Number _____

**IN THE**

**SUPREME COURT OF THE UNITED STATES**

October Term, 2019

# PETITION FOR WRIT OF CERTIORARI

GEOFF EDWIN MURPHY, Petitioner,

vs.

DEBBIE ASUNCION, Warden, Respondent.

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Petitioner, GEOFF EDWIN MURPHY, respectfully prays that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals, No. 17-17131, filed May 2, 2019, affirming the denial of his habeas corpus petition which challenged his state court conviction for premeditated murder.

On May 9, 2019, in the Court of Appeals, petitioner filed a petition for re-hearing and rehearing *en banc.* On June 11, 2019, the Court of Appeals entered an Order Denying Petition for Rehearing and Petition for Rehearing En Banc.

## OPINIONS BELOW

Attached to this Petition are: the Memorandum Opinion of the Circuit Court of Appeals, May 2, 2019, affirming the denial of habeas corpus relief (No. 17-

17139; App. A); the Opinion of the California Court of Appeal, Fifth Appellate District, filed July 14, 2016, affirming the judgment in all respects (No. F069891; App. B); the Order of the California Supreme Court, filed October 19, 2016, denying the petition for review (No. S236536; App. C); the Findings and Recommendations filed in the District Court on July 5, 2019 (1:16-cv-01934; App. D); the Order of the District Court, Eastern District of California, adopting the Findings and Recommendations and denying the habeas corpus petition on October 19, 2019 (1:16-cv-01934; App. E); and the Order Denying petitioner's Petition for Rehearing and Petition for Rehearing *En Banc* on June 11, 2019 (No. 17-17131; App. F).

## STATEMENT OF JURISDICTION

This Court has jurisdiction on certiorari pursuant to 28 U.S.C. § 1651. The district court had jurisdiction in habeas corpus under 28 U.S.C. § 2254. The Court of Appeals had jurisdiction over the appeal pursuant to 28 U.S.C. § 2253.

## CONSTITUTIONAL PROVISIONS INVOLVED

This Petition concerns the constitutional protection from jury instructions which shift the burden of proof in violation of the Due Process Clause of the Fourteenth Amendment: "No State shall ... deprive any person of life, liberty, or property, without due process of law...."

This Petition also concerns the denial constitutional Due Process protection from a state procedural rule (Cal. Penal Code § 1259). Section 1259 permits discretionary state court forfeiture of a meritorious federal constitutional claim for lack of objection, but does not contain a rule of guided discretion which is firmly established and regularly followed. The lack of a firmly established and regularly followed state procedural rule permits discrimination against federal claims and claimants in design and operation.

## NECESSITY FOR CERTIORARI REVIEW

The circumstances of the present case are highly unusual, but they provide a suitable platform for resolution of at least two recurrent issues which remain unresolved stemming from past decisions of this Court.

First, the procedural record in the state trial court presents a straightforward issue of a burden-shifting jury instruction which relieved the state prosecutor of the burden of demonstrating a necessary element, the absence of self-defense. Prior decisions of this Court suggest that self-defense is a fundamental constitutional right. See *District of Columbia v. Heller,* 554 U.S. 570 (2008) and *McDonald v. City of Chicago,* 561 U.S. 742, 767 (2010). But no decision of this Court has explicitly stated that self-defense is a fundamental right. Without an explicit holding on this important issue, lower courts will lack guidance in applying the

proper standard of review for errors involving an infringement of the right to self-defense.

Second, this Court has cautioned lower federal courts to be alert to state procedural rules which operate to arbitrarily deny review of federal constitutional claims, particularly state rules which evince a "purpose or pattern to evade constitutional guarantees." *Walker v. Martin*, 562 U.S. 307, 321 (2011). But no decision has addressed the degree by which a defendant must demonstrate that the state court purposefully evaded constitutional guarantees. Since the present record suggests that the state court deliberated evaded the issue concerning the burden-shifting jury instruction, resulting in a forfeiture of the federal constitutional claim, this issue is ripe for review.

## STATEMENT OF THE CASE

Petitioner was convicted of premeditated murder with use of a firearm after a jury trial in the California Superior Court, County of Kern. (No. BF150423A.) He was sentenced to a state prison sentence of 53 years 8 months to life.

The judgment was affirmed by an Opinion of the California Court of Appeal, filed on July 14, 2016. (No. F069891.) Review was denied by the California Supreme Court on October 19, 2016. (No. 236536.)

Petitioner sought federal habeas corpus relief by a timely petition in the United States District Court for the Eastern District of California. (2:14-cv-01153.)

Relief was denied in the district court, and a certificate of appealability was denied. A notice of appeal was nevertheless filed in the district court.

On June 22, 2018, the Circuit Court of Appeals for the Ninth Circuit certified an appeal, limited to the following questions: "(1) whether the trial court deprived appellant of his right to due process by instructing the jury on justifiable attempted homicide committed by the victim, including whether this claim is procedurally defaulted, and (2) whether counsel rendered ineffective assistance for not objecting to the instruction."

Oral argument was heard in the Court of Appeals in San Francisco on April 17, 2019.

On May 2, 2019, the Court of Appeals affirmed the denial of relief through a panel Memorandum Opinion. That Court denied rehearing and rehearing *en banc* on June 11, 2019. (No. 17-17131.)

At all stages of the post-conviction proceedings petitioner argued that the jury was improperly instructed that the victim, petitioner's father, could be justified in shooting petitioner in the chest with intent to kill him, and that petitioner was therefore not entitled to self-defense. When the state court of appeal declined to review the constitutional issue for lack of an objection to the jury instruction, petitioner asked for rehearing and thereafter argued that the state procedural rule on review of erroneous jury instructions denies Due Process because it lacks a stand-

ard which is firmly established and regularly followed. The two issues presented here are fully exhausted.

## STATEMENT OF FACTS

Petitioner has a history of bipolar disorder leading up to the fatal incident. R.T. 633.

In July and August of 2013, petitioner's parents were attempting to get him out of their house, due to his domineering and delusional behavior. Two days before the shooting they consulted an attorney and devised a plan to provoke him and make a video recording of petitioner in the throes of a psychotic episode. State Court of Appeal Opinion, App. B, p. 4.

The fatal incident was described in the testimony of petitioner's mother, and was captured on a video recording taken from the father's cell phone.

With petitioner out of the room, his mother said, "Do you have a plan?" and "How do you want to proceed on this?" The father replied, "Uh, he's got to physically assault one of us." The mother suggested that the father record; "if they come out and he's reasonable," or "does not assault us," then "we're going to look stupid if we don't have a recording to show what's going on." Opinion, p. 6.

Accordingly, when petitioner re-entered the living room his mother began to needle him until he became verbally abusive and threatening. In the view of the

defense psychiatrist, the parents' tactic could result in an irrational, "impulsive reaction from Geoff's mental condition." 6 R.T. 681.[1]

At one point petitioner poked his mother with a fireplace lighter. He used abusive language including saying, "fuck you" and calling her a "bitch." Opinion, App. B, pp. 10-13.

However, petitioner took no action which threatened a murder or felony assault. Finally, he pointed the fireplace lighter in his mother's direction and clicked it. At that point his father rose from his chair and shot petitioner in the chest.

The question raised following the conviction is whether the jury was properly instructed that the father could be justified in using lethal force in defense of the mother from a "forcible and atrocious crime," with the result that the defendant had no right to self-defense.

## SUMMARY

Certiorari review is necessary to resolve the question of whether California's rule of post-conviction review is firmly established and regularly followed, or whether it operates to the contrary, to discriminate against claims of federal rights.

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[1] "R.T." and "C.T." references are to the Reporter's Transcript and Clerk's Transcript of the state court trial, part of the record in the California Court of Appeal. These transcripts were lodged with the U.S. District Court and later transferred to the Ninth Circuit Court of Appeals.

California law permits post-conviction review of language in a jury instruction which "affected the substantial rights of the defendant." Cal. Penal Code § 1259. Despite many years of mixed results, there is no firmly established rule of what errors might affect "the substantial rights of the defendant." Nor is it clear that in the absence of an objection, the appellate court may not simply choose to deem any objection forfeited, even if the error did affect the substantial rights of the defendant.

This procedural rule is irregularly applied. It unpredictably leads to forfeiture of meritorious claims of unfair conviction. The state rule is particularly prone to discriminate against claims of federal rights.

Rather than confront the underlying fault in state procedure, the reviewing federal courts have strained to belittle the federal constitutional violation which led to this unsound conviction in the first place.

The core of the courts' reasoning is that the jury must have found that the defendant premeditated his father's murder in the few seconds leading to the fatal shot. This is not a reasonable conclusion to attribute to the state court jury, since it ignores the fact that the defendant had just been shot squarely through the center of the chest. The wound was lethal by any reasonable expectation, and the defendant could only expect to lose consciousness shortly. The father continued to resist, and showed every intention of finishing him off.

The only reasonable conclusion from the record is that the jury was persuaded that the defendant had no right to self-defense, and the prosecution was under no obligation to prove the absence of self-defense.

## ARGUMENT

### I. THE STATE TRIAL COURT DEPRIVED APPELLANT OF HIS RIGHT TO DUE PROCESS BY INSTRUCTING THE JURY ON JUSTIFIABLE ATTEMPTED HOMICIDE COMMITTED BY THE VICTIM.

A jury instruction cannot relieve the state of the burden of proving beyond a reasonable doubt a crucial element of the criminal offense. See *Francis v. Franklin*, 471 U.S. 307, 325 (1985); *Sandstrom v. Montana*, 442 U.S. 510, 521 (1979); *Mendez v. Knowles*, 556 F.3d 757, 768 (9th Cir. 2009).

In California it is the prosecution's burden to show the absence of self-defense. *People v. Banks*, 67 Cal.App.3d 379, 383-384 (1977); *People v. Pinerio*, 129 Cal.App.3d 915, 921-922 (1982); see *People v. Humphrey*, 13 Cal.4th 1073, 1103 (1996). The state court jury was so instructed. C.T. 12.

The jury instruction questioned here, CALJIC 5.13, justified James Murphy in shooting appellant squarely in the chest. As a result, appellant's right to self-defense was nullified.

No system of ordered liberties can justify a person in attempting to shoot to death an unwanted, verbally abusive house guest. Yet that is what occurred on

this record. The jury instructions permitted the prosecution to evade its burden to show the absence of self-defense.

Almost every reviewing court has commented on the anomaly of this murder conviction in the face of overwhelming evidence of self-defense.[2] But the explanation for the verdict is not mysterious or far afield. It lies in the jury instruction (modified CALJIC 5.13), which told the jury that James Murphy could be justified in shooting his son Geoff in the chest.

> Attempted homicide is justifiable and not unlawful when committed by any person in the defense of himself or another if he actually and reasonably believed that the individual he attempted to kill in-

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[2] The district court noted, "[t]his is a tragic case. As the state probation officer indicated prior to sentencing: '[T]his sounds like voluntary or involuntary manslaughter[;] what am I missing?' 9 R.T. 1312:25-27…" E.R. 276.

This comment echoed the Opinion of the California Court of Appeal, which observed that "… for many people the facts of this case will beg the question of how appellant could have been convicted of any crime greater than heat of passion manslaughter…. [¶] "Being intentionally shot in the chest by anyone, much less your own father, surely constitutes adequate provocation for purposes of a heat of passion analysis…." E.R. 232, 233.

The state trial court voiced similar sentiments at sentencing. "I will acknowledge that this was a very unusual case. I can appreciate why Probation may have contacted counsel with regard to some question as to whether the facts in this case should not have resulted in either a voluntary manslaughter or involuntary manslaughter verdict. "¶ I think I will state, quite candidly, that when counsel first came to my court with this case and upon my initial review of the allegations I probably myself acknowledged that this was an unusual case to be charged as a first degree murder. However, I can't decide this motion based upon what the result would have been if the case had been tried without a jury. It is what it is…." 8 R.T. 1320.

tended to commit a forcible and atrocious crime and that there was imminent danger of that crime being accomplished.

A person may act upon appearances whether the danger is real or merely apparent.

State Court of Appeal Opinion, App. B, p. 13; 7 R.T. 918, 3 C.T. 536.

Once this instruction was read, the loss of any claim of self-defense followed logically and in accordance with California law. See *People v. Watie*, 100 Cal.App. 4th 866, 878 (2002); *People v. Hardin*, 85 Cal.App.4th 625, 633-634 (2000); *People v. Gleghorn*, 193 Cal.App.3d 196, 201 (1987). If there was any doubt, the point was driven home by the prosecutor in argument to the jury.[3]

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[3] "The judge read you a lot of instructions about murder but he also read you a lot of instructions about defenses. And I think it's important to understand defenses in this case. Not only what are the potential defenses but who are they available to. Are defenses the exclusive domain of the defendant or are they [available] to all of us under the right circumstances? The judge has answered that question for you already.

"Defenses are available to everybody not just somebody accused of a crime. So, for example, Jim Murphy, he's got a right to defend himself. He's also entitled to defend another person. Specifically, he's entitled to defend his wife and their home. That's not my opinion. That's the law. The law the judge has read to you and the law that you'll have back in the back in the jury room for your review."

8 R.T. 1022; emphasis added.

[Following noon break.]

"MR. ZULFA: When we left off -- I promise I'm not gonna go over what I already went over. But when we left off we were talking about de-

fenses and specifically I was talking to you about who the law says that they apply to. They don't just apply to defendants. They are defenses that are available to everybody.

"And specifically in this case they are available to Jim Murphy. How do we know that they are available to Jim? Well, you already heard the instructions and the judge actually instructed you that when somebody does something, for example, like attempt homicide in the defense of somebody else, that that's okay under the right circumstances.

"Now I could, you, know, reference you to the jury instructions -- jury instruction 5.13, things like that. You're gonna have them. You're gonna be able to find them. I don't need to do that. But they are there and they are there for a reason.

8 R.T. 1026-1027; emphasis added.

"… This was a household in turmoil. Barbara and Jim Murphy were living in terror day-to-day, literally moment to moment. That's important to keep in mind. Because you see, when you determine whether or not Jim Murphy's conduct was reasonable, you have to look at it as what would a reasonable person in his circumstances do?"

8 R.T. 1027; emphasis added.

"Now, you may be thinking, well, shooting somebody, that's pretty extreme. And I think we all agree with that. But extreme isn't the question. Was it reasonable is the question….

"You have to be using reasonable force. And like I said, shooting somebody, that's an extreme measure. But under the circumstances, … Jim did what was necessary.

….

"… So when you're talking about defense of other, you have to talk about it in the context that it's justified if there's a reasonable belief of a forceable [*sic*] and atrocious crime about to happen that's imminent. That what the jury instruction says."

The Court of Appeals perceived no error in the jury instructions' "explication of state law or otherwise." However, the Court concluded, even if "some note of ambiguity were injected," that did not infect the trial to the extent that the resulting conviction violated due process. Opinion, App. A, p. 2.

This is assertedly because "the evidence of Murphy's murderous attack upon his father was overwhelming. That, rather than some instructional ambiguity, most probably led to the first degree murder verdict." Opinion, App. A, p. 3, citing *Estelle v. McGuire*, 502 U.S. 62, 72-73 (1991), and *People v. Elmore*, 59 Cal.4th 121, 134 (2014).[4]

Having been shot squarely in the chest (a circumstance which escaped mention by the Court of Appeals), appellant's need for self-defense was not "entirely delusional." Any reasonable person in appellant's situation would view his wound as lethal and potentially fatal. His father was still armed, and tried to shoot him a second time. See Opinion of State Court of Appeal, App. B, p. 13. Appellant, if

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8 R.T. 1031-1032; emphasis added.

"Defense of self. Again, there has to be imminent danger of death or great bodily injury. And that's what they faced. That's what Jim faced…."

8 R.T. 1033; emphasis added.

[4] "Here, defendant claims his request for an instruction on unreasonable self-defense should have been granted, even though his perception of a threat was entirely delusional." *Ibid.*

not mortally wounded, was at least losing blood fast, and could expect to lose consciousness in a few minutes, whereupon his father would undoubtedly finish him off. This is a paradigm case for self-defense by the defendant.

In *Estelle v. McGuire, supra,* this Court limited federal habeas corpus review of state jury instructions to those which violate some constitutional right. Reviewing courts were counseled not to view a challenged jury instruction in "artificial isolation," but to consider the instructions as a whole and in the context of the entire trial record. *Ibid.*

Viewed in context, the jury instruction was fatally burden-shifting. It is readily apparent from the Opinion of the California Court of Appeal that the parents provoked appellant into a psychotic episode. But he did not threaten to kill anyone or commit any "forcible or atrocious crime."[5]

Still, the prosecutor argued that the circumstances justified the use of lethal force by the father (see footnote 3 above). And that argument was based squarely on the challenged jury instruction.

The Court of Appeals was incorrect in concluding that there was no error in the jury instructions' "explication of state law or otherwise."

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[5] There was no evidence that appellant had ever committed a prior crime, and specifically that appellant had ever committed a serious assault. If there were such evidence it would have been readily admissible on the issue (stated in CALJIC 5.13) of the father's state of mind and his supposed need to use lethal force in justifiable defense of his wife. See Cal. Evidence Code § 1101.

Viewing the challenged instruction in the entire procedural context of the case, the Court of Appeals' conclusion of no prejudice adopted by reference part of the reasoning of the California Court of Appeal. That discussion was directed toward the defendant's argument that the evidence of premeditation was legally insufficient. The state court concluded that the jury in this case may have accepted that appellant was provoked, "but obviously believed he kept or regained the mental fortitude to refrain from killing his father." App. B, p. 26.[6]

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[6] Going on, the state appellate court directed its attention to the final seconds before the fatal shot was fired.

> "[A] killing resulting from preexisting reflection, of any duration, is readily distinguishable from a killing based on unconsidered or rash impulse." (*People v. Solomon* (2010) 49 Cal.4th 792, 813.) The most probative evidence of premeditation is found at approximately 18 minutes and 37 seconds into the August 10, 2013 video, when appellant says, "I'm gonna kill you. I'm gonna kill you." These words show that he "thought about or considered the act beforehand." (*Pearson*, *supra*, 56 Cal.4th at p. 443; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant's statement of "Put the phone down or I'll kill you" was evidence of planning].) He does not shoot his father until nearly a minute later, when the video counter reaches 19 minutes and 33 seconds. In the interim, at 18 minutes and 40 seconds, appellant asks, "How did you get this gun?" The jury may have interpreted this question as indicating appellant had disarmed his father by that point in time, thus supporting its conclusion that the use of lethal force was unnecessary and gratuitous.
>
> There was testimonial and photographic evidence which showed the victim was pummeled prior to being shot. Beginning at 18 minutes and 54 seconds into the video, the viewer hears at least four heavy blows being landed, with one of the impacts punctuated by

The imaginative scenario conjured by the state Court of Appeal informed the conclusion of the federal Court of Appeals, leading it to conclude that "the evidence of Murphy's murderous attack upon his father was overwhelming." But the evidence was not overwhelming, and the state court's analysis is misleading.

The key fact which the state court of appeal omitted from its analysis was that appellant had just been shot in the chest. Although he was capable of overpowering his father, and apparently did so, the father continued to struggle. Appellant was bleeding to death. As the seconds ticked off, the clock was working against the defendant, not in his favor.

This was not a case of "overwhelming" evidence that appellant did not act from self-defense. The prosecution still was tasked, or should have been tasked, with disproving self-defense; the defendant still had, or should have had, the right to assert self-defense.

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> appellant's statement of "Fuck you." This is followed by the distinct sound of appellant spitting, and one can't help but assume he is projecting saliva at his father. The audio paints a vivid picture in the mind's eye, which for the jury was the image of a man acting with cold, calculated malice. A full 33 seconds pass from that point until the moment when the fatal shot is fired.
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> App. B, pp. 27-28.

Instead, the prosecution was conveniently relieved of its burden. This jury never considered whether appellant acted in self-defense. It was told that the defendant had no right to self-defense.

When these simple facts are accurately set forth, the case becomes a reasonably straightforward application of the rules against burden-shifting instructions. See *Francis v. Franklin*, *supra*; *Sandstrom v. Montana*, *supra.* The jury instruction indicated that the father might be justified in shooting the son, the prosecutor made the next logical step that self-defense was not available to the defendant, and the jury convicted in ignorance of the fundamental right of self-defense in these circumstances.

In addition, there is a further overlay of federal constitutional violation here. A federal standard of review applies once the right to self-defense is recognized as not merely a creature of state statute but as a fundamental right embodied in the Second Amendment and the Due Process Clause.

Self-defense was alluded to as a fundamental right in this Court's decision in *District of Columbia v. Heller*, 554 U.S. 570, 599 (2008) [the right to self-defense was "the *central component*" of the Second Amendment right to bear arms].

In *McDonald v. City of Chicago*, 561 U.S. 742, 767 (2010) this Court elaborated on the fundamental right to self-defense.

> Self-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*, we held that individual self-defense is "the *central component*" of the Second Amendment right. 554 U.S., at 599, 128 S.Ct. 2783, 171 L.Ed.2d, at 662; see also *id*., at 628, 128 S.Ct. 2783, 171 L.Ed.2d, at 679 (stating that the "inherent right of self-defense has been central to the Second Amendment right"). Explaining that "the need for defense of self, family, and property is most acute" in the home, *ibid*., we found that this right applies to handguns because they are "the most preferred firearm in the nation to 'keep' and use for protection of one's home and family," *id*., at 628-629, 128 S.Ct. 2783, 171 L.Ed.2d, at 679 (some internal quotation marks omitted); see also *id*., at 628, 128 S. Ct. 2783, 171 L. Ed. 2d, at 679 (noting that handguns are "overwhelmingly chosen by American society for [the] lawful purpose" of self-defense); *id*., at 629, 128 S.Ct. 2783, 171 L.Ed.2d, at 680 ("[T]he American people have considered the handgun to be the quintessential self-defense weapon"). Thus, we concluded, citizens must be permitted "to use [handguns] for the core lawful purpose of self-defense." *Id*., at 630, 128 S.Ct. 2783, 171 L.Ed.2d, at 680.
>
> 561 U.S. at pp. 767-768.

Some federal Courts of Appeal have drawn precisely this conclusion, even prior to *Heller* and apart from the Second Amendment: the right to self-defense is fundamental to the federal constitution. See *Taylor v. Withrow*, 288 F.3d 846, 851 (6th Cir. 2002);[7] and see *Newton v. Million*, 349 F.3d 873, 878-879 (6th Cir. 2003).

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[7] "The right to claim self-defense is deeply rooted in our traditions. *See Egelhoff*, 518 U.S. at 43 ('Our primary guide in determining whether the principle in question is fundamental is, of course, historical practice'). Blackstone referred to self-defense as 'the primary law of nature,' and claimed that 'it is not, neither can it be in fact, taken away by the law of society.' 3 William Blackstone, *Commentaries*, 4. According to him, the common law 'held [self-defense] an excuse for breaches of the peace, nay even for homicide itself.' *Id*.; *see also id*. at 183-87.

Other federal courts have held that where the right to self-defense is also guaranteed by state law (as here), the failure to adequately instruct on it is a violation of federal Due Process. See *Woods v. Solem*, 891 F.2d 196, 199 (8th Cir. 1989); *Everett v. Roth*, 37 F.3d 257, 261 (7th Cir. 1994).

Other federal courts have drawn a similar conclusion directly from *Heller*, though limited to the use of firearms within the home. See *Silvester v. Harris*, 843

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It is a well-established rule in federal criminal trials that 'a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor,' including the defense of self-defense. *Mathews v. United States*, 485 U.S. 58, 63-64, 99 L.Ed.2d 54, 108 S.Ct. 883 (1988); *see also Stevenson v. United States*, 162 U.S. 313, 40 L.Ed. 980, 16 S. Ct. 839 (1896). Even in *Egelhoff*, a case taking a decidedly narrow view of which rights are 'fundamental,' the Court commented that 'the right to have the jury consider self-defense evidence' may be a fundamental right. 518 U.S. at 56 (Scalia, J., plurality opinion). We know of no state that either currently or in the past has barred a criminal defendant from putting forward self-defense as a defense when supported by the evidence.

"In finding that the right to claim self-defense is a fundamental right we break no new ground. Other Courts of Appeals have already reached the same conclusion. In a recent case Judge Easterbrook held that 'when there is evidentiary support for a defendant's theory of self-defense, failure to instruct on self-defense violates a criminal defendant's Fifth and Sixth Amendment rights,' *Sloan v. Gramley*, 2000 U.S.App. LEXIS 8815, 2000 WL 536164, at 3 (7th Cir., May 1, 2000), and Judge Richard Arnold also recently found that a criminal defendant 'is entitled to a self-defense instruction if there is evidence to support his theory,' *Clemmons v. Delo*, 177 F.3d 680, 685 (8th Cir. 1999). This Court has also already held, as have other Courts of Appeals, that in certain circumstances refusing to instruct a jury properly on self-defense can so taint the resulting verdict as to be an error of constitutional dimension. *See, e.g.*, *Davis v. Strack*, 270 F.3d 111, 116 (2d Cir. 2001); *Barker v. Yukins*, 199 F.3d 867, 872-73 (6th Cir. 1999), *cert. denied sub nom*, *Yukins v. Barker*, 530 U.S. 1229, 147 L.Ed.2d 273, 120 S.Ct. 2658 (2000)."

F.3d 816, 820 (9th Cir. 2016);[8] see also *Bauer v. Becerra*, 858 F.3d 1216, 1222 (9th Cir. 2017).

The parameters of the federal constitutional right to self-defense are nevertheless unclear. Appellant's jury was instructed on self-defense, but it was also told that self-defense was forfeited because James Murphy was justified in shooting the defendant. If self-defense is a fundamental right, it was denied on this record.

Certiorari review is necessary for this reason as well.

## II. THE STATE COURT RULE ON FORFEITURE OF A CHALLENGE TO JURY INSTRUCTIONS IS NOT FIRMLY ESTABLISHED OR REGULARLY FOLLOWED, AND DISCRIMINATES AGAINST FEDERAL CLAIMS AND CLAIMANTS.

The state court of appeal declined to address appellant's challenge to the burden-shifting jury instruction. Opinion, App. B, p. 18. A petition for rehearing was filed in the court of appeal, arguing that there had been a denial of Due Process. The issue was continuously briefed through the state supreme court and the

[8] "The core of the *Heller* analysis is its conclusion that the Second Amendment protects the right to self defense in the home. The Court said that the home is 'where the need for defense of self, family, and property is most acute,' and thus, the Second Amendment must protect private firearms ownership. *Id.* at 628. The *Heller* Court held that, under any level of scrutiny applicable to enumerated constitutional rights, the ban on handgun possession 'would fail constitutional muster.' *Id.* at 629."

United States District Court. The order certifying the appeal to the Ninth Circuit included the issue whether the trial court deprived appellant of his right to due process by instructing the jury on justifiable attempted homicide committed by the victim, "including whether this claim is procedurally defaulted."

Resolution of this procedural Due Process issue is a prerequisite to federal relief. The issue is properly preserved, and it presents a substantial issue on which Supreme Court review is necessary.

California's contemporaneous objection rule has a major exception: trial counsel need not object to a jury instruction if it affects the substantial rights of the defendant. Despite the lack of an objection, the state appellate court may review a jury instruction which affects the defendant's substantial rights. Cal. Penal Code § 1259.

However, state law permits unguided discretion in the state appellate court in deciding whether to permit appellate review of an unobjected jury instruction, even one which affected the defendant's substantial rights. This leads to arbitrary forfeiture of meritorious federal constitutional claims; there is no state procedural rule, firmly established and regularly followed, which guides state appellate review of federal constitutional claims of unobjected jury instructions.

The question of when and how a default in compliance with state procedural rules can preclude federal review is itself a federal question. *Henry v. Mississippi*,

379 U.S. 443, 447 (1965). Federal courts must ensure that state procedural default rules do not operate arbitrarily to discriminate against the assertion of federal constitutional rights. *Johnson v. Mississippi,* 486 U.S. 578, 587-589 (1988).

A state court finding of default will deprive the federal court of jurisdiction if, but only if, the default rests on an independent and adequate state ground. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). In order to qualify for such deference, the state forfeiture rule must be "firmly established and regularly followed." *Lee v. Kemna,* 534 U.S. 362, 376 (2002).

In *Beard v. Kindler,* 558 U.S. 53, 60-61 (2009) this Court held that a discretionary state procedural rule can serve as an adequate ground to bar federal habeas review. A discretionary rule can be "firmly established" and "regularly followed," even if the appropriate exercise of discretion permits a consideration of a federal claim in some cases but not in others; discretionary rules permit the state a certain flexibility which benefits some claimants while disadvantaging others. *Ibid.*

The state has repeatedly argued that section 1259 meets the federal standard simply because it gives the state court "permissive discretion" to review or not review an unobjected jury instruction. See Appellee's Brief in the Ninth Circuit, p. 63. But to say that the state appellate court has "permissive discretion" to ignore a federal constitutional claim is to say that there is no rule of guided discretion at all.

It opens the door to arbitrary discrimination against the assertion of federal constitutional rights.

Guided discretion is a familiar concept in California law. The scope of discretion resides in the particular law being applied, and derives from the common law or statutes under which discretion is conferred. *People v. Jacobs,* 156 Cal. App.4th 728, 736 (2007); *People v. Ziegler,* 211 Cal.App.4th 638, 667 (2012); compare *United States v. Hinkson,* 611 F.3d 1098, 1114 (9th Cir *en banc* 2009). The reviewing court normally looks to a uniform set of guidelines in state law; thus there is or should be a ready means to determine if discretion has been abused.

In cases following *Beard v. Kindler, supra,* this Court clarified that the exercise of discretion which leads to a forfeiture of federal constitutional rights must be guided by uniform rules of state statute or decisional law.

In *Walker v. Martin,* 562 U.S. 307 (2011), the Court explained that California's rule on the timeliness of state habeas corpus petitions, though lacking a definite statute of limitations, is firmly established and regularly followed. This is because the exercise of discretion is guided by criteria set forth in decisions of the state supreme court. *Id.* at pp. 310, 317.[9]

[9] See *In re Clark,* 5 Cal.4th 750 (1993); *In re Robbins,* 18 Cal.4th 770, 780 (1998); *In re Gallego,* 18 Cal.4th 825, 833 (1998).

The petitioner in *Walker v. Martin* argued that the California timeliness rule was too vague to be firmly established because it lacked a definite time limit or statute of limitations. To the contrary, the Court held that "[i]ndeterminate language is typical of discretionary rules. Application of those rules in particular circumstances, however, can supply the requisite clarity." *Id.* at 317.

The necessity of a guided state rule – a set of criteria to guide the exercise of discretion – is an essential feature of the Court's jurisprudence concerning state court exhaustion and forfeiture of constitutional claims. In *Johnson v. Lee,* 136 S.Ct. 1802 (2016) the Court found adequate another California procedural bar – the ban on state habeas corpus claims that were raised or could have been raised earlier in direct review of the criminal conviction. That procedural bar was found to be "firmly established" because it was based on a decades-old decision of the state supreme court, *In re Dixon,* 41 Cal.2d 756 (1953). The state rule was found to be "regularly followed" because habeas claims are routinely denied based on the criteria set forth in the *Dixon* decision. *Id.* at 1805, citing *Dugger v. Adams,* 489 U.S. 401, 410, fn. 6 (1989).

The same cannot be said of Cal. Penal Code § 1259.

Section 1259 states California's contemporaneous objection rule. Contemporaneous objection in the trial court is necessary to preserve an issue for appellate review. With regard to jury instructions, there is a major exception: an instruction

may be challenged on appeal without objection below if it affects the defendant's "substantial rights."[10]

There is no set of criteria from the California Supreme Court to guide the exercise of section 1259 discretion. Though the question has come before that Court dozens of times,[11] no single rule emerges from those decisions.

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[10] "Upon an appeal taken by the defendant, the appellate court may, without exception having been taken in the trial court, review any question of law involved in any ruling, order, instruction, or thing whatsoever said or done at the trial or prior to or after judgment, which thing was said or done after objection made in and considered by the lower court, and which affected the substantial rights of the defendant. The appellate court may also review any instruction given, refused or modified, even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby." *Ibid.*

[11] A number of state supreme cases have recognized forfeiture of challenges to jury instructions for lack of objection. See *People v. Mora and Rangel*, 5 Cal.5th 442, 471 (2018); *People v. Covarrubias*, 1 Cal.5th 838, 901 (2016); *People v. Grimes*, 1 Cal.5th 698, 724 (2016); *People v. Jackson*, 1 Cal.5th 269, 335-36 (2016); *People v. Souza*, 54 Cal.4th 90, 120 (2012); *People v. Livingston*, 53 Cal.4th 1145, 1166 (2012); *People v. Virgil*, 51 Cal.4th 1210, 1260 (2011) [this decision was cited by the state court of appeal in appellant's case]; *People v. Lee*, 51 Cal.4th 620, 638 (2011); *People v. Rundle*, 43 Cal.4th 76, 151 (2008); *People v. Valdez*, 32 Cal.4th 73, 112-13 (2004); *People v. Hillhouse*, 27 Cal.4th 469, 504 (2002); *People v. Catlin*, 26 Cal. 4th 81, 149 (2001); *People v. Welch*, 20 Cal.4th 701, 757 (1999); *People v. Lang*, 49 Cal.3d 991, 1024 (1989), *abrogated on another ground in People v. Diaz*, 60 Cal.4th 1176 (2015).

On other occasions, however, the state supreme court has opted under section 1259 to consider such claims absent a prior objection upon a finding that the defendant's "substantial rights" were implicated. *See People v. Delgado*, 2 Cal.5th 544, 572 fn.15 (2017); *People v. Johnson*, 60 Cal.4th 966, 993 (2015); *People v. Valdez*, 55 Cal.4th 82, 151 (2012); *People v. Mil*, 53 Cal.4th 400, 409 (2012); *People v. Foster*, 50 Cal.4th 1301, 1346 fn. 20 (2010); *People v. Lewis*, 46 Cal.4th 1255, 1315 fn. 43 (2009); *People v. Kelly*, 42 Cal.4th 763, 791 (2007); *People v.*

The state has not articulated a uniform rule but instead argues that the state courts of appeal have "permissive discretion" to ignore the appellant's federal constitutional issue. This is nothing more than to say that there is no guided discretion at all – a violation of the process deemed necessary in *Walker v. Martin* and *Johnson v. Lee, supra.*

Some state court of appeal opinions provide a two-step analysis whereby the appellate court first determines whether the defendant's "substantial rights" were affected by the asserted error. If the asserted error is one which affected the substantial rights of the defendant, the appellate court then turns to the merits. See *People v. Andersen,* 26 Cal.App.4th 1241, 1249 (1994) and *People v. McPheeters,* 218 Cal.App.4th 124, 132 (2013). Even if the defendant loses on the merits, he has at least obtained appellate review, and the federal constitutional claim is preserved.

The "substantial rights first" analysis has much to recommend it. The state appellate court may find the issue reviewable because it "affected the substantial rights of the defendant," and then address the merits, ruling for or against the de-

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*Carey*, 41 Cal.4th 109, 129 (2007); *People v. Gray*, 37 Cal.4th 168, 235 (2005); *People v. Prieto*, 30 Cal.4th 226, 247, 268 (2003); *People v. Slaughter*, 27 Cal.4th 1187, 1199 (2002); *Hillhouse, supra*, 27 Cal.4th at 503; *People v. Smithey*, 20 Cal.4th 936, 976 n.7 (1999); *People v. Flood*, 18 Cal.4th 470, 482 fn.7 (1998).

There is no rhyme or reason to these decisions, and no coherent rule has been suggested by the state. Some claims are reviewed, in other cases with substantial issues, including substantial federal constitutional claims, the state court turns a blind eye. No one knows why.

fendant. Importantly, even if the state court of appeal rules against the defendant, if the federal claim has been found reviewable it is not forfeited, and the claim may advance in federal habeas corpus.

But there are several problems with the implementation of the "substantial rights first" analysis. One is that the state supreme court has never adopted it and seldom employs it. Another is that the courts of appeal do not uniformly observe it.

The state court of appeal did not employ it here. Instead, when asked to exercise section 1259 discretion, it simply stated "[w]e decline to do so." Opinion, App. B, p. 18. The state court of appeal never made the threshold determination of whether the federal constitutional claim, accurate or not, affected the defendant's substantial rights.

Beyond that, there is no uniform definition of what is meant by the term "affected the substantial rights of the defendant." Conceivably the term could refer to an argument that a jury instruction that omitted or misstated an element of the crime or a defense, or the burden of proof. But no one knows for sure; there is no uniform definition in California case law.[12]

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[12] In contrast, see Federal Rules of Criminal Procedure, Rule 52: "(a) Harmless error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded. "(b) Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

For these reasons the California standard for appellate review of unobjected jury instructions is not firmly established or regularly followed. It cannot function as a forfeiture bar to federal habeas corpus review.

Unfortunately, there is another reason for United States Supreme Court review of this state court judgment.

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This Court has explicated the meaning of "substantial rights" in this context. See *United States v. Olano*, 507 U.S. 725, 736 (1993); *Molina-Martinez v. United States*, 136 S.Ct. 1338 (2016); *Rosales-Mireles v. United States*, 138 S.Ct. 1897 (2018).

The term "substantial rights" was amended into California Penal Code § 1259 in 1909. Rule 52 was adopted in 1944. Therefore it is unlikely that the federal rule informed the adoption or interpretation of section 1259.

The California Supreme Court has occasionally alluded to the *Olano* standard, as requiring a demonstration of prejudice before the merits of the argument are addressed. See *People v. Dykes*, 46 Cal.4th 731, 775, fn. 8 (2009); *People v. Williams*, 49 Cal.4th 405, 464, fn. 8 (2010). The California Supreme Court has never explicitly adopted the *Olano* interpretation, however; at times that Court has applied the "substantial rights first" approach described above, starting with the merits and avoiding federal forfeiture. See *People v. Johnson*, 60 Cal.4th 966, 993 (2015) and *People v. Valdez*, 55 Cal.4th 82, 151 (2012).

More often the California Supreme Court gives no explanation for its decision to provide or withhold appellate review. While it is possible that the state court of appeal in petitioner's case determined that there was no prejudice from the erroneous jury instruction, that court's opinion did not say so. It is equally likely that the state court sought to discriminate against a claim of federal rights.

In *Walker v. Martin, supra,* 562 U.S. at p. 321, the Court cautioned that state procedural rules must be reviewed to ensure that the process of review of federal constitutional rights is protected. This Court has repeated recognized that

> ... [F]ederal courts must carefully examine state procedural requirements to ensure that they do not operate to discriminate against claims of federal rights. See *Brown* v. *Western R. Co. of Ala.*, 338 U.S. 294, 298-299, 70 S.Ct. 105, 94 L.Ed. 100 (1949); *Davis* v. *Wechsler*, 263 U.S. 22, 24-25, 44 S.Ct. 13, 68 L.Ed. 143, 21 Ohio L. Rep. 322 (1923); 16B Wright & Miller § 4026, p. 386 (noting "risk that discretionary procedural sanctions may be invoked more harshly against disfavored federal rights, . . . deny[ing] [litigants] a fair opportunity to present federal claims"). See also *Kindler*, 558 U.S., at 65, 130 S. Ct. 612, 175 L. Ed. 2d 417, 427 (Kennedy, J., concurring) (a state procedural ground would be inadequate if the challenger shows a 'purpose or pattern to evade constitutional guarantees')."
>
> *Ibid.*

There is reason to conclude that the state rule on contemporaneous objection was purposely used in this case to evade constitutional guarantees.

Petitioner has noted above that the first-degree murder conviction was anomalous in view of the trial court record of provocation and self-defense, and reviewing courts have repeatedly commented on that anomaly (see footnote 2 above). The evidence of murder liability, even if legal sufficient, was not overwhelming; there is no basis to exclude self-defense other than the faulty instruction.

There is no ready explanation for the verdict other than the burden-shifting jury instruction. The connection between the erroneous instruction on justifiable attempted homicide and the first-degree murder conviction is ineluctable.

We cannot know what the state court of appeal thought about the merits of the argument – it did not say. Appellant was denied state court review of the claim of federal error on the merits. In addition, the finding of forfeiture blocks review of the claim in federal court. This suggests that the state court finding of forfeiture was arbitrary, and was aimed at suppression of a valid federal claim.

There are only a handful of possible reasons for the state court of appeal to dodge the federal constitutional claim here. Regrettably, the most likely reason is an intentional silencing of a federal claim. In this case section 1259 "operate[d] to discriminate against [a] claim[] of federal rights." The federal claim here is strong, and the record suggests no other reason for the state court to not at least determine whether the defendant's claim involves a denial of his substantial rights.

For these reasons appellant has suffered a severe denial of his right to Due Process. The state appellate court arbitrarily refused to review his federal constitutional claim.

The state appellate court did not rely on a state procedural rule which is firmly established and regularly followed, because there is no such rule. Instead, it

appears that the state court deliberately and arbitrarily sought to forfeit this meritorious federal claim.

Properly interpreted, this Court's decision in *Walker v. Martin, supra,* should have prevented this result. Certiorari review is necessary.

## CONCLUSION

For the reasons stated, certiorari review must be granted and Petitioner must be granted relief in habeas corpus.

Date: July 29, 2019

Respectfully submitted,

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