No. _____

IN THE SUPREME COURT OF THE UNITED STATES

MARK JAMES MARTINEZ, Petitioner

v.

THE STATE OF CALIFORNIA, Respondent.

On Petition For a Writ of Certiorari to the
California Court of Appeal, Second Appellate District, Division Six

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Self-defense is a fundamental right protected by the United States Constitution. *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 767, 130 S.Ct. 3020 (2010) (plur. opn., Alito, J.) ["Self-defense is a basic right, recognized by many legal systems from ancient times to the present day"]; *Taylor v. Withrow*, 288 F.3d 846, 853 (6th Cir. 2002) [finding a clearly-established constitutional right to an instruction on self-defense]. The common law rule is that a person who has no choice but to use deadly force to defend his or her own life may still claim self-defense even if he or she was simultaneously harbored another motive to kill the assailant. *Golden v. State*, 25 Ga. 527, 1858 WL 1991, *5 (Ga. 1858) [this principle is "too plain to need amplification"]; accord. *State v. Rapp* (Mo. 1898) 142 Mo. 443, 44 S.W. 270, 271 (Mo. 1898); *State v. Bowyer* (W.Va. 1957) 143 W.Va. 302, 313 (W.Va. 1957). But in California, "self-defense is not available when a person does not act out of fear alone, but out of fear and a desire to harm the attacker." *People v. Nguyen* 61 Cal.4th 1015, 1045 (Ca. 2015); Cal,. Pen. Code, § 198.

The question for this Court is:

Whether California's rule that self-defense is not available when a person does not act out of fear alone impermissibly infringes on the constitutionally-guaranteed right to self-defense?

LIST OF PARTIES

The parties to the proceeding in the California Court of Appeal were defendant-appellant Mark James Martinez and plaintiff-respondent People of the State of California.

LIST OF PROCEEDINGS

1. State trial court: *People v. Mark James Martinez;* Ventura County Superior Court No. 2014010150; judgment and sentence, July 15, 2019.

Direct Appeal:

2. State appellate court: *People v. Mark James Martinez;* California Court of Appeal, Second Appellate District, Division Six No. B299222; opinion, June 10, 2021.

3. State Supreme Court: *People v. Mark James Martinez;* California Supreme Court No. S269844; order denying review, September 15, 2021.

State Habeas Corpus:

4. State appellate court: *In re Mark James Martinez*; California Court of Appeal, Second Appellate District, Division Six, No. B311136; order summarily denying petition, June 10, 2021.

5. State Supreme Court: *In re Mark James Martinez*; California Supreme Court, No. S269937; order denying review, September 22, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Mark James Martinez respectfully prays that a writ of certiorari issue to review the judgment of the California Court of Appeal, Second Appellate District, Division Six, which affirmed the judgment of the Superior Court of California, Ventura County, in which petitioner was convicted of murder and shooting at an inhabited dwell, and sentenced to life in prison without the possibility of parole.

OPINION BELOW

The Court of Appeal, which is the highest state court to review the merits, issued its unreported decision on June 10, 2021. A copy of that opinion appears at Appendix A (App. A), *post*.

Petitioner filed a timely petition for rehearing, which was denied on June 6, 2021. A copy of that order appears at Appendix B (App. B), *post*.

Petitioner filed a timely petition for review in the California Supreme Court, which denied review on September 15, 2021. A copy of that order appears at Appendix C (App. C), *post*.

JURISDICTION

Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1257(a), on the ground that his rights under the Second, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution were

violated. This petition is filed within 90 days of the California Supreme Court's denial of discretionary review, in conformity with rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Second Amendment: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

Fifth Amendment: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . .[.]"

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

Fourteenth Amendment: ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . [.]"

Cal. Penal Code § 198: "A bare fear of the commission of any of the offenses mentioned in subdivisions 2 and 3 of [Pen. Code §] Section 197, to prevent which homicide may be lawfully committed, is not sufficient to justify it. But the circumstances must be sufficient to excite the fears of a reasonable person, and the party killing must have acted under the influence of such fears alone."

STATEMENT OF THE CASE

Petitioner and his companion got into a fistfight with two members of a different gang. The man petitioner was fighting produced a gun and repeatedly fired it at petitioner, who was unarmed. Petitioner then ran to his car, retrieved a gun from inside, and fired back. A stray bullet struck and killed a woman in her home. App. A, A1-A5.

At his trial, petitioner claimed he acted in justifiable self-defense. App. A, A4.

The California Supreme Court has held that, under California law, a person has no right to self-defense unless reasonable fear is the only causal factor of his or her decision to kill. *People v. Nguyen,* 61 Cal.4th 1015, 1044-1045 (Ca. 2015); Cal. Pen. Code, § 198. In other words, "self-defense is not available when a person does not act out of fear alone, but out of fear and a desire to harm the attacker." *Id.* at 1045, quoting *People v. Shade* 185 Cal.App.3d 711, 716 (Ca. App. 1986).

On appeal, petitioner urged that to defeat an otherwise valid self-defense claim, a secondary motive besides fear must have been a "but-for" cause of and a substantial factor in the decision to kill the assailant. AOB:29-33; see *Burrage v. United States,* 571 U.S. 204, 210, 213, 134 S.Ct. 881 (2014) [Causation in the criminal context generally requires both "actual," meaning "but-for" causation, as well as "proximate" causation]; *In re M.S.* (1995) 10 Cal.4th 698, 719 (Ca. 1995) [interpreting a state hate crime law, consistent with traditional rules of causation, as requiring bias motive be a but-for cause and substantial factor to be considered a "cause"]. He complained that the CALCRIM No. 505 jury instruction on justifiable homicide failed to state that rule, thereby denying him his due process and Sixth Amendment rights. AOB:39-50; see *Mullaney v. Wilbur,* 421 U.S. 684, 704, 95 S.Ct. 1881 (1975) [due process requires the prosecution to prove the absence of a defense beyond a reasonable doubt]; *United States v. Sayetsitty,* 107 F.3d 1405, 1414 (9th Cir. 1997) ["a defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; *Crane v. Kentucky*, 476 U.S. 683, 690, 106 S.Ct. 2142 (1986) [Due Process Clause and Sixth Amendment

guarantee defendants a meaningful opportunity to present a defense].

The Court of Appeal held the CALCRIM No. 505 instruction, which "told the jury it could consider [the deceased's] killing justified if appellant 'believed there was imminent danger of death or great bodily injury to himself' and 'acted only because of that belief'" (App. A, A6-A7), correctly states California law. App. A, A8-A9. The Court of Appeal did not acknowledge any but-for (actual causation) requirement and expressly rejected petitioner's argument regarding proximate causation, saying it would not "graft a substantial factor standard onto section 198." App. A, A8.

Rehearing was denied. App. B, A15.

The California Supreme Court denied review. App. C, A16.

REASONS FOR GRANTING THE PETITION

California's rule restring self-defense to those who act only from fear impermissibly infringes on the right to self-defense guaranteed by United States Constitution.

A. Introduction

The common law rule has long been that a person who is forced to kill in self-defense does not lose that right merely because he or she simultaneously harbors other motives. California, though, restricts the right to self-defense to those who act only from fear and has no requirement that the non-fear motive be a but-for or proximate cause of the decision to kill to defeat an otherwise valid self-defense claim.

That rule is not just inconsistent with the common law; it impermissibly infringes on the fundamental, constitutionally-guaranteed, right to self-defense. This court should this petition to provide guidance about the extent to which a state may restrict this fundamental right.

B. Contrary to common law, California does not recognize a right to self-defense by a person who kills out of a reasonable fear of imminent harm unless that fear was the *only* motive that caused her to kill her assailant.

Cases going back to at least the mid-nineteenth century have held that a person may claim self-defense regardless of whether he or she is simultaneously motivated to kill the assailant by something other than fear. *Golden v. State*, 25 Ga. 527, 1858 WL 1991, *5 (Ga. 1858). Calling the principle "too plain to need amplification," the *Golden* court stated, "[o]ne may harbor the most intense hatred toward another; he may court an opportunity to take his life; may rejoice while he is imbruing his hands in his heart's blood; and yet, if, to save his own life, the facts showed that he was fully justified in slaying his adversary, his malice shall not be taken into the account." *Ibid.* Forty years later, the Missouri Supreme Court agreed with *Golden* and held that, "If . . . the right of self–defense existed, it was wholly immaterial whether its exercise was voluntary or involuntary. Existing the right, the animus which prompts and accompanies its enforcement could not

toll that right." *State v. Rapp*, 142 Mo. 443, 44 S.W. 270, 271 (Mo. 1898).

Time has not changed the common law rule. Midway through the twentieth century, the West Virginia Supreme Court, again citing *Golden*, explained "The right of self-defense is not impaired by malice upon the part of an accused against a deceased or by mere intention or preparation by an accused to kill a deceased or inflict great bodily harm upon him if such malice, intention, or preparation is not accompanied by overt acts which are indicative of a wrongful purpose or are calculated to provoke an attack." *State v. Bowyer*, 143 W.Va. 302, 313 (W.Va. 1957). Modern commentators continue to reject the notion that a killing in self-defense is not justified unless the defendant acted solely from fear. 2 LaFave, Substantive Criminal Law, (2d ed. 2003) Self-Defense, § 10.4(c), pp. 149-150 ["if [a defendant] acts in proper self-defense, he does not lose the defense because he acts with some less admirable motive in addition to that of defending himself"; MPC § 3.04 cmt. 2(b) & n.13, at p. 39 (Official Draft 1962) [highlighting the intentional omission of any "sole motivation" requirement].

Yet in California, "self-defense is not available when a person does not act out of fear alone, but out of fear and a desire to harm the attacker." *Nguyen, supra,* 61 Cal.4th at 1045. This means "other

emotions cannot be causal factors in his decision to use deadly force." *Ibid*., quoting *People v. Trevino*, 200 Cal.App.3d 874, 879 (Ca. App. 1988). The California Supreme Court has declined to decide whether a motive other than fear must be a but-for cause of the decision to kill to defeat an otherwise valid self-defense claim. *Id*. at 1046 [declining "to consider whether such a rule would be consistent with section 198 as interpreted in *Trevino* or other cases"]. And the Court of Appeal determined that Cal. Penal Code § 198's plain language precludes imposing a proximate cause standard. App. A, A8. The Attorney General's position, likewise, is that neither but-for nor proximate causation is required. RB:26-31.

C. California's restriction on self-defense is unconstitutional.

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

The right to self-defense is a fundamental right which pre-existed the founding of our nation, and represents a law of nature which may not be abridged. *McDonald v. City of Chicago, Ill.,* 561 U.S. 742, 767, 130 S.Ct. 3020 (2010) (plur. opn., Alito, J.) ["Self-defense is a basic right, recognized by many legal systems from ancient times to the present day"]. This includes the right to use deadly force to protect one's own life. *McDonald, supra,* at 768 [2nd Amend. demands citizens

must be permitted "to use handguns for the core lawful purpose of self-defense"], quoting *District of Columbia v. Heller*, 554 U.S. 570, 639, 128 S.Ct. 2783 (2008).

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

The right to self-defense is necessarily protected as a matter of substantive due process since, "the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition' [Citation]." *Washington v. Glucksberg,* 521 U.S. 702, 720-721, 117 S.Ct. 2258 (1997); *McDonald, supra,* 561 U.S. at 768 ["*Heller* makes it clear that this right is 'deeply rooted in this Nation's history and tradition'" and citing *Glucksberg*]. And as *Heller* explains, the Second Amendment right to bear arms is in essence a means of ensuring the right to self-defense is not abridged. *Heller, supra,* at 635 [2nd Amend. "elevates

above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home"]. There can be no question then that a state law categorically restricting the right to defend oneself against a mortal threat infringes upon a fundamental constitutional right. The only issue is whether the infringement codified in Cal. Penal Code § 198 can be justified. It cannot.

ii. California's restriction on the right to self-defense is subject to heightened scrutiny.

"[T]he Fifth and Fourteenth Amendments' guarantee of 'due process of law' [includes] a substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores*, 507 U.S. 292, 301-302, 113 S.Ct. 1439 (1993) (emphasis in original). Because the right to self-defense is such a fundamental liberty interest, any restrictions must satisfy this strict scrutiny standard. *McDonald, supra,* 561 U.S. at 768; *Glucksberg, supra,* 521 U.S. at 720-721.

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

2013), quoting *Ezell v. City of Chicago*, 651 F.3d 684, 703 (7th Cir. 2011). If strict scrutiny did not apply, the restriction would be subject to intermediate scrutiny, which requires "the government's stated objective to be significant, substantial, or important; and (2) a reasonable fit between the challenged regulation and the asserted objective." *Chovan, supra,* at p. 1139.) In either case, the burden is on the government, not a party challenging the law, to identify the interest and show the restriction is appropriately tailored to meet that objective. *United States v. Chester,* 628 F.3d 673, 683 (4th Cir. 2010) ["intermediate scrutiny places the burden of establishing the required fit squarely upon the government"]. For the reasons explained below, the restriction California places on the exercise of the right to self-defense cannot withstand either level of scrutiny.

iii. There is no sufficiently weighty governmental interest in precluding someone who has no choice but to kill her assailant to save her own life from claiming self-defense merely because she harbored another motive in addition to her reasonable fear.

Petitioner is not aware of any asserted justification for California's apparently unique rule restricting self-defense to those who act solely from fear. It is difficult to conceive of what sufficiently weighty interest the state would have in prosecuting for murder someone who had no choice but to kill to save her own life, on the ground that her motives were not entirely pure. The lack of any compelling or even important interest is enough by itself to render the

restriction unconstitutional. *Flores*, *supra,* 507 U.S. at 301-302; *Chovan, supra,* 735 F.3d at 1138.

Contrasted with the lack of any weighty justification for California's rule, the burden the restriction places on persons who find themselves with no choice but to exercise their right to self-defense is significant. For one, in many self-defense cases, the circumstances of the homicide will at least support an inference that the defendant was influenced by other motives in addition to fear. *Trevino, supra,* 200 Cal.App.3d at 879 [recognizing many justified killings occur in circumstances in which it would be unreasonable to expect the defendant not to harbor other feelings toward the assailant besides fear of imminent harm]. The practical effect of California's rule is that persons who are forced to exercise their right to self-defense will find themselves subjected to prosecution regardless of whether they actually harbored additional motives. This danger is especially pronounced when the person who had no choice but to kill his assailant is someone whom law enforcement may be predisposed to believe would harbor additional motives.

Another serious problem with requiring an absence of any motive but fear is that as a practical matter it is unrealistic to expect a person who has suddenly found herself in a kill-or-be-killed situation to search her heart and mind for impure motives before responding to

the threat. *Brown v. United States*, 256 U.S. 335, 343, 41 S.Ct. 501 (1921) ["Detached reflection cannot be demanded in the presence of an uplifted knife"]. How, indeed, is a woman being beaten by her abuser supposed to decide if her hatred for him is a causal factor in her decision to fight back or just a "feeling." See, *Nguyen, supra*, 61 Cal.4th at 1045 [whether a motive is a feeling or a causal factors in the decision to kill marks the difference between justifiable homicide and murderer under California law]. One cannot reasonably be expected to conform one's conduct to such a rule. And that is to say nothing of how a jury is supposed to reliably determine if a defendant who reasonably feared imminent death from his assailant just felt ill-will toward the attacker or acted in part based on it.

For the reasons explained above, the restriction California places on the right to self-defense is unconstitutional. *McDonald, supra,* 561 U.S. at 768; *Glucksberg*, *supra,* 521 U.S. at 720-721.

D. This Court should grant the petition.

This case, where self-defense was central to the question of guilt or innocence and there it was uncontested that petitioner only armed himself and returned fire after being shot at (App. A, A2-A4), is a good vehicle for deciding whether California's restriction on the right to self-defense is unconstitutional. If the jury instruction on justifiable

homicide fact misstated the requirements for self-defense, as petitioner contends, then the error almost undoubtedly affected the verdict.

No further benefit can be expected from allowing this question to remain unanswered, as the California Supreme Court has demonstrated no intention to revisit the issue. Perhaps most important, the California rule is wrong and a fundamental right is being abridged as a result. This Court should grant the petition.

Respectfully submitted,

December 6, 2021

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