that defendant used excessive force in defending himself against Matthew. (*People v. Harris* (1971) 20 Cal.App.3d 534, 537 [" 'the question of whether there was [excessive force] is ordinarily one of fact for the jury to determine' "].) That the record also includes some evidence from which a rational jury could have found otherwise does not establish defendant acted in self-defense as a matter of law. Accordingly, we find the evidence adduced at trial was sufficient to support his conviction.[3]

B. *Ineffective Assistance of Counsel in Closing Argument*

On appeal and in a related habeas corpus petition, defendant argues ineffective assistance of counsel due to his counsel's failure to emphasize Matthew's alleged concession that "it took every blow [defendant] struck to get [Matthew] to back off."

"Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result."

[3] Because we find substantial evidence supports a finding that defendant used excessive force, we need not address whether there was substantial evidence of mutual combat or of defendant initiating the fight.

(*People v. Dennis* (1998) 17 Cal.4th 468, 540.) "The right to effective assistance extends to closing arguments. [Citations.] Nonetheless, counsel has wide latitude in deciding how best to represent a client, and deference to counsel's tactical decisions in his closing presentation is particularly important because of the broad range of legitimate defense strategy at that stage. Closing arguments should 'sharpen and clarify the issues for resolution by the trier of fact,' [citation], but which issues to sharpen and how best to clarify them are questions with many reasonable answers. Indeed, it might sometimes make sense to forgo closing argument altogether. [Citation.] Judicial review of a defense attorney's summation is therefore highly deferential . . . ." (*Yarborough v. Gentry* (2003) 540 U.S. 1, 5–6.) "Reversals for ineffective assistance of counsel during closing argument rarely occur; when they do, it is due to an argument against the client which concedes guilt, withdraws a crucial defense, or relies on an illegal defense." (*People v. Moore* (1988) 201 Cal.App.3d 51, 57.) "The mere circumstance that a different, or better, argument could have been made is not a sufficient basis for finding deficient performance by defense counsel." (*People v. Ledesma* (2006) 39 Cal.4th 641, 748.)

In this case, counsel may well have believed raising the argument defendant now asserts on appeal would not have been the best trial strategy. First, counsel's decision to focus on the increasing threat posed by Matthew to justify defendant's response was a reasonable approach. Defendant acknowledges as much. He repeatedly notes his counsel's representation was "excellent" and "admirable" apart from this one allegedly missing argument. As to the omitted argument, and contrary to defendant's assertions, Matthew never testified he stopped only when defendant struck the final blow. Rather, Matthew testified that "everything stopped" upon seeing blood everywhere, and he left after realizing the extent of his injuries. Had trial counsel pursued this alternative argument now proposed by defendant, he would have been forced to address conflicting evidence regarding how and why the fight stopped. For example, Nicole testified the fight ended when she pulled Matthew away from defendant. Counsel then would have needed to argue why Nicole would have been unable to do the same had Matthew suffered lesser injuries. And counsel would have needed to address and counter the

prosecution's evidence that Matthew may have been *more likely* to continue fighting due to the severity of his injuries. Contrary to defendant's position, this is neither a clean nor simple argument.

Second, trial counsel spent a considerable portion of time impeaching Matthew during his testimony. After painting Matthew as a liar, it was reasonable for counsel to avoid asking the jury to then rely on Matthew's testimony.

Finally, we note counsel did, in fact, argue the point defendant now raises. And defendant concedes his trial counsel "did touch on this." Trial counsel argued as part of his summation: "When this incident is going on, and when the fight is taken into the kitchen and [Matthew] is punching [defendant] and [defendant] is defending himself against these attacks, and the attacks wind up on the back sliding glass door, [Matthew] tells the police officers that even as he's getting cut, even as [defendant] is defending himself against these attacks, he caught him with a punch and he rocked him. [¶] [Defendant] was backing up the entire time. The fight goes on. He's defending himself; and even as [defendant] is defending himself, [Matthew] continues to go forward. He hits him with a punch so hard that it rocked him. [¶] . . . [¶] . . . So is the danger over? Is the danger over when an individual that has done all this, knife, bat, umbrella[,] sucker punch, and the fight is taken to the kitchen, [defendant] uses the knife to defend himself, and this individual is still coming forward at you, and he's still coming forward at you throwing punches, punches hard enough to rock him, causing him to slide back to the sliding glass door."

Defendant's position that the summation should have further emphasized this point or been structured differently, does not support a finding that counsel's performance was deficient. As the United States Supreme Court noted in *Yarborough*: "When counsel focuses on some issues to the exclusion of others, there is a strong presumption that he did so for tactical reasons rather than through sheer neglect. [Citation.] That presumption has particular force where a petitioner bases his ineffective-assistance claim solely on the trial record, creating a situation in which a court 'may have no way of knowing whether a seemingly unusual or misguided action by counsel had a

sound strategic motive.' [Citation.] Moreover, even if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight." (*Yarborough v. Gentry*, *supra*, 540 U.S. at p. 8.)

Defendant also contends trial counsel raised a "patently invalid legal theory" when he first commented if someone uses deadly force against you by shooting a gun, you can use deadly force to defend yourself, and then analogized that to if someone throws a knife, you can pick up the knife and defend yourself with it. Defendant asserts this argument reduced counsel's credibility because he was relying on a misstatement of the law. Defendant cites no authority to support his proposition. (*People v. Stanley* (1995) 10 Cal.4th 764, 793 [when a defendant fails to support an argument with citations to authority, we may treat it as waived].) Even considering the merits, counsel's closing, as a whole, was within the correct legal framework. As part of his summation, trial counsel read the jury the instruction on self-defense and proceeded to discuss each element. When he reached the third element—whether defendant used no more force than was necessary—he described how Matthew barged into the house, pulled and opened a knife, and threw it at defendant. Trial counsel argued an individual has the right to defend himself with a deadly weapon if that deadly weapon was used against him, and analogized that proposition to the current situation where "[a]n individual throws a knife at [defendant]. He picks up the knife, and he defends himself with the same knife." Counsel then presented the following argument: "And I submit to you, [defendant] acted reasonably by picking up that knife, because [Matthew] did not deescalate. He grabbed a bat. He grabbed an umbrella, and he sucker punched him, furthe[r] escalating the incident. [¶] It goes along the line of what I just said. . . . [Y]ou don't have to wait for you to be injured by this weapon, because if you wait, you might be dead." In the context of counsel's larger argument, we do not believe defendant has established this analogy reduced counsel's credibility or otherwise undermined his summation.

Accordingly, we reject defendant's ineffective assistance claim based on his counsel's summation because he fails to overcome the presumption that counsel's

argument reflected a reasonable tactical choice. (See *People v. Freeman* (1994) 8 Cal.4th 450, 498 [decision as to how to argue to the jury is inherently tactical].)

C. *Cumulative Error*

Defendant next argues prosecutorial misconduct and various instructional errors deprived him of a fundamentally fair proceeding and entitle him to a new trial. As we explain below, the court did not err except by instructing the jury on CALCRIM No. 3471. That error, however, did not prejudice defendant, and we find no basis for concluding defendant was otherwise deprived of a fair trial.

1. Prosecutorial Misconduct

Defendant first contends the prosecution engaged in misconduct by suggesting defendant was getting off lightly with an assault conviction rather than one for attempted murder. Defendant argues the prosecution engaged in a deceptive method of persuasion by suggesting defendant deserved harsher treatment than he would receive via conviction. We disagree.

The standards governing review of misconduct claims are settled. Under state law, reversal is required "when a prosecutor uses 'deceptive or reprehensible methods to persuade either the court or the jury' [citation] and ' "it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct." ' " (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Although it is not necessary to show the prosecutor acted in bad faith, a defendant asserting misconduct must show, " ' "[i]n the context of the whole argument and the instructions" [citation], there was "a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner." [Citation.] If the challenged comments, viewed in context, 'would have been taken by a juror to state or imply nothing harmful, [then] they obviously cannot be deemed objectionable.' " (*People v. Cortez* (2016) 63 Cal.4th 101, 130.)

Defendant concedes he did not object at trial to the alleged instances of misconduct he now raises on appeal. Nor did he request the jury be admonished. "A defendant generally ' " 'may not complain on appeal of prosecutorial misconduct unless

in a timely fashion—and on the same ground—[he or she] made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]' " [Citation.]' [Citation.] A defendant's failure to object and to request an admonition is excused only when 'an objection would have been futile or an admonition ineffective.' " (*People v. Fuiava* (2012) 53 Cal.4th 622, 679 (*Fuiava*).)

Defendant asserts we should excuse his failure to object because doing so would have been futile and any admonishment ineffective. He cites *People v. Hill*, *supra*, 17 Cal.4th 800, 820 in support of his position. But this case is not on a par with the circumstances of *Hill*. "[D]efense counsel here was not faced with a ' "constant barrage of [the prosecutor's] unethical conduct" ' and counsel's objections did not provoke ' "the trial court's wrath." ' Unlike in *Hill*, the trial court in this case did not suggest before the jury that counsel was ' "an obstructionist," ' and was merely ' "delaying the trial with 'meritless' objections." ' " (*Fuiava*, *supra*, 53 Cal.4th at p. 680; accord, *People v. Friend* (2009) 47 Cal.4th 1, 29 [defense counsel's failure to object to alleged misconduct is excused "when the 'misconduct [is] pervasive, defense counsel [has] repeatedly but vainly objected to try to curb the misconduct, and the courtroom atmosphere was so poisonous that further objections would have been futile' "]; *People v. Dykes* (2009) 46 Cal.4th 731, 775 [exception to forfeiture rule does not apply when the case "did not involve counsel experiencing—as did counsel in *Hill*—a 'constant barrage' of misstatements, demeaning sarcasm, and falsehoods, or ongoing hostility on the part of the trial court, to appropriate, well-founded objections"].) As was the case in *Fuiava*, "[h]ere, the record does not establish that properly framed objections would have been in vain or provoked any 'wrath' on the part of the trial court; rather, all indications are that the court was reasonably responsive to defense objections throughout the trial," and was courteous and succinct in ruling on the objections of both parties. (*Fuiava*, at p. 680.) "There is no reason to suspect the trial court was predisposed to overrule objections to the prosecutor's deeds (i.e., that an objection would have been futile), or that corrective actions, such as appropriately strong admonitions, would not have been able to cure any prejudicial effect on the jury had defendant requested them." (*Ibid.*) Accordingly, we do

not excuse the failure to preserve prosecutorial misconduct claims below. Those claims were forfeited.

Nor does defendant's claim have merit. Nowhere in the record does the prosecution argue defendant deserved harsher treatment than he would receive if convicted of the charged offense. Instead, the statements at issue related to the extent of Matthew's injuries and defendant's "intent to kill."[4] Such comments are appropriate. " '[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine.' " (*People v. Thomas*, *supra*, 2 Cal.4th at p. 526.) In *Thomas*, for example, the defendant alleged the prosecutor engaged in misconduct by inviting the jury to speculate that a murder was sexually motivated. (*Ibid*.) The Supreme Court framed the issue as whether the inference of possible motive "found some basis in the evidence, or was instead based on mere suspicion, imagination, speculation, surmise, conjecture, or guesswork." (*Id*. at p. 527.) The court ultimately rejected the argument, concluding the "comments here had a sufficient evidentiary basis." (*Ibid*.)

Here, the statements regarding the extent of Matthew's injuries are directly drawn from the evidence presented by Dr. Zopfi. He testified Matthew required 40 minutes of resuscitation and was placed on a ventilator. He described the various injuries on Matthew, including a 14-centimeter laceration on his neck, a 12-centimeter laceration along the jaw, and a 16-centimeter laceration on his forehead. Zopfi noted one laceration was down to the skull and transected the temporal artery, and one laceration transected the external jugular vein. He estimated Matthew lost approximately 30 to 35 percent of

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[4] While defendant argues these statements implied he committed attempted murder, these comments were made in the context of whether he exercised a reasonable degree of force when acting in self-defense. (*People v. Dennis*, *supra*, 17 Cal.4th 468, 522 ["we must view the statements in the context of the argument as a whole"].) Accordingly, we view these statements as addressing whether defendant responded with reasonable force.

his total blood volume and would have died within 30 to 40 minutes from his injury without control of the hemorrhage. The prosecutor's comments regarding defendant's intent to kill are also supported by testimony. Matthew and Nicole's daughter testified defendant said, "Nigga, I'm going to come find you and kill you," when Matthew was leaving Nicole's residence. The prosecutor's comments were thus based in the evidence and did not amount to deceptive or reprehensible methods of persuasion.

2. Jury Instruction on CALCRIM No. 224

Defendant contends the trial court erred by failing to instruct the jury "it could not convict unless the circumstantial evidence was inconsistent with any rational conclusion other than guilt." The People assert defendant forfeited this argument by failing to raise it below. We agree the argument is forfeited.

As a general rule, " '[a] party may not argue on appeal that an instruction correct in law was too general or incomplete, and thus needed clarification, without first requesting such clarification at trial.' " (*People v. Livingston* (2012) 53 Cal.4th 1145, 1165 (*Livingston*).) Defendant does not dispute he failed to object to the jury instruction, but contends he was not required to request clarification because the instruction actually given was an incorrect statement of law. (See *People v. Franco* (2009) 180 Cal.App.4th 713, 719 ["The rule of forfeiture does not apply, however, if the instruction was an incorrect statement of the law [citation], or if the instructional error affected the defendant's substantial rights."].)

Defendant relies on *People v. Bender* (1945) 27 Cal.2d 164, 175 (*Bender*) and CALJIC No. 2.01 in support of his argument. These authorities provide " 'that, to justify a conviction, the facts or circumstances must not only be entirely consistent with the theory of guilt but must be *inconsistent with any other rational conclusion*.' " (*Bender*, at p. 175, italics added; CALJIC No. 2.01 ["a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion"].) The Supreme Court in *Bender* further noted, " 'Neither the statement in an instruction that the guilt of the defendant must be

established beyond a reasonable doubt, nor the statement that as between two opposing reasonable inferences the one which is consistent with innocence must be preferred to the one tending to show guilt, satisfies the right of the defendant to have the jury instructed that where circumstantial evidence is relied upon by the People it must be irreconcilable with the theory of innocence in order to furnish a sound basis for conviction.' " (*Bender*, at pp. 175–176.) Defendant maintains the trial court's omission of the italicized language from its jury instruction conflicts with authority from our high court. (See *id*. at pp. 175, 177.)

Defendant is correct CALCRIM No. 224 does not contain the language stating circumstantial evidence must be "inconsistent with any other rational conclusion." But no authority requires use of this precise language. Our Supreme Court "has long held that when the prosecution's case rests substantially on circumstantial evidence, trial courts must give 'an instruction *embodying the principle* that to justify a conviction on circumstantial evidence the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.' " (*Livingston*, *supra*, 53 Cal.4th at p. 1167, italics added.)

Here, the trial court instructed the jury, "[B]efore you may rely on circumstantial evidence to find the defendant guilty, you must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the defendant is guilty." Thus, the trial court fulfilled its obligation to instruct the jury that, to justify a conviction on circumstantial evidence, the facts and circumstances must be inconsistent with any other rational conclusion. (*Livingston*, *supra*, 53 Cal.4th at p. 1167; *Bender*, *supra*, 27 Cal.2d at pp. 175, 177.)

No reasonable jury would interpret CALCRIM No. 224 in such a way as to allow conviction if it could draw multiple reasonable inferences from the circumstantial evidence, one of which points to innocence. "Words of equal import may be substituted if the principle is substantially but clearly and fairly set forth." (*People v*. *Navarro* (1946) 74 Cal.App.2d 544, 550.) None of the authority cited by defendant suggests otherwise. (See, e.g., *People v*. *Koenig* (1946) 29 Cal.2d 87, 93 [error in not giving the

requested instruction or "a proper statement of the principle"]; *People v. Kinowaki* (1940) 39 Cal.App.2d 376, 380 [trial court erred in refusing to give requested instruction or "its equivalent"].) The instruction given adequately conveys and embodies the principle articulated in *Bender*. Contrary to defendant's contention, CALCRIM No. 224 does not merely convey circumstantial evidence must be consistent with guilt, but that it must be "the only reasonable conclusion" to be drawn from the circumstantial evidence. (CALCRIM No. 224.) Accordingly, defendant forfeited his claim of error.[5]

3. Jury Instruction on CALCRIM No. 3471

Defendant contends the court erred in instructing the jury on mutual combat pursuant to CALCRIM No. 3471, because there was no evidence he either provoked the fight or engaged in mutual combat. We agree, but conclude the error was harmless.

It is well settled that "instructions *not* supported by substantial evidence should not be given. [Citation.] 'It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case.' " (*People v. Ross* (2007) 155 Cal.App.4th 1033, 1050 (*Ross*).) "Evidence is '[s]ubstantial' for this purpose if it is 'sufficient to "deserve consideration by the jury," that is, evidence that a reasonable jury could find persuasive.' " (*Id*. at pp. 1049–1050.)

As both parties concede, the doctrine of mutual combat as provided in CALCRIM No. 3471 requires " 'not merely the *combat*, but the *preexisting intention to engage in it* . . . be mutual.' " (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1044, first italics added; accord, *Ross*, *supra*, 155 Cal.App.4th at p. 1045 [the term " 'mutual combat' means not merely a reciprocal exchange of blows but one *pursuant to mutual intention, consent, or agreement preceding the initiation of hostilities*"].) There "must be evidence from which the jury could reasonably find that *both combatants actually consented or intended to fight before the claimed occasion for self-defense arose*." (*Ross*, at p. 1047.)

[5] Because we find defendant forfeited his claim of error, we need not address defendant's argument that the error was significant.

Here, no one testified defendant and Matthew shared a preexisting intent to fight at Nicole's house. Matthew testified he intended to hug defendant when he approached defendant. Only after defendant allegedly pushed (and stabbed) Matthew did Matthew begin punching defendant. While other witnesses contradicted Matthew's depiction of events, they also did not recount any preexisting agreement to fight. For example, Nicole testified Matthew approached defendant requesting a hug but then sucker punched defendant. Under her version, Matthew unilaterally attacked defendant. Despite this contradictory evidence, under either scenario there was no mutual, preexisting agreement to fight.[6]

Although the instruction on mutual combat should not have been given here, the error is harmless. (*People v. Clem* (1980) 104 Cal.App.3d 337, 344–345 [reversal required only if there is a reasonable probability that a result more favorable to the defendant would have been reached had the instruction not been given].) "[G]iving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' " (*People v. Cross* (2008) 45 Cal.4th 58, 67.) When a court errs by giving a correct instruction that has no application to the facts of the case, the error does not amount to a constitutional violation and is reviewed under the standard articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*). (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129–1130.) "Under *Watson*, reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*Id*. at p. 1130.)

The record reflects no such probability. The jury was instructed, pursuant to CALCRIM No. 200, that some of the instructions may not apply, depending on its findings about the facts of the case, and that the inclusion of a particular instruction did

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[6] Nor does the other evidence cited by the parties suggest a preexisting intention to engage in mutual combat. For example, the exchange of threatening texts was not directly related to the March 8 incident. Likewise, Matthew's testimony that defendant told Nicole to let Matthew into the house must be viewed in the context of Matthew's other testimony—i.e., that *he* no longer desired to fight when approaching defendant. We also note the prosecution conceded defendant was not the aggressor.

not mean the court was "suggesting anything about the facts." The jury was also instructed to first determine what the facts were, then follow the instructions that applied to the facts as it found them. Although there was insufficient evidence of mutual combat, we presume the jury, following the directive of CALCRIM No. 200, disregarded the inapplicable portions of CALCRIM No. 3471. (See *People v. Holloway* (2004) 33 Cal.4th 96, 152–153; *People v. Guiton*, *supra*, 4 Cal.4th at p. 1131 ["The jurors' 'own intelligence and expertise will save them from' the error of giving them 'the option of relying upon a factually inadequate theory.' "].) We further note the prosecutor did not argue the applicability of CALCRIM No. 3471 in his closing argument and, in fact, acknowledged "Matthew . . . came in hot. . . . [¶] [and] defendant reasonably believed that the use of—the immediate use of force was necessary to defend against that danger." (*People v. Crandell* (1988) 46 Cal.3d 833, 870 [no harm where "instruction did not figure in the prosecutor's closing argument"].) And there is no evidence, such as questions from the jury, indicating the jury relied on the mutual combat instruction in reaching its verdict. For these reasons, it is not reasonably probable that defendant would have received a more favorable verdict had the mutual combat instruction not been given.

4. Failure to Instruct on CALCRIM No. 226

Defendant next contends the trial court erred by failing to instruct the jury that a grant of immunity is a factor to consider when evaluating credibility. We disagree.

CALCRIM No. 226 is the pattern instruction on determining the credibility of a witness. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 934–936.) The introductory paragraphs state in part: "You alone must judge the credibility or believability of the witnesses. In deciding whether testimony is true and accurate, use your common sense and experience. . . . [¶] In evaluating a witness's testimony, you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." (CALCRIM No. 226.) The pattern instruction lists numerous factors for the jury to consider as to a witness's credibility, including whether the witness is influenced by any bias, prejudice, or a personal interest in how the case is decided. (*Ibid*.) The pattern instruction also has various optional or "bracketed" witness credibility factors that may

be included—when relevant—based on the evidence presented. (*Ibid*.; *People v*. *Horning* (2004) 34 Cal.4th 871, 910 [court "may omit factors that are inapplicable under the evidence"].) One such bracketed factor states: "Was the witness promised immunity or leniency in exchange for his or her testimony?" (CALCRIM No. 226.)

Here, defendant asserts the interview between Matthew and the police constitutes such a promise of immunity or leniency. Specifically, during the interview Matthew expresses concern regarding whether he would be charged for his conduct. In response, the police officers responded that it was "not our job" and "the DA will look at it," but "There's nothing that you've explained to me so far that I can see a crime in." The police also stated, "We're not gonna charge you with anything," and explained the "major lacerations" on Matthew's face and neck were "our main concern right here."

Nothing in *People v*. *Rincon-Pineda* (1975) 14 Cal.3d 864, nor any other case cited by defendant, requires the inclusion of the bracketed factor on immunity in the trial court's witness credibility instruction. Nor are we aware of any such authority requiring inclusion of this factor under similar circumstances. Moreover, CALCRIM No. 226 specifically states: "In evaluating a witness's testimony you may consider anything that reasonably tends to prove or disprove the truth or accuracy of that testimony." The jurors were thus free to draw whatever conclusion they wished to draw from Matthew's exchange with the police.

Finally, even if we were to deem the omission of the bracketed credibility factor from the given CALCRIM No. 226 instruction to constitute error, we would find such an error harmless. CALCRIM No. 226, as given, instructed the jury to "Consider the testimony of each witness" and to "consider anything that reasonably tends to prove or disprove the accuracy of that testimony." In addition, defendant did not argue at trial that Matthew's credibility was suspect due to any alleged agreement of immunity or lenience. Accordingly, we see no reasonable probability that defendant would have obtained a more favorable outcome had the bracketed credibility factor been included in the CALCRIM No. 226 instruction given to the jury. (*Watson*, *supra*, 46 Cal.2d at p. 836.)

5. Due Process Right to a Fair Trial

Defendant raises two arguments regarding his due process right to a fair trial. First, defendant contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial. However, as we have " 'either rejected on the merits defendant's claims of error or have found any assumed errors to be nonprejudicial,' " we reach the same conclusion with respect to the cumulative effect of the purported errors. (*People v*. *Cole* (2004) 33 Cal.4th 1158, 1235–1236, quoting *People v*. *Sapp* (2003) 31 Cal.4th 240, 316.)

Second, defendant argues reversal is required because his trial was fundamentally unfair, even if such unfairness was not the result of any error. In support of this argument, defendant relies on *People v*. *Chambers* (1964) 231 Cal.App.2d 23 (*Chambers*). *Chambers* is distinguishable. In *Chambers*, the owner of a convalescent home was charged with one count of assault on a patient in a convalescent home. He was jointly tried with an employee who had been charged with three separate assaults on patients, none of which were the same assault the defendant was charged with. (*Id*. at pp. 24–25.) Defense counsel had stipulated to a joint trial and did not object to the "voluminous evidence of unrelated acts of brutality by [the employee], admissible only because she was on trial for offenses unrelated to that charged against [the defendant]." (*Id*. at p. 27.) The jury was not admonished about the limited admissibility of the evidence. (*Id*. at pp. 27–28.) Further, there was irrelevant evidence that suggested the defendant and his employee shared a bed. (*Id*. at p. 28.) As a result, the appellate court concluded the defendant was probably convicted based on his employment and romantic relationships with his employee, rather than by evidence of his personal guilt. (*Id*. at p. 28.) The appellate court stated, even though no motion for severance had ever been made: "The record impresses us with the belief that [the defendant] was probably fastened with vicarious responsibility for the long-continued brutality of [the employee], in the absence of any charge of concerted or conspiratorial action." (*Id*. at p. 29.)

Chambers thus involved a different issue, that is, review of a decision to consolidate or to sever. Normally, review of a trial court's decision to consolidate or

sever trials is based on the evidence available to the trial court at the time it made the ruling. (*People v. Hardy* (1992) 2 Cal.4th 86, 167.) This review standard does not evaluate what actually occurred at trial. *Chambers*, and those cases following *Chambers*, recognize in some cases consolidation may result in gross unfairness due to a defendant being convicted based on guilt by association with a codefendant. In those cases, despite the lack of objection or error associated with consolidation, reversal is merited. (*Chambers*, *supra*, 231 Cal.App.2d at pp. 28, 34; accord, *People v. Ervin* (2000) 22 Cal.4th 48, 68–69.) *Chambers* and its progeny do not create a general rule that a defendant is entitled to appellate review of a claim that was waived below or reversal in the absence of any error.[7]

Here, we are not faced with a consolidation issue or the prospect defendant may have been convicted due to inflammatory evidence and guilt by association with a codefendant. Instead we have evidentiary and instructional challenges, none of which raise issues that were unduly inflammatory. Under these circumstances, we reject defendant's claim that he was denied a fair trial.

III. DISPOSITION

The judgment is affirmed.

[7] Defendant also argues *People v. Romero and Self* (2015) 62 Cal.4th 1, supports his position because a similar argument was raised by the parties on appeal. To this end, on February 19, 2018, defendant filed an unopposed request for judicial notice of certain briefs filed in that appeal. We grant that request. (Evid. Code, § 452, subd. (d).) However, the fact that the parties raised a similar argument in *Romero and Self* does not suggest the Supreme Court found it to have any merit. To the contrary, it was summarily rejected. (*Romero and Self*, at p. 58 ["We further conclude this error and any assumed error are not prejudicial when considered cumulatively, nor have defendants otherwise demonstrated that they were denied a fair trial."].)

_____
Margulies, J.

We concur:

_____
Humes, P.J.

_____
Banke, J.

A149775
People v. Lew

COPY

COURT OF APPEAL, FIRST APPELLATE DISTRICT
350 MCALLISTER STREET
SAN FRANCISCO, CA 94102
DIVISION 1

THE PEOPLE,
Plaintiff and Respondent,
v.
ARTHUR NOP LEW,
Defendant and Appellant.

A149775
Solano County No. FCR320190

Court of Appeal, First Appellate District
FILED
AUG 22 2018
Charles D. Johnson, Clerk
by _____ Deputy Clerk

BY THE COURT:

The petition for rehearing is denied.

Date: AUG 22 2018

HUMES, P.J.
_____ P.J.

oruu

Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 02/08/2019 02:23 PM

Case Summary

Supreme Court Case:	**S251080**
Court of Appeal Case(s):	First Appellate District, Div. 1 A149775
Case Caption:	PEOPLE v. LEW
Case Category:	Review - Criminal Appeal
Start Date:	09/11/2018
Case Status:	case closed
Issues:	none
Disposition Date:	11/14/2018
Case Citation:	none

Cross Referenced Cases:
No Cross Referenced Cases Found

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Appellate Courts Case Information

CALIFORNIA COURTS
THE JUDICIAL BRANCH OF CALIFORNIA

Supreme Court

Change court

Court data last updated: 02/08/2019 02:23 PM

Disposition

PEOPLE v. LEW
Division SF
Case Number S251080

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: **none**

Date	Description
11/14/2018	Petition for review denied

Click here to request automatic e-mail notifications about this case.

DECLARATION OF MICHAEL P. GOLDSTEIN

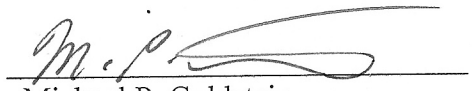
1. My name is Michael P. Goldstein, and I am the attorney appointed by the California Court of Appeal to represent Arthur Lew in his appeal and related proceedings.

2. I have been unable to find in my files a copy of the California Supreme Court order denying review of that appeal.

3. The previous pages of this Appendix are printouts of that court's official online case information pages in petitioner's case, viewed and printed by me on February 7, 2019.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Signed at Oakland, California, on February 10, 2019.



Michael P. Goldstein

blood around that area?
A Yes.
Q Okay. It was blood all over your clothes?
A Yes.
Q How about on, um, how about on the defendant?
A Yes.
Q Okay. Do you remember what he was wearing?
A I don't.
Q You don't? Do you remember if it was a T-shirt or sweatshirt or anything like that?
A I don't.
Q You don't, okay. And what about Nicole? Did she get blood on her?
A I'm sure she did.
Q Okay. All right. And after you were bleeding and did you at some point stop? I mean, how did the whole altercation stop?
A I backed up and I put my hand like this, (indicating), and all these fingers went inside my neck, and I grabbed my skin, and I pulled my skin, (indicating), and it stretched like this far to where it was flapped, and I could see that my skin was cut, and I just held my throat and started to walk outside.

At first, I like grabbed my necklace and my hearing aid, and then I just, I went outside.

THE COURT: For the record, you were holding your hands about what? Four or five inches in front of your face?

THE WITNESS: Yes.

THE COURT: Okay. Go ahead.

Q BY MR. MADOW: Okay. So you knew that your throat was cut?

A Yes.
Q And after, did you notice that you had any other wounds on you?
A Yes.
Q Okay. Where did you have those wounds?
A Right here, (indicating); was hanging like this.
Q So the top left side of your face?
A And then right here, (Indicating).
Q Talking about -- let's go one at a time. The top?
A Side of my face.
Q Hold on one second. The top left side of your face you are pointing to, what happened with the top left side of your face?
A It was cut and hanging like this. I could see my skull, and it was just pouring.
Q Okay. And you are saying the skin was hanging?
A The whole thing, muscle and everything was hanging.
Q And how about the -- you just said there was another wound on the left side of your cheek?
A Yes. All this was open, just like sagging down here like a hole like that big. It just looked like a big hole. (Indicating)
Q Okay. And then anywhere else?
A Yes. Right here was split all the way, like all the way down my nose. (Indicating).
Q Okay.
A It was just pouring blood.
THE COURT: So for the record, he was pointing to the right side of his face, just like on the right side of his temple.

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Q BY MR. MADOW: Right above your temple?
A Yes. (Indicating).
Q And then anywhere else?
A Yes.
Q Where?
A I was cut here, (Indicating).
Q Are you talking about on your left arm?
A Yes.
Q Did you get a scar from that?
A I did, (indicating), because it was hanging. It was like a big hole and then here, (indicating), on the right arm right here. (Indicating)
Q Okay.
A And then here on my left side.
Q And the left side wound is the one we've already seen --
A Yes.
Q -- in People's Exhibit 9? All right. How many times did the defendant stab you in total?
A Seven.
Q Seven?
A I believe.
Q Okay. And when you backed up, was he still coming toward you or what was going on?
A He stopped.
Q He stopped?
A Yeah. He was just -- he was -- he just stopped in the kitchen, and him and Nicole were right there.
Q Okay. Was Nicole facing you, or was Nicole facing the

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Self-defense is a defense to Assault with a Deadly Weapon as charged in Count One ~~or~~ AND Simple Assault, a lesser crime thereto. The defendant is not guilty of those crimes if he used force against the other person in lawful self-defense or defense of another. The defendant acted in lawful self-defense or defense of another if:

1. The defendant reasonably believed that he or someone else was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;

2. The defendant reasonably believed that the immediate use of force was necessary to defend against that danger;

AND

3. The defendant used no more force than was reasonably necessary to defend against that danger.

Belief in future harm is not sufficient, no matter how great or how likely the harm is believed to be. The defendant must have believed there was imminent danger of bodily injury to himself or someone else or an imminent danger that he or someone else would be touched unlawfully. Defendant's belief must have been reasonable and he must have acted because of that belief. The defendant is only entitled to use that amount of force that a reasonable person would believe is necessary in the same situation. If the defendant used more force than was reasonable, the defendant did not act in lawful self-defense or defense of another.

When deciding whether the defendant's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the defendant and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the defendant's beliefs were reasonable, the danger does not need to have actually existed.

The slightest touching can be unlawful if it is done in a rude or angry way. Making contact with another person, including through his or her clothing, is enough. The touching does not have to cause pain or injury of any kind.

The defendant's belief that he was threatened may be reasonable even if he relied on information that was not true. However, the defendant must actually and reasonably have believed that the information was true.

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If you find that Matthew Hamilton threatened or harmed the defendant or others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.

If you find that the defendant knew that Matthew Jason Hamilton had threatened or harmed others in the past, you may consider that information in deciding whether the defendant's conduct and beliefs were reasonable.

Someone who has been threatened or harmed by a person in the past is justified in acting more quickly or taking greater self-defense measures against that person.

If you find that the defendant received a threat from someone else that he reasonably associated with Matthew Hamilton, you may consider that threat in deciding whether the defendant was justified in acting in self-defense or defense of another.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of bodily injury has passed. This is so even if safety could have been achieved by retreating.

The People have the burden of proving beyond a reasonable doubt that the defendant did not act in lawful self-defense or defense of another. If the People have not met this burden, you must find the defendant not guilty of Assault with a deadly weapon or Simple Assault, a lesser crime thereto.