24-5435

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

ORLANDO JAVIER SANCHEZ — PETITIONER
(Your Name) INPROPER

vs.

NEIL MCDOWELL — RESPONDENT(S)
(WARDEN)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT CALIFORNIA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ORLANDO JAVIER SANCHEZ
(Your Name) (STATE PRISONER)

CENTINELA STATE PRISON P.O. BOX 921
(Address) C3-142

IMPERIAL, CA 92251
(City, State, Zip Code)

_____
(Phone Number)

QUESTIONS PRESENTED

1). DOES THE U.S. SUPREME COURT HAVE JURISDICTION TO REVIEW WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO INSTRUCT THE JURY ON THE IMPERFECT SELF-DEFENSE THEORY OF VOLUNTARY MANSLAUGHTER.

2). WHETHER THE TRIAL COURT PREJUDICIALLY ERRED IN REFUSING TO INSTRUCT THE JURY ON VOLUNTARY INTOXICATION.

3). WHETHER THE GIVEN JURY INSTRUCTIONS ON SELF DEFENSE, PROVOCATION AND SUDDEN QUARREL/HEAT OF PASSION VOLUNTARY MANSLAUGHTER WERE PREJUDICIALLY INCOMPLETE AND MISLEADING.

4). WHETHER THE CUMULATIVE EFFECT OF THE JURY INSTRUCTIONS ERRORS DEMONSTRATED IN QUESTIONS 1-3 DEPRIVED PETITIONER OF HIS CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

5). DID THE COURT OF APPEALS ERR IN CONCLUDING THAT THE TRIAL COURT DID NOT VIOLATE DUE PROCESS AS INTERPRETED IN PEOPLE V. DUEÑAS (2019) 30 CAL. APP. 4TH 1157 IN IMPOSING A RESTITUTION FINE AND VARIOUS FEES AND ASSESSMENTS WITHOUT HOLDING AN ABILITY TO PAY HEARING OR FINDING THERE WAS AN ABILITY TO PAY.

LASTLY, DID THE NINTH CIRCUIT COURT OF APPEALS PROPERLY ASSESS THESE CLAIMS PRESENTED IN ITS DENIAL OF PETITIONERS APPLICATION FOR A CERTIFICATE OF APPEALABILITY UPON DENIAL FROM THE U.S. DISTRICT COURT AFTER REVIEWING THE ABOVE MENTIONED/STATED ISSUES

AND DETERMINING THAT PETITIONER HAS PRESENTED THE DENIAL OF A CONSTITUTIONAL RIGHT TO SATISFY 28 USC 2253 (C)(2). WILL THIS COURT VACATE THE NINTH CIRCUITS DENIAL OF A REQUEST FOR COA AND REMAND THE CASE BACK TO THE COURT OF APPEALS ALLOWING PETITIONER TO APPEAL FURTHER OR GRANT ALL APPROPRIATE REUEF.

List Of Parties

ALL PARTIES APPEAR IN THE CAPTION OF THE CASE ON THE COVER PAGE

NEIL McDOWELL (WARDEN)
IRONWOOD STATE PRISON P.O. BOX 2199
BLYTHE CA 92226

Table Of Contents

Index To Appendices

TABLE OF AUTHORITIES CITED

CONSTITUTIONS

STATUTES

Penal Code

RULES OF COURT

28 USC §2253(c)(2)

28 USC §1254(1)

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:** CASE NO: 3:22-CV-0192-GPC-KSC

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

VIII

JURISDICTION

[ ] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was 3-22-24 COA DENIED DISTRICT COURT/9TH CIR NO: 23-55073

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

1) TO REVIEW THE DENIAL OF AN APPLICATION FOR CERTIFICATE OF APPEALABILITY BY A U.S. COURT OF APPEALS U.S. V. HOHN 524 U.S. 236 (U.S. NEB 1998)

2) TO DETERMINE THE DENIAL OF PETITIONERS CONSTITUTIONAL RIGHTS

[ ] For cases from **state courts**:

The date on which the highest state court decided my case was _____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOKED

CONSTITUTIONAL PROVISIONS

1). 5TH AMENDMENT TO THE U.S. CONSTITUTION - NO PERSON SHALL BE HELD TO ANSWER FOR A CAPITOL OFFENSE OR OTHER INFAMOUS CRIME NOR BE DEPRIVED OF LIFE LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW,

2) 6TH AMENDMENT TO THE U.S. CONSTITUTION - WHICH PROVIDES IN PART; IN ALL CRIMINAL PROSECUTIONS THE ACCUSED SHALL HAVE ASSISTANCE OF COUNSEL FOR HIS DEFENSE,

3) 14TH AMENDMENT TO THE U.S. CONSTITUTION - THE 14TH AMENDMENT PROVIDES THAT NO STATE SHALL MAKE OR ENFORCE ANY LAW WHICH SHALL ABRIDGE THE PRIVILEGES OR IMMUNITIES OF CITIZENS OF THE UNITE STATES NOR SHALL ANY STATE DEPRIVE ANY PERSON OF LIFE, LIBERTY OR PROPERTY WITHOUT DUE PROCESS OF LAW; NOR DENY TO ANY PERSON WITHIN ITS JURISDICTION THE EQUAL PROTECTION OF LAW.

JURISDICTION IS GIVEN TO THIS COURT SEEKING REVIEW OF THE U.S. DISTRICT COURTS DECISION DENYING PETITIONERS WRIT OF HABEAS CORPUS AND CERTIFICATE OF APPEALABILITY TO THE NINTH CIRCUIT COURT OF APPEALS.

STATEMENT OF THE CASE

I. INTRODUCTION

On February 9, 2022 Petitioner Orlando Sanchez filed a petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254. ECF No. 1. On June 29, 2022 Respondent Neil McDowell filed an answer and opposition to the petition, ECF Nos. 14 & 15, and lodged the appropriate state court records, ECF No. 17. On July 22, 2022 Sanchez filed a Traverse. ECF No. 21. On October 3, 2022 Magistrate Judge Karen S. Crawford issued a Report and Recommendation ("R&R") pursuant to 28 U.S.C. § 636(b) and Civil Local Rule 72.1(d), recommending that the Court deny the petition. ECF No. 23. No objections were filed.

Jordy Lopez died during surgery in a San Diego hospital after being shot in the back on October 15, 2016. *Id.* at 2, 5–6. Lopez's friend, N.D., was with him the night of the shooting. *Id.* at 2. N.D.'s version of events was that he and Lopez were walking to N.D.'s cousin's house in Linda Vista when two men in a small, white SUV passed by them. *Id.* at 2–3. The SUV's passenger was staring at them aggressively. *Id.* at 3. N.D. then saw the SUV park across the street from N.D.'s cousin's house, and the two passengers went into the courtyard of an apartment complex. *Id.* at 4. The SUV passengers came outside with three or four other men—some of whom were holding beer bottles—and the passenger who had been staring at N.D. and Lopez began taunting N.D. and Lopez in Spanish. *Id.* The group of men then started an unprovoked fight with N.D. and Lopez, during which N.D. was knocked to the ground shortly before he heard multiple gunshots. *Id.* N.D. saw some of the men flee from the shooting in the white SUV before he discovered Lopez lying on the ground. *Id.* at 4–5.

The police arrived on the scene and interviewed a dying Lopez who told them there was no reason why anybody would want to shoot him, but that he had seen "suspicious" people in a car, specifically two men in a small, white SUV that had been driving slowly on the street. *Id.* at 5. Two other percipient witnesses who lived near the scene of the shooting testified they heard gunshots immediately before seeing a small, white SUV (which one of the witnesses identified as a Scion XB) speed away from the scene. *Id.*

Another witness, Luis N., testified he had been Sanchez's roommate and Sanchez had at one point in the past driven a white Scion. *Id.* at 7–8. He testified that Sanchez admitted his involvement in shooting Lopez to Luis N. sometime in November or December 2016. *Id.* at 8. Sanchez purportedly explained the shooting to Luis N. in more detail at a later time, saying two "Cholos" had been "bothering" or "bugging" Sanchez for a beer; that Sanchez had seen "something chrome" flashing under one of the "Cholo's" shirts; and that Sanchez then left the street, went to the apartment complex where he lived

[illegible] To her recollection, A[illegible]

[illegible] being armed prior to the shooting [illegible]

[illegible] grounds to this Petition the jury [illegible]

[illegible] firearm enhancement, and the Superior [illegible]

[illegible] plus 50 years to life in prison." *Id.* at [illegible]

[illegible] direct appeal raised [illegible]

[illegible] In this Petition [illegible]

[illegible] affirmed the judgment [illegible]

[illegible] California Supreme Court [illegible]

[illegible] Petition [illegible] on February 10, 2[illegible]

at the time, retrieved a gun from his room, came back to the street, and shot one of the men. *Id.* at 8–9. Sanchez told Luis N. he had been with his friend Alfredo, who also went by the name of "Billy," on the night of the shooting. *Id.* at 9.

San Diego Sheriff Department detective Manuel Heredia testified about an undercover operation in San Diego jail during which deputies solicited information from Alfredo. *Id.* at 11. Alfredo told deputies he had been with Sanchez on the night of the shooting, both of them were drunk and high, and there had been a "brawl" during which Sanchez had shot somebody. *Id.* at 11–12. Alfredo's wife, Patricia C., also testified at trial about Alfredo's version of events from the night of the shooting. *See id.* at 13. According to Patricia C., Alfredo told her that he and Sanchez had been drinking the night of the shooting; some guys "wanted to start a fight" with them while Sanchez was asleep in the car; and Sanchez responded by going back to his apartment, getting a gun, and shooting one of the men. *Id.* To her recollection, Alfredo never mentioned anything about one of the men potentially being armed prior to the shooting. *Id.* After hearing this and other evidence not germane to this Petition, the jury convicted Sanchez of first-degree murder with a firearm enhancement, and the Superior Court consequently sentenced Sanchez to "three years plus 50 years to life in prison." *Id.* at 2.

B. Post-Trial Procedures

Sanchez appealed his conviction directly to the California Court of Appeal. ECF Nos. 1 at 2; 17-21. Sanchez's direct appeal raised and exhausted the same five grounds for relief he asserts in this Petition. *See generally* ECF No. 17-21. The Court of Appeal unanimously affirmed the judgment against Sanchez. *See id.* at 33. Sanchez then petitioned the California Supreme Court for review. ECF No. 1-2. The Supreme Court rejected his Petition without comment on February 10, 2021. *See* ECF Nos. 1-3; 17-23. Sanchez timely filed this Petition on February 9, 2022. *See* ECF No. 1.

Sanchez has also filed a Petition for a writ of habeas corpus in the California Superior Court alleging ineffective assistance of counsel and insufficient evidence to support the conviction against him. *See* ECF No. 1 at 3. These claims have not been exhausted in the state court system because Sanchez did not raise them during his direct appeal. *See* ECF 17-23. Thus, Sanchez may not raise them in this Petition. *See King v. Ryan*, 564 F.3d 1133, 1138 (9th Cir. 2009). Any subsequent federal habeas petition based on his ineffective assistance of counsel or sufficiency of the evidence claims will be barred unless Sanchez shows either an intervening, retroactive change in the Supreme Court's constitutional doctrine, or new facts that could not have been discovered with reasonable diligence and which "if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense." 28 U.S.C. § 2244(b)(2).

If Sanchez had filed a so-called "mixed" petition alleging both exhausted and unexhausted claims, he would have had the opportunity to request a stay and abeyance pending the exhaustion of his unexhausted claims. *Rhines v. Weber*, 544 U.S. 269, 275–76 (2005). Sanchez initially suggested he would seek a stay and abeyance. *See* ECF No. 1 at 5. He subsequently elected to exclude his unexhausted claims from this Petition because they would cause "delay." *See* ECF No. 4.[2] Accordingly, this Court will address the merits of the fully exhausted claims.

---

[2] This Court has no obligation to advise Sanchez on the wisdom or folly of his decision to gamble a procedural bar to habeas relief for his unexhausted claims against the expedience of proceeding only on his exhausted claims. *Cf. Pliler v. Ford*, 542 U.S. 225, 233 (2004); *Robbins v. Carey*, 481 F.3d 1143, 1148–49 (9th Cir. 2007).

A jury convicted defendant Orlando Javier Sanchez of first degree murder of 23-year-old Jordy L. (Pen. Code,[1] § 187, subd. (a); count 1), and possession of a firearm by a felon (§ 29800, subd. (a)(1); count 2). In connection with count 1, the jury found true the allegation that defendant intentionally and personally discharged a firearm, and proximately caused great bodily injury and death to a person other than an accomplice. (§ 12022.53, subd. (d).) The court sentenced defendant to a total term of three years plus 50 years to life in prison.

Defendant on appeal contends the court committed error by refusing to instruct on (1) the lesser-included offense of voluntary manslaughter based on imperfect self-defense or defense of another; and (2) voluntary intoxication. Defendant further contends (3) the jury instructions on perfect self-defense, provocation, and voluntary manslaughter based on a sudden quarrel/heat of passion were prejudicially incomplete and misleading; (4) his conviction must be reversed under the cumulative error doctrine; and (5) the imposition of various fines, fees, and assessments without a finding of ability to pay violated his due process rights. (See *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*).)

As we explain, we reject these contentions and affirm the judgment.

FACTUAL OVERVIEW

N.D., a documented Linda Vista 13 gang member, testified he met victim Jordy while growing up in the San Diego neighborhood of Linda Vista. They became good friends and hung out together, although Jordy was not in a gang. N.D. and Jordy were together on October 15, 2016, when Jordy was shot and killed.

---

1 All further statutory references are to the Penal Code, unless otherwise noted.

Although at the time of trial N.D. could not recall many of the details of Jordy's killing, about five days after the shooting N.D. was interviewed by San Diego Police Department detectives including Jesse Zaldivar, which interview was recorded and played for the jury. A transcript of the interview was included in the record.

Detective Zaldivar had known N.D. since about 2011, when the detective began working in a gang unit. N.D. at the time of the interview had been arrested in connection with an unrelated crime. N.D. initiated the contact with police a few hours after Jordy's shooting.

N.D. testified that neither he nor Jordy had any sort of firearm or weapon at the time of the shooting; that he had never seen Jordy carry a gun; and that, prior to the shooting, the two of them had walked to a middle school in their neighborhood and sat on some steps. Although N.D. had gotten "high" the night before and had not slept for three or four days, N.D. testified he and Jordy were not drinking or getting high together on the night of the shooting. Instead, they were just hanging out and talking. At some point well after midnight, they left the school and started walking to the nearby home of N.D.'s cousin M.L.

As they were walking on Morley Street nearing M.L.'s home on Comstock Street, they saw a white car drive by that N.D. later identified as a Scion XB. Two men were inside the car. Neither N.D. nor Jordy recognized either of the men.

Despite the fact they said nothing to the men in the car, N.D. told detectives the man sitting in the passenger seat started "mad-dogging" them. Concerned by the passenger's behavior, N.D. also told the detectives that he and Jordy paused on the sidewalk after watching the Scion turn right on Comstock.

As N.D. and Jordy continued walking, they saw the Scion had parked on Comstock, across the street from M.L.'s home. N.D. told detectives the two men got out of the car and appeared to go into a "courtyard area" of an apartment complex. N.D. and Jordy then went to the front door of M.L.'s home, but found it locked.

About two minutes later, the two men, along with three or four other men, came back outside holding beer bottles. The man who had been sitting in the passenger seat stated to N.D. and Jordy, "Que guey? Que guey?" which N.D. stated meant "What's up fool?" N.D. did not believe any of the men were gang members, estimated they were all in their 30's, and described them as being "paisas."[2]

Suddenly, the men "jumped" N.D. and Jordy. Prior to being jumped, N.D. testified neither he nor Jordy had said anything to the men to start the fight. N.D. also had not flashed any gang signs or had otherwise attempted to engage the men. N.D. blamed the incident on the passenger of the Scion, who, according to N.D., had instigated it first by "mad-dogging" them as they walked and second, by later confronting them on the street.

N.D. and Jordy initially fought side-by-side, until N.D. was knocked to the ground. N.D. estimated the fight lasted no more than a minute. During the fight, N.D. heard a gunshot, and, after a short pause, at least one more gunshot.

Immediately after the gunshots, some of the men involved in the fight left in the Scion, while others ran away. Before hearing the gunshots, N.D. told detectives none of the men from the car or the apartment complex said anything about a gun, nor did any of them brandish a weapon. If they had,

---

2 Detective Zaldivar testified that a "paisas" was a "slang or a derogatory term that is used to describe a Mexican National, as opposed to someone born in the United States who was of Mexican-American decent."

N.D. said he and Jordy would have backed-off. After the gunshots, N.D. called out for Jordy, then saw him lying on the sidewalk a short distance away.

Before leaving the scene of the shooting, N.D. went to a car parked near where Jordy had been shot and broke one of its windows. N.D. believed the person who owned that car lived in the apartment complex where the men had been partying. N.D. waited for the car's owner to come outside, hoping he or she had knowledge regarding who may have shot Jordy.[3]

Police arrived at about 4:00 a.m. and found Jordy lying on the ground. An officer activated his body-worn camera, which video was played for the jury, and a transcript of which was included in the record. Jordy told police he heard a clicking sound, then started running, and realized he had been shot in the back. Jordy claimed he was "fine," but the transcript from the video shows he was struggling to breathe, as police implored Jordy to "stay awake" and "[k]eep talking."

In response to further questioning, Jordy stated he had not "claim[ed] anything," implying he was not in a gang, had no reason why anybody would want to shoot him, and had been waiting near a stop sign because he saw "suspicious" people in a car. Jordy also stated the car had been "driving slow up and down" the street past them. Jordy described the car as a "small" "white SUV" with two occupants.

Paramedics transported Jordy to the hospital, where he later died during surgery. Forensic pathologist Jacquelyn Morhaime testified she conducted an autopsy of Jordy, who sustained a gunshot wound to the right side of his back, consistent with an entrance wound. The bullet then traveled

---

[3] As it turned out, the man who owned the car with the window broken by N.D. had nothing to do with Jordy's homicide.

through Jordy's body, perforated his interior vena cava, which is the largest vein in a person's body, and his liver, and exited his body without perforating the heart. According to Dr. Morhaime, these injuries caused significant bleeding, leading to Jordy's death.

Aureliano G. testified he lived on Comstock at the time of the shooting. Aureliano had just gotten off work and was eating his breakfast when he heard people outside arguing in Spanish. Aureliano in response raised his curtain and saw three men standing in the middle of the street. He next heard one of the men twice aggressively yell in English, "You fucked up homeboy," then two gunshots. Aureliano saw two men run to what he described as a white SUV, and another man run in a different direction. Aureliano watched the SUV drive off.

Another witness, Steven N., testified he was living with his grandmother on Morley Street on the night of the shooting when he was awakened by the sound of a gunshot. After hearing the gunshot, Steven immediately ran outside and, from the porch area, looked down Comstock Street and watched a "white box cube car speed off," which Steven identified as a Scion XB. Steven noticed the Scion had tinted windows and was missing a rim on its back left tire. A short time later, Steven saw a man helping another man, who was limping, to an area near some palm trees.

As noted, Detective Zaldivar and another detective interviewed N.D. five days after Jordy's October 15, 2016 murder, with detectives conducting a follow-up interview about a year later. Detective Zaldivar testified that the statement by the passenger in the Scion of "Que guey?" meant, "What's up, punk?" "What are you looking at?"; and that "mad-dogging" another person means to "star[e]" that person down, as if to "challenge" that person.

Detective Zaldivar testified N.D. during the October 20 interview was concerned about being labeled a "snitch" or "rat" for talking to police. According to Detective Zaldivar, a gang member who "snitches" could be kicked out of the gang, attacked, or even killed. Detective Zaldivar at no time offered N.D. any promises, benefits, or deals for information regarding Jordy's killing. Detective Zaldivar at trial confirmed many of the details N.D. had provided during his October 20 interview with detectives.

At the scene of the shooting, police found an expended shell casing in the street, near the curb line; a bullet projectile under a parked car; and what appeared to be a recently disposed of beer bottle. These items were impounded.

Using a computer program that maintains DNA profiles, testing from the beer bottle was traced back to DNA matching Alfredo N. Alfredo was arrested on April 11, 2017, for charges unrelated to this case. Alfredo admitted owning a white Scion in October 2016, and selling the car sometime thereafter to defendant.

DNA from the shell casing collected from the scene contained DNA from two contributors, with defendant's DNA "included with limited support as one of the contributors" on the casing. Using a statistical analysis based on the Hispanic population, it was determined that defendant was "762 times more likely" he was a contributor than not.

After being granted immunity by the court pursuant to section 1324, Luis N. testified that he and defendant had been roommates at one point, living in a house on Polk Avenue in San Diego. Prior to living on Polk, Luis testified that defendant had lived with several other roommates in an apartment complex in Linda Vista. Luis recalled going about five times to

visit defendant at this complex. At some point after moving from his Linda Vista apartment, defendant began driving a white Scion.

Luis testified that defendant kept a safe at their Polk house; that defendant previously had given Luis the combination to the safe; and that Luis in the past had been able to open the safe, which contained, among other items, guns owned by defendant. After defendant's arrest in late January 2017, Luis tried but was unable to open the safe. Luis told the jury he wanted to open the safe because he did not want any of defendant's belongings, including his guns, in their house. As such, Luis also moved defendant's belongings outside, onto the patio. After defendant's arrest, his girlfriend Blanca G. came to the Polk Avenue house looking for defendant's safe.

Sometime in November or early December 2016, defendant initiated a conversation with Luis about homicide. Luis recalled the conversation took place in a car when they were alone. Defendant asked Luis what he (i.e., Luis) would do if he had killed someone. Defendant also asked Luis if he had "seen the news?" Using his cellphone, defendant searched online, found a story about a homicide, then handed his phone to Luis, who testified the article involved a killing in Linda Vista. Defendant then admitted his involvement in the homicide.

Luis testified he and defendant had a second conversation about the Linda Vista homicide. Luis could not recall when this second conversation took place, as he testified it could have been "months" later, but also admitted he told detectives during an interview in October 2017 that it could have been the same day he and defendant had first spoken of the incident.

During this second conversation, defendant provided more details about the homicide, including the events leading up to it. Luis testified

defendant had told him that two "gang members," whom defendant also referred to as "Cholos," had been "bothering" or "bugging" defendant for some beer; that defendant "saw something chrome" or a "chrome handpiece" under the shirt of one of the gang members, which defendant believed was a gun; and that defendant in response left the street, went to the apartment complex where he was then-living, retrieved a gun from his room, "and came back down, . . . and shot" one of the gang members. Defendant told Luis he fired the gun a "couple of times."

Luis further testified defendant stated during this second conversation that his "buddy Billy" had been with him at the time of the shooting; that Alfredo also went by the name Billy; that one of the gang members, whom defendant referred to as a "cholito," had gotten away, with defendant adding, "it wasn't—it wasn't his time"; and that defendant had meant to shoot the gang member who got away, as the "one that got shot and killed—it wasn't meant for him." Luis also testified defendant had never mentioned being in a fight, or having a gun pointed at him, prior to the shooting. Nor did defendant tell Luis he had been "afraid" of the two men.

As Luis was moving defendant's belongings onto the patio of their Polk Avenue house, Luis testified he found a black handgun. Luis further testified he took the gun for his own "protection" because he "didn't know what was going on," and he wanted to "leave nothing up [to] chance[.]" At some point, Luis gave the gun to his uncle.

The record shows the parties entered into the following stipulation: "The defendant was arrested by law enforcement on January 31st, 2017. While the defendant was in law enforcement custody, his telephone calls and in-person visits were lawfully recorded by law enforcement. At the beginning

of each recorded conversation, the operator states in Spanish that the calls will be recorded and subject to monitoring at any time. The chain of custody was proper at all times."

San Diego Police Department detective Maria Delgadillo, whose first language is Spanish, testified she reviewed about 100 recorded conversations from February 12 to May 5, 2017 between Blanca and defendant. These conversations were in Spanish, and were the result of either in-person jail visits, or a monitored phone line. Detective Delgadillo translated some of these messages into English, which transcripts were included in the record.

Blanca at trial testified that she and defendant had been in a dating relationship for about six years and had a child together. In April 2017, Blanca went to the police station to speak with detectives. During their conversation, Blanca stated defendant about six months earlier had told her he was "very nervous" because he had "hurt" someone, but claimed he did know what had happened to this person. Defendant also told Blanca that he had gotten into "a fight with some cholos because they stared at him"; that he had been "afraid" and felt "threatened" by these men; and that the incident had been in the news. Defendant then neglected to tell Blanca he had shot and killed one of the men during the fight.

In January 2017 defendant and Blanca exchanged a series of text messages that police later recovered from defendant's cellphone. In one such message, Blanca wrote, "And overall for what you said with pride that you can take someone's life and not feel a thing." Blanca testified at or near the time she sent this message to defendant, she had become frustrated because he had promised to give her a ring as he sought to "restart" their relationship.

After his arrest, defendant and Blanca had several jailhouse conversations, as noted. During some of these conversations, they talked about a "box or a shoebox." Blanca testified she understood this was a reference to a safe. During at least one such conversation, defendant urged Blanca to arrange for the "box" or "shoebox" to be moved. Blanca also told detectives during other interviews that when she and defendant spoke of "perfume," that was code-speak for the guns that defendant kept inside the safe.

San Diego Sheriff Department detective Manuel Heredia testified he worked for the special investigations division. Detective Heredia, who speaks Spanish fluently, testified he and two other Spanish-speaking detectives participated in an undercover operation inside the jail on September 7, 2017 with Alfredo as the "target." The operation, which lasted a couple of hours, was recorded, portions of which were played for the jury. A transcript of various audio clips were included in the record. The purpose of the operation was to determine if Alfredo had any involvement in, or knowledge of, Jordy's murder.

During the operation, Alfredo stated that he had been transferred from federal to state custody because they wanted to charge him with a homicide; that the charge resulted from "a slight brawl" "with a dude and I threw a bottle at him and my fingerprint was on the bottle," as was his (i.e., Alfredo's) DNA; that Alfredo believed the two individuals they encountered were going to "rob us"; that Alfredo was with "another dude," and both "were already all drunk"; and that they had "scored up a bit of drugs" "or blow" as well.

Alfredo repeatedly stated he did not shoot the victim. At a later point, Alfredo reiterated they had gone to the home on Comstock Street to buy "blow" and he had been driving a Scion, which he then owned. Alfredo later

sold the Scion. At some later point during the operation, Alfredo claimed that there was DNA and fingerprints on the expended "casings," but that there were no casings in the Scion.

At another point, Detective Kimberly Ann Collier purposely interrupted the operation and confronted Alfredo, indicating that he would be charged for murder as a co-conspirator because his fingerprints and DNA had been found on the beer bottle located at the crime scene. Detective Collier showed Alfredo a picture of defendant, referring at one point to defendant by his nickname "Ronas." Detective Collier then left, allowing the undercover detectives to renew their conversation with Alfredo about the shooting.

They asked Alfredo if "Ronas" had "pulled that shit out all of a sudden" as a result of being "upset or what?" to which Alfredo responded, "No, it—it was a brawl." One of the undercover detectives asked Alfredo if "Ronas" had killed the victim. Although Alfredo replied, "No, no," at trial Detective Heredia testified Alfredo at the same time "nodded his head up and down, referring to yes."

Alfredo during the surreptitious recording reiterated he was not scared by Detective Collier because he did not shoot the victim. One of the undercover detectives then asked Alfredo, "Hey, well Ronas was really well armed or what?" to which Alfredo responded, "Yes, it's fucked up." Alfredo went on to state that he had been driving the Scion and defendant had been sitting in the passenger seat on the night of the shooting; that defendant had fired a ".40" caliber gun; that after the shooting, they left together in the Scion and defendant had left the gun in the car; but that Alfredo was not concerned his DNA would be found on the gun because he had not touched it after the shooting.

STATEMENT OF THE CASE

On October 15, 2016, Jordy Lopez (Lopez) was shot and killed in the Linda Vista area of San Diego.

A San Diego County information filed on August 12, 2018, charged Sanchez with the murder of Lopez (Pen. Code[1], § 187, subd. (a) – count 1) and possession of firearm by a felon (§ 29800, subd. (a)(1) – count 2). (CT 12-13.) An enhancement allegation that Sanchez personally and intentionally discharged a firearm causing death was attached to the murder count. (CT 12-13; § 12022.53, subd. (d).) Sanchez pled not guilty to the substantive charges and denied the firearm allegation. (CT 193.)

On April 15, 2019, following jury trial, Sanchez was convicted of first degree murder and possession of firearm by a felon. (CT 228, 229, 230; 11-RT 1405-1406.) The jury also sustained the personal firearm discharge causing death allegation. (CT 228, 229; 11-RT 1405-1406.)

On May 13, 2019, Sanchez was sentenced to 53 years to life in prison. (CT 175, 177, 232; 12-RT 1465-1466.)

The court imposed a $80 court facilities assessment (Gov. Code, § 70373), a $60 court operations assessment (§ 1465.8), a $154 criminal justice administration fine (Gov. Code, § 29550) and a $10,000 restitution fine (§ 1202.4). (CT 176, 232; 12-RT 1466.) It also ordered Sanchez to pay $5,512 to the California Victims Compensation Board. (CT 232; 12-RT 1466-1467.)

---

[1] All unspecified statutory citations are to the Penal Code.

Defendant and Appellant Orlando Javier Sanchez (Sanchez) petitions for review of the decision by the Court of Appeal for the Fourth Appellate District, Division One. The unpublished opinion is attached in Appendix "A" (Opinion). The opinion was filed on November 13, 2020. Neither party filed a petition for rehearing. This petition is timely. (Cal. Rules of Court, rules 8.366(b)(1), 8.500(e)(1).)

QUESTIONS PRESENTED

1. Whether the trial court prejudicially erred in refusing to instruct the jury on the imperfect self-defense theory of voluntary manslaughter?

2. Whether the trial court prejudicially erred in refusing to instruct the jury on voluntary intoxication?

3. Whether the given jury instructions on self-defense, provocation, and sudden quarrel/heat of passion voluntary manslaughter were prejudicially incomplete and misleading?

4. Whether the cumulative effect of the jury instruction errors demonstrated in Questions 1 through 3 deprived Sanchez of his constitutional rights to due process and a fair trial?

5. Did the Court of Appeal err in concluding that the trial court did not violate due process, as interpreted in *People v. Dueñas* (2019) 30 Cal.App.4th 1157, in imposing a restitution fine and various fees and assessments without holding an ability-to-pay hearing or finding there was an ability to pay?

Sanchez timely appealed. (CT 179.)

On November 13, 2020, the Court of Appeal for the Fourth Appellate District, Division One, issued an unpublished opinion affirming the judgment of conviction.

Sanchez seeks review.

STATEMENT OF FACTS

For purposes of this petition, Sanchez adopts the Court of Appeal's "Factual Overview" in the opinion. (Opn. pp. 2-13.)

NECESSITY FOR REVIEW

REASONS FOR GRANTING THE PETITION

Question 1: The Trial Court's Refusal to Instruct the Jury on Imperfect Self-Defense Voluntary Manslaughter.

The trial court instructed the jury on self-defense or defense of another according to CALCRIM No. 505 (CT 143-144; 8-RT 1182-1185), but it refused defense counsel's request for a jury instruction on imperfect self-defense/defense of another voluntary manslaughter, a lesser necessarily included offense of murder. (8-RT 1159, 1164-1166, 1176-1182.) On appeal, Sanchez argued the court's refusal amounted to prejudicial error because there was sufficient evidence for a reasonable jury to conclude that he killed the victim in unreasonable self-defense or defense of another. Sanchez further argued the error deprived him of his constitutional rights to due process of law and to present a defense. (Cal. Const., art. I, § 15; U.S. Const., 6th & 14th

Amends.) The Court of Appeal rejected the argument, ruling the evidence was insufficient to warrant the requested voluntary manslaughter jury instruction. (Opn. pp. 13-21.)

Review should be granted because both the trial court and the Court of Appeal erred in their assessment of the evidence.

When a homicide, committed with malice, is accomplished under the good faith but unreasonable belief that deadly force is required to defend oneself or another person from imminent harm, the malice element is "negated" or "mitigated", and the resulting crime is voluntary manslaughter, a lesser included offense of murder. (*People v. Bryant* (2013) 56 Cal.4th 959, 968.)

When the evidence raises a question as to whether all of the elements of the charged offense are present and there is substantial evidence that would justify a conviction of a lesser included offense, the trial court has a duty to instruct on the lesser included offense even without request. (*People v. Wyatt* (2012) 55 Cal.4th 694, 698.) "Substantial evidence" is evidence sufficient to deserve consideration by the jury, that is, evidence that a reasonable jury could find persuasive. (*People v. Williams* (2015) 61 Cal.4th 1244, 1263.) The reviewing court must determine the "sufficiency of the evidence without evaluating the credibility of witnesses, for that is a task reserved for the jury." (*People v. Wyatt, supra*, 55 Cal.4th at p. 698.) Doubts as to the sufficiency of the evidence to warrant a jury instruction must be resolved in favor of the defendant. (*People v. Tufunga* (1999) 21 Cal.4th 935, 944.)

Here, contrary to the Court of Appeal's conclusion, the trial court should have instructed on the imperfect self-defense/defense of another voluntary manslaughter for the following reasons.

The trial court instructed on self-defense and defense of another. (CT 143-144.) If there is substantial evidence of self-defense/defense of another, there will always be substantial evidence of to support an imperfect self-defense/defense of another jury instruction. (See *People v. De Leon* (1992) 10 Cal.App.4th 815, 824 ["If there was substantial evidence of his 'honest belief' for self-defense purposes, there was substantial evidence of his 'honest belief' for imperfect self-defense purposes."]; see also *People v. Ceja* (1994) 26 Cal.App.4th 78, 90 (conc. opn. of Johnson, J.), overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 91.) Accordingly, if the trial court found substantial evidence of self-defense/defense of another (not imperfect self-defense/defense of another) there was, necessarily, substantial evidence of imperfect self-defense/defense of another. This is so because self-defense requires both an honest and reasonable belief in imminent peril while imperfect self-defense requires only an honest belief.

Indeed, there is evidence that before the shooting there was a heated argument and a fight or "brawl." (4-RT 431-435; 5-RT 648; 6-RT 780, 784; 8-RT 1073, 1077; Aug.CT 71-72, 123, 128, 145, 161, 163, 166, 167.) The argument involved N.D., a well-known member of a street gang who accompanied victim Lopez at the time of the incident that led to the homicide. (5-RT 590-591,

639, 641.) Both N.D. and Lopez participated in the fight. (5-RT 650; Aug.CT 145.) There is also evidence that N.D. brandished a firearm during the incident. (7-RT 881-883, 887, 891.)

Alfredo N. (Alfredo), Sanchez's friend and companion at the time of the incident, told the undercover police investigators that N.D. and Lopez wanted to rob him as Alfredo and Sanchez were sitting drunk in the Scion. (Aug.CT 166-167; 8-RT 1076.) Alfredo described N.D. and Lopez as "gangsters" and said "they got there to – to rob us" and "they got to me to rob me." (Aug.CT 161, 162, 166, 167; 8-RT 1074-1076.) Alfredo tried to get out of his car but could not because N.D. and Lopez would not let him out of the car. (Aug.CT 161.) When Alfredo eventually got out of his car, he started fighting with the robbers. (Aug.CT 161, 175; 8-RT 1074-1075.) Alfredo said, "they assaulted us" and "it was a brawl." (Aug.CT 163; 8-RT 1075.) When N.D. and Lopez ran and whistled "like to call more fools," Alfredo threw a bottle at "him" but did not hit "him." (Aug.CT 162, 175-176.) Then, as Alfredo was going back to his car, N.D. and Lopez came around from somewhere and Alfredo heard gunshots. (Aug.CT 162, 176, 184; 8-RT 1075.) Alfredo identified Sanchez as the shooter. (Aug.CT 195; 8-RT 1066-1068, 1079, 1081-1082.)

Alfredo's common-law wife, Particia C. (Patricia), testified that in the morning after the shooting Alfredo told her that he was drinking with Sanchez near Sanchez's residence and that Sanchez was asleep when some "guys" came by and wanted to pick a fight with Alfredo. (8-RT 1089-1091, 1092.) Alfredo said

he told them to leave and that he did not want to fight. (8 RT 1090.) The "guys" then asked where they were from (which is a known gang challenge). (8-RT 1090.) Sanchez woke up and asked Alfredo what was going on. (8-RT 1090.) When Alfredo told Sanchez the "guys" were trying to pick a fight, Sanchez went inside his house, brought out a gun, and shot at the "guy." (8-RT 1090.)

Sanchez's roommate, Luis N. (Luis), testified that Sanchez told him that he was outside his apartment when two gang members (Lopez and N.D.) approached him and Alfredo. (7-RT 881-882, 1013.) Sanchez said that N.D. and Lopez were "bugging" them for beer and that there was an argument during which N.D. brandished a firearm. (7-RT 881-883, 887, 891.) Sanchez told Luis that he went inside his apartment, came back out with a gun, and fired two shots, killing Lopez. (7-RT 883-886, 894.)

Sanchez's girlfriend, Blanca G. (Blanca), told the police that Sanchez called her on the phone and said that he got into a fight with some gang members because they stared at him and that he hurt someone and did not know what happened to that person. (7-RT 957-959, 966-967.) Blanca testified that Sanchez told her the gang members threatened him and that he was afraid.[2] (7-RT 966-967.)

[2] Substantial evidence of a defendant's state of mind, including an honest but unreasonable belief in the necessity to defend against imminent peril to life, may be present without defendant testimony. (*People v. Castillo* (1987) 193 Cal.App.3d 119, 126; *People v. Anderson* (1983) 144 Cal.App.3d 55, 62.)

Based upon the totality of this evidence, and interpreting the evidence in light most favorable to the rejected jury instruction, a reasonable jury could find that during his encounter with N.D. and Lopez Sanchez was scared for himself and Alfredo because they were confronted by two apparent gang members who challenged them by saying "Where are your from?" The two gang members tried to rob Alfredo and/or Sanchez and one of the gang members brandished a firearm during the incident. A reasonable jury could further find that there was a fight or brawl and that during this fight Sanchez went to get his gun and then fired the gun to protect himself and/or Alfredo from the assault or robbery by the gang members.

Although the jury was instructed on self-defense and defense of another and it nevertheless found Sanchez guilty of first degree murder, a reasonable jury could conclude from the evidence that Sanchez fired the shots honestly but unreasonably believing in the need to use deadly force in self-defense or defense of another, thereby committing voluntary manslaughter.

The trial court therefore erred in refusing to instruct the jury on imperfect self-defense/defense of another voluntary manslaughter.

Although failure to instruct on a lesser included offense is ordinarily only state law error (see *People v. Breverman* (1998) 19 Cal.4th 142, 149), courts have treated voluntary manslaughter differently, holding that failure to instruct on that lesser included offense "is an error of federal constitutional dimension that denies

the defendant due process because it relieves the prosecution of the burden to prove malice beyond a reasonable doubt." (*People v. Thomas* (2013) 218 Cal.App.4th 630, 641-642; see also *People v. Moye* (2009) 47 Cal.4th 537, 563-564 (dis. opn. of Kennard, J.) [explaining that failure to instruct on heat of passion amounts to an incomplete instruction on the definition of malice for the charged offense itself, and hence constitutes federal constitutional error, and noting that the Supreme Court majority "has yet to resolve the issue"]; *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414 ["a defendant has a constitutional right [under the due-process clause] to have the jury consider defenses permitted under applicable law to negate an element of the offense"]; *Dixon v. Williams* (9th Cir. 2014) 750 F.3d 1027, 1034 [there was federal constitutional error where "the kind of provocation that could give rise to manslaughter was improperly limited"].)

The reasoning of *People v. Thomas*, *supra*, should apply equally to imperfect self-defense/defense of another, because it too negates malice. (See *In re Christian S.* (1994) 7 Cal.4th 768, 778-780 & fn. 4 [relationship between imperfect self-defense and statutory definition of malice].)

Furthermore, federal cases recognize a due process right to instructions on the "defense theory of the case." (See e.g., *Bradley v. Duncan* (9th Cir. 2002) 315 F.3d 1091, 1098-1099.) The "defense theory of the case" may require instructions on a lesser included offense, where the defense evidence and arguments are

directed to a distinction between the charged and the lesser offense. (*Conde v. Henry* (9th Cir. 1999) 198 F.3d 734, 739.)

Here, the trial court denied defense counsel's request for imperfect self-defense voluntary manslaughter instructions, thereby refusing to instruct on "defense theory of the case," in violation of Sanchez's constitutional rights to present a defense and to due process of law and a fair trial.

The error was prejudicial under the federal *Chapman*[3] test and the state *Watson*[4] test for assessing prejudice. The theory of imperfect self-defense/defense of another was reasonable for the reasons discussed above. The prosecution case against Sanchez was not an "air tight." (*People v. Vasquez* (2006) 136 Cal.App.4th 1176, 1177, 1179-1180 [reversal for failing to instruct on imperfect self-defense].) The jury's lengthy deliberations and its request for transcripts of the recordings introduced at trial establish the closeness of the case in the eyes of the jury. (See *In re Martin* (1987) 44 Cal.3d 1, 51; *People v. Godinez* (1992) 2 Cal.App.4th 492, 504.)

The fact the jury convicted Sanchez of premeditated first degree murder does not make the error harmless because the jury was not aware of the legal significance of imperfect self-defense/ defense of another to premeditation. Also, a finding of premeditation was hardly compelled. This could have been a

---

[3] *Chapman v. California* (1967) 386 U.S. 18

[4] *People v. Watson* (1956) 46 Cal.2d 818

spur-of-the-moment shooting, intentional but not deliberate and premeditated. (See *People v. Gunder* (2007) 151 Cal.App.4th 412, 423-424; *People v. Ramirez* (2010) 189 Cal.App.4th 1483, 1488.)

Review should therefore be granted.

Question 2: The Trial Court's Refusal to Instruct the Jury on Voluntary intoxication.

The trial court refused to instruct on the principles of voluntary intoxication. (8-RT 1164-1168, 1185-1189.) Sanchez argued on appeal the trial court prejudicially erred in refusing to give the instruction because evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent and there was sufficient evidence to warrant the instruction. Sanchez further argued the error deprived him of his constitutional right to due process of law. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.) The Court of Appeal rejected the argument, ruling the evidence was insufficient to warrant the instruction. (Opn. pp. 21-24.)

Review should be granted because both the trial court and the Court of Appeal erred in their assessment of the evidence.

On request, the trial court has a duty to instruct on voluntary intoxication. (*People v. Castillo* (1997) 16 Cal.4th 1009, 1014; *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Pursuant to Penal Code section 29.4 evidence of voluntary intoxication is admissible with respect to the actual formation of a required specific intent. (§ 29.4, subd. (b); *People v. Mendoza* (1998) 18 Cal.4th 1114, 1124-1126.)

Voluntary intoxication can be used to negate an element of the crime that must be proven by the prosecution. (*People v. Visciotti* (1992) 2 Cal.4th 1, 56-57; *People v. Reyes* (1997) 2 Cal.App.4th 975, 982.)

Pertinent to the crime of murder charged here, section 29.4, subdivision (b), permits evidence of voluntary intoxication on the question of whether the defendant "formed a required specific intent," "premeditated," "deliberated," or "harbored express malice aforethought." (*People v. Soto* (2018) 4 Cal.5th 968, 975.)

Contrary to the Court of Appeal's ruling, there is sufficient evidence to warrant a voluntary intoxication jury instruction on the question of whether Sanchez "formed a required specific intent," "premeditated," "deliberated," or "harbored express malice aforethought", as permitted by California law.

Alfredo told the undercover deputies that he and Sanchez were sitting and drinking in the car shortly before the altercation that led to the shooting. (Aug.CT 167, 172, 175, 186; 7-RT 1022.) Alfredo said they were drunk (Aug.CT 162-163; 8-RT 1070-1071, 1075) and that Sanchez was asleep in the car (Aug.CT 162-163, 173; 8-RT 1077). Alfredo stated he "was really fucking drunk." (Aug.CT 199; 8-RT 1070.) Alfredo's common-law wife, Patricia, confirmed that he returned home very drunk after the incident and said that he was drinking with Sanchez and that Sanchez was asleep when some "guys" came by and wanted to pick a fight with them. (8-RT 1089-1093, 1096, 1102.)

N.D. and Sanchez confirmed Sanchez's beer consumption to some extent. N.D. stated that the men who confronted him and Lopez had beer bottles in their hands. (5-RT 648; Aug.CT 108-109, 113, 123.) In turn, Sanchez told his roommate Luis that the men he and Alfredo encountered were "bugging" them for beers. (7-RT 881-883, 887, 891.)

In its totality, this evidence circumstantially demonstrates that both Alfredo and Sanchez were drinking beer and were intoxicated at the time of the fight that resulted in the deadly shooting. Alfredo's statement that they were "drunk" and that Sanchez was "asleep" in the car can be reasonably interpreted as evidence that Sanchez was passed out drunk in the car shortly before the incident.

In deciding whether to give a jury instruction, the trial court must view the evidence in the light most favorable to the defendant and must resolve doubts as to the sufficiency of evidence in the defendant's favor. (*People v. King* (1978) 22 Cal.3d 12, 15; *People v. Enriquez* (1977) 19 Cal.3d 221, 228.) Likewise, on appeal the evidence must be viewed in the light most favorable to the omitted jury instruction. (*People v. Tufunga, supra*, 21 Cal.4th at p. 944.)

For the above reasons, contrary to the Court of Appeal's opinion, the trial court erred in refusing to give the voluntary intoxication jury instruction.

Because the instruction on voluntary intoxication was necessary to enable the jurors to decide the crucial issues of the

mental state required for a first degree murder conviction, the error violated the due process guarantee that requires the prosecution in a first degree murder prosecution to prove the required intent and mental state (malice, deliberation and premeditation) beyond a reasonable doubt.

Furthermore, because the evaluation of the events preceding the shooting and determination of what type of homicide Sanchez committed was a factual one for the jurors, the error affected Sanchez's constitutional right to have the jury determine every material issue presented by the evidence (*People v. Hedgecock* (1990) 51 Cal.3d 395, 407-409), to resolve disputed factual issues, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts (*Wright v. West* (1992) 505 U.S. 277, 296-297; *Mathews v. United States* (1988) 485 U.S. 58, 64-65).

The error was prejudicial for the reasons stated in Question 1, above. A properly instructed jury could reasonably conclude that Sanchez was very intoxicated at the time of the incident and that his intoxication prevented him from deliberating and premeditating the homicide and/or acting with express malice aforethought.

Review should therefore be granted.

Question 3: The Jury Instructions on Self-Defense Provocation, and Sudden Quarrel/Heat of Passion Voluntary Manslaughter Were Prejudicially Incomplete and Misleading.

Sanchez argued on appeal the jury instructions on self-defense, provocation, and sudden quarrel/heat of passion voluntary manslaughter were prejudicially incomplete and misleading. He further argued that this jury instruction error deprived him of his constitutional right to due process of law. (Cal. Const., art. I, § 15; U.S. Const., 14th Amend.) The Court of Appeal rejected the argument, concluding there was no error. (Opn. pp. 24-30.)

Review should be granted because the trial court and the Court of Appeal erred.

Trial courts have a sua sponte duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence, i.e., those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 873.) This duty required the trial court to correctly instruct the jury on all applicable defenses and lesser included offenses, including the defense "theory of the case." (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 149, 155.)

Here, the trial court instructed the jury on the general principles of homicide (CT 134 [CALCRIM No. 500]), first and second degree with malice aforethought (CT 135-136 [CALCRIM No. 520]), willful, deliberate and premeditated first degree

murder (CT 137 [CALCRIM No. 521]), self-defense or defense of another (CT 143-144 [CALCRIM No. 505]), and the lesser included offense of sudden quarrel/heat-of-passion voluntary manslaughter (CT 141-142 [CALCRIM No. 570]).

Under the facts of this case, these jury instructions were incomplete and misleading because they failed to instruct on the principles of self-defense in a situation where, as here, there is evidence of an armed attempted robbery, battery or assault, or battery with hands committed by the victim in response to which the defendant resorts to the use of a firearm.

First, because there is evidence that Sanchez resorted to the use of a firearm in response to an attempted armed robbery by N.D. and victim Lopez or an assault and/or battery with hands or fists during which N.D. brandished a firearm, the trial court had a sua sponte duty to instruct on the right to defend personal property, assault with hands or fists, and on the use of a deadly weapon in response to such crimes. These principles of law are contained in CALCRIM No. 3427 and CALJIC Nos. 9.08 and 5.31.

Second, in order for the jury to fully and properly evaluate N.D.'s and/or victim Lopez's conduct during their altercation with Sanchez and Alfredo, the trial court should have defined for the jury the legal elements of assault and assault by means of force likely to produce great bodily injury, as set forth in CALJIC Nos. 9.00 and 9.02 and CALCRIM Nos. 875 and 900. The word "assault" is not a word of common meaning and an instruction giving the legal meaning of the term must be given sua sponte.

(*People v. McElheny* (1982) 137 Cal.App.3d 396, 403-404.)

Third, in light of the evidence of a fistfight or "brawl" before the shooting, the trial court should have instructed the jury on the law of battery, according to CALJIC Nos. 16.140 and 16.141 and CALCRIM Nos. 925 and 960.

Fourth, because there was evidence of provoking statements prior to the fight and shooting, the trial court should have instructed that insulting words alone are not justification for an assault or battery. This well-established principle of law is contained in CALJIC Nos. 9.11 and 16.142.

Fifth, the trial court should have instructed on the effect of provocation on the degree of murder according to CALCRIM No. 522.

These jury instructions were necessary to enable the jurors to evaluate and decide the crucial issues in this case. The trial court therefore had a sua sponte duty to give them. (*People v. Bloyd* (1987) 43 Cal.3d 333, 354; *People v. Quach* (2004) 116 Cal.App.4th 294, 301.) Indeed, jurors are not experts in legal principles and they must be accurately instructed in the law. (*Carter v. Kentucky* (1981) 450 U.S. 288, 302.)

In deciding whether to give a jury instruction, the trial court must view the evidence in the light most favorable to the defendant and must resolve doubts as to the sufficiency of evidence in the defendant's favor. (*People v. King*, *supra*, 22 Cal.3d at p. 15; *People v. Enriquez*, *supra*, 19 Cal.3d at p. 228.) Likewise, on appeal the evidence must be viewed in the light

most favorable to the omitted jury instruction. (*People v. Tufunga, supra*, 21 Cal.4th at p. 944.)

Here, based on the totality of the evidence, a fully and properly instructed jury could reasonably conclude: (1) that Sanchez was justified in resorting to the use of deadly force in self-defense and/or defense of Alfredo; (2) that although the provocation and sudden quarrel or heat of passion were insufficient to reduce murder to voluntary manslaughter, they were sufficient to reduce murder from first degree to second degree; or (3) that Sanchez's actions amounted to imperfect self-defense and/or imperfect defense of another voluntary manslaughter rather than murder (see Question 1, above).

Whether the above-listed instructional omissions are considered individually or jointly, they resulted in incomplete and misleading jury instructions which allowed the jury to presume that N.D. and Lopez were acting lawfully and that Sanchez was not entitled to use deadly force in response to the attempted robbery and/or physical altercation by the victim. The above jury instruction omissions effectively removed Sanchez's defense of self-defense/defense of another from the jury's consideration. The omissions also removed from the jury's consideration the lesser included offense of sudden quarrel/heat of passion voluntary manslaughter.

By failing to give the above listed jury instructions, the trial court failed to adequately inform the jurors on the law governing the case to the extent necessary to enable the jurors to perform

their function. (*People v. McCleod* (1997) 55 Cal.App.4th 1205, 1216.) It is well established the trial court's instructional duty is not always satisfied by a mere reading of wholly correct, requested jury instructions. (*People v. Sanchez* (1950) 35 Cal.2d 522, 528; *People v. Reynolds* (1988) 205 Cal.App.3d 776, 779.)

The error violated the federal constitution's due process guarantee that requires the prosecution to bear the burden of proving the absence of self-defense/defense of another beyond a reasonable doubt. (*People v. Martinez* (2003) 31 Cal.4th 673, 707.) The error also violated the due process guarantee that requires the prosecution in a murder prosecution to prove the absence of sudden quarrel/heat of passion (or imperfect self-defense/defense of another) beyond a reasonable doubt. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 703-704; *People v. Rios* (2000) 23 Cal.4th 450, 460, 462.)

Moreover, because the evaluation of the events preceding the shooting and determination of what type of crime Sanchez committed was a factual one for the jurors, the incomplete and misleading instructions affected Sanchez's constitutional right to have the jury determine every material issue presented by the evidence (*People v. Hedgecock, supra,* 51 Cal.3d at pp. 407-409), to resolve disputed factual issues, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts (*Wright v. West, supra,* 505 U.S. at pp. 296-297; *Mathews v. United States, supra,* 485 U.S. at pp. 64-65).

The error was prejudicial under the federal *Chapman* test and the state *Watson* test for assessing prejudice. Sanchez's guilt was contested and was susceptible to dispute. (*Neder v. United States* (1999) 508 U.S. 1, 19.) The prosecution case was circumstantial (*People v. Quartermain* (1997) 16 Cal.4th 600, 621), and was not so "overwhelming" that the jury "could have had no reasonable doubt" (*People v. Williams* (1997) 16 Cal.4th 635, 689-690; *People v. Harris* (1994) 9 Cal.4th 407, 431).

The jury had reasonable grounds to reject the prosecution's case because there was substantial evidence from which the jury could reasonably conclude that N.D. and Lopez were the aggressors and that the shooting occurred in self-defense or defense of another. There was also substantial evidence of a sudden quarrel and heat of passion. Indeed, the trial court instructed the jurors on provocation. A properly instructed jury could therefore find the crime committed was voluntary manslaughter rather than murder or second degree murder rather than first degree murder.

Moreover, as pointed out by defense counsel in her arguments to the jury, many of the prosecution witnesses were credibility-challenged and their testimony and extrajudicial statements were suspect.

Additionally, the error is prejudicial for the reasons set forth in Argument I, *ante*, including the lengthy jury deliberations and the jury's request for transcripts of the recordings played during the trial.

Conclusion

For The Following Reasons Set Forth Herein, Petitioner Respects Judicial Notice Be Given With Judicial Action Taken By This Supreme Court Granting The Writ Of Certiorari, Recognizing That 1) The Instructional Error During Trial "Did" Raise The Constitutional Issues Argued Herein Of Absolving The Prosecution Of Its Burden To Prove Every Element Of A Murder Charge, 2) Petitioner Was Denied The Right To Present A Defense 3) Petitioners Materiality Issue Presented By The Defense 4) The Cumulative Error Of Petitioners Due Process Rights Being Violated "Not" Being Recognized. Petitioner Sets Forth The Clearly Established Right To A Fair Trial With Due Process Given At Every Stage Of The Trial. The Totality Of The Errors Are Not Harmless And Did Cumulatively Deny Due Process According To Clearly Established Federal Law Not Merely On Point But As Point.

Under Penalty Of Perjury I Am An Indigent Inmate Petitioner A Proper Request All Available Relief.

Respectfully Submitted
x Orlando Sanchez
x

Dated June 11, 2024

The Instant Petition Minus Appendices, Table Of Contents, & Statutory Provisions Is Within The 40 Page Limit, Jurisdictional Requirements Of This Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted, ORLANDO SANCHEZ

x _____

Date: JUNE 10, 2024