

No. 25-7543

In the
Supreme Court of the United States

Michael Burciaga,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

Reply Brief in Support of a Writ of Certiorari

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List of Parties

Michael Burciaga is the Petitioner. The United States of America is the Respondent. No party is a corporate entity.

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Introduction

The government agrees that informational words can constitute adequate provocation for a heat of passion defense. Br. in Opp. 7–8. The government also agrees that heat of passion “negates the malice that would otherwise attach” to a murder charge. Br. in Opp. 7. Thus, where informational words constitute adequate provocation for heat of passion, this Court’s decision in *Mullaney v. Wilbur*, 421 U.S. 684 (1975), necessarily requires the government to prove the absence of heat of passion beyond a reasonable doubt as part of the murder charge itself—not in a freestanding instruction on a lesser offense the jury would reach only if it first acquitted or could not reach a verdict on murder. *See* Pet. App. 6a–9a, 18a–21a.

Yet the government attempts to defend the panel’s decision by claiming it correctly applied the proper framework for assessing provocation involving words and asserts the issue presented is fact-based. Br. in Opp. 8–13. The government is wrong on both fronts. The panel’s summary, non-contextual rejection of a heat-of-passion instruction by applying the general “words alone” rule is not a fact bound application of settled law. The panel’s decision diverges from the operative test adopted by five federal circuits and 13 state courts of last resort—precisely the type of division that warrants this Court’s review. *See infra*, Part I.

The government also mischaracterizes the circuit division by framing it as a dispute over case outcomes rather than the governing method. Br. in Opp. 10–13. Every published circuit decision to address the common-law informational-words provocation exception—the Second, Fourth, Fifth, Eighth, and Tenth Circuits—does so by examining the actual words exchanged and their full context. Thirteen

state high courts align with the prevailing federal view. The panel fractured the Ninth Circuit from the predominant view by failing to acknowledge the existence of the informational words exception, invoking only the “words alone” maxim, and ending its analysis there. Doing so, the panel decided for itself that the heat of passion defense did not mitigate the murder charge—though the district court concluded it did—and deprived Petitioner Michael Burciaga of his due process right to have a properly instructed jury adjudicate the murder charge. *See infra*, Part II.

The government also ignores the due process concerns Justice Sotomayor recently flagged in *Black v. Tennessee*, 606 U.S. ___, 145 S. Ct. 2622, 2623–26 (2025) (Mem.), by treating a legitimate defense as foreclosed if the jury convicts on a greater defense even when the instructions and verdict form rendered it “legally impossible for the jury to accept a legitimate defense.” *See infra*, Part III. Properly considered, the due process rights of defendants to have jurors consider legitimate defenses makes this the ideal vehicle for this Court’s review.

Finally, the government’s harmlessness defense misses the mark. It borrows the wrong standard of review and assumes the very finding the jury was never asked to make. *See infra*, Part IV.

The petition should be granted.

I. The government’s concessions and the trial record confirm the *Mullaney* problem.

The government concedes two points that support Mr. Burciaga’s petition for a writ of certiorari. First, while the government does not address the common-law roots of the informational-words exception (*see* Pet. 5–16), it agrees informational

words may establish heat of passion under the modern prevailing view (Br. in Opp. 7–8 (citing *United States v. Sockey*, 157 F.4th 1282, 1287 (10th Cir. 2025))).¹ Second, the government agrees that finding a defendant acted in the heat of passion “negates the malice that would otherwise attach” to a murder charge. Br. in Opp. 7 (quoting *United States v. Begay*, 33 F.4th 1081, 1088 (9th Cir. 2022) (en banc)). Because the absence of heat of passion is built into the malice element of federal murder,² *Mullaney* thus requires the jury to be instructed that the government must prove that absence of heat of passion beyond a reasonable doubt as part of proving murder. 421 U.S. at 704 (holding “the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented”).

The jury instructions at Mr. Burciaga’s trial confirm a *Mullaney* problem here. To convict on first-degree murder, the murder instruction required the jury to find, beyond a reasonable doubt, malice, premeditation, and that Mr. Burciaga “did

¹ The government refers only to informational words conveying “actual fact of injury or harm,” see Br. in Opp. 8, but under the prevailing view, informational words are the “equivalent of the event presently occurring” “and may itself constitute adequate provocation, even if the disclosure is untrue.” J. Ohlin, Wharton’s Criminal Law § 22:6 Provocation—Words and Gestures (16th ed. 2025) (citing *State v. Yanz*, 50 A. 37, 39 (Conn. 1901) (“It is the belief, so reasonably formed, that excites the uncontrollable passion. Such a belief, though a mistaken one, is calculated to induce the same emotions as would be felt were the wrongful act in fact committed.”))).

² The government’s discussion of premeditation does no work here. Br. in Opp. 13–14. As the government concedes, heat of passion negates the element of malice necessary to convict on murder. Br. in Opp. 7–8. Thus, this Court’s decision discussion of premeditation in *United States v. Frady*, 456 U.S. 152 (1982), is inapposite. See Pet. 25–26. And unlike Mr. Burciaga, Frady presented no colorable evidence to mitigate his offense to manslaughter. Pet. 25–26. Had Frady done so, this Court stated it would have been “a different case.” Pet. 26.

not act in reasonable self-defense.” Pet. App. 6a–7a. The murder instruction told jurors nothing about the heat of passion defense. Heat of passion appears only in the separate voluntary manslaughter instruction, an offense the jury would reach only “if [it found] the defendant not guilty” or could not reach a unanimous verdict on murder. Pet. App. 9a, 18a–21a. This is the very instructional defect *Mullaney* forbids. The government’s own cited appellate authority establishes that heat of passion negates malice itself. Br. in Opp. 7 (citing *Begay*, 33 F.4th at 1088). Other circuits agree. See e.g., *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985) (*Mullaney* “controls” an 18 U.S.C. § 1111 murder prosecution because “[t]he heat of passion defense is directly at odds with malice”). Because the jury was never asked to consider heat of passion in assessing malice, the government’s fallback harmlessness argument, addressed in Part III, cannot supply what the instructions omitted.

II. The federal circuit courts are now divided over whether words can supply adequate provocation, and the Ninth Circuit’s decision makes it the outlier.

In opposition, the government insists there is no conflict because other courts have denied relief on comparable facts. Br. in Opp. 10–13. The flaw in this approach, however, is its failure to acknowledge that each result in those cases followed from the contextual inquiry that the panel skipped altogether here. See Pet. 18–19 (discussing analysis of the words used by five federal circuits), 21–22 & nn.63–75 (discussing analysis of the words used by 13 state supreme courts). In other words, the government conflates outcome for process.

Every published circuit decision to address informational-words provocation resolved the question by examining the actual words exchanged, their meaning, and the surrounding circumstances—not by declaring the issue closed as a matter of law as the Ninth Circuit did here. *See Sockey*, 157 F.4th at 1284–87 (examining whether victim’s words were more than mere name-calling sufficient to negate malice aforethought); *United States v. Slager*, 912 F.3d 224, 236 (4th Cir. 2019) (recognizing the words-alone rule does have exceptions and examining whether words used could provoke a reasonable person to kill); *United States v. Velazquez*, 246 F.3d 204, 213 (2d Cir. 2001) (examining whether victim’s words conveyed information that could be considered provocative); *United States v. McRae*, 593 F.2d 700, 705 (5th Cir. 1979) (examining specific exchange between the parties); *Wakaksan v. United States*, 367 F.2d 639, 641 (8th Cir. 1966) (examining nature of marital argument preceding the killing).

The government’s opposition does not confront the panel’s divergence from the prevailing view so much as recite a list of results. Br. in Opp. 10–13 & nn.2–4. But each of the seven cases the government discusses reached its result by doing exactly what the panel below refused to do—examining the specific words at issue in context against the informational-words exception framework. Br. in Opp. 11. In *State v. Thille*, 570 P.3d 18, 25 (Kan. 2025), the court denied relief because Thille identified “no evidence” the victim “said anything to provoke” him—a factual finding about that record, not a categorical bar. In *State v. Thompson*, 836 N.W.2d 470, 478 (Iowa 2013), the court denied relief because the victim’s words there were “merely insulting or abusive,” not informational. In *Washington v. State*, 989 P.2d

960, 966, 969 n.4 (Okla. Crim. App. 1999), the court held that words “considered in connection with provoking conduct of the deceased” may constitute adequate provocation depending on the specific conduct presented, but were insufficient there as the victim simply stated she no longer loved Washington when the two were already in the process of divorcing. In *People v. Pouncey*, 471 N.W.2d 346 (Mich. 1991), the court declined to hold “that insulting words per se are never adequate provocation” because “what constitutes adequate provocation is a factual question” to be assessed case by case but denied relief because the insults there were mere name-calling. And in *Commonwealth v. Bermudez*, 348 N.E.2d 802, 804–05 (Mass. 1976), the court recognized the informational words exception but found it inapplicable to remote information about possible past adultery—the opposite of a per se words-alone rule. *Sockey* and *McRae* follow the same pattern. *See supra*, 5. Not one of these seven courts resolved the question the way the panel did here—by citing the general rule and ending the inquiry. The government’s own case citations thus aptly illustrate the framework the panel skipped.

The panel below categorically applied only the general words-alone doctrine and declared—without identifying the precipitating words, their context, or the circumstances surrounding them—that Mr. Burciaga’s evidence was “insufficient evidence of provocation.” Pet. App. 2a. That is not an application of the approach every other circuit to consider the question in a published opinion or 13 state courts of last resort have adopted; it is a refusal to apply it. *See* Pet. 17–24 & nn.63–75 (collecting authority).

The government's reliance on the Ninth Circuit's decision in *Begay*, 33 F.4th 1081, does not rehabilitate the panel's approach—it condemns it. Br. in Opp. 10. In *Begay*, the en banc court did not invoke the “words alone” maxim and stop there. It examined the substance of Begay's heated exchange with the victim over her alleged infidelity and explained, on the merits and under plain-error review, why that specific exchange did not warrant a heat-of-passion instruction. *Begay*, 33 F.4th at 1088–99. Because Begay's defense theory at trial was that he did not shoot the victim, the error was not plain and, in any event, the court found was nothing differentiating the argument that occurred before the shooting from past arguments. *Id.* That is precisely the contextual inquiry the panel below refused to undertake here. *Begay* thus sharpens the conflict rather than dissolves it. The same circuit that examined the words, their meaning, and their context in *Begay* on plain error review declined to contextually examine Mr. Burciaga's evidence and resolved his preserved challenge by relying on only the general rule. App. 2a. That is not the circuit applying settled law to different facts—it is the circuit applying two different methods to the same recurring question, reinforcing the need for this Court's review.

The panel's decision thus presents a legal framework problem, not a factual dispute. The analytical question—whether the precipitating words, when viewed in their full context, conveyed information sufficient to provoke a reasonable person to kill or merely conveyed an insult—was never evaluated below. Resolving that question under the prevailing view required the panel to inquire whether Amanda Davis's statement that she did not want Mr. Burciaga's baby during a sudden

argument while in the midst of their unresolved, life-or-death dispute over whether to pursue medical intervention for a fetus diagnosed with Trisomy-18, where Burciaga favored intervention and Davis did not, conveyed information about Davis's intended course of action on a matter of comparable gravity to the infidelity-revelation cases the government itself cites as capable of providing sufficient provocation. Br. in Opp. 7–8. Applying only the general “words alone” maxim absent any analysis of the words used or their context under the informational-words exception, the panel placed the Ninth Circuit at odds with every other federal circuit to issue a published opinion on the issue and 13 state courts of last resort.

The government separately suggests that because the panel's decision is unpublished, it “is not precedent” and “cannot establish binding law . . . that would conflict with another circuit's.” Br. in Opp. 10. The panel's non-precedential label is an internal circuit-rule designation, not a jurisdictional limit under 28 U.S.C. § 1254(1). The government's suggestion also does not survive the text of this Court's own rule. Supreme Court Rule 10(a) asks whether “a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter” or “decided an important federal question in a way that conflicts with a decision by a state court of last resort.” Rule 10(a) does not ask whether the decision constitutes precedent within its own circuit. The panel here was comprised of three active circuit judges who resolved an important recurring question of federal criminal law—whether informational-words evidence must be evaluated in context before a heat-of-passion instruction may be refused—by declining to conduct that evaluation. App. 2a. Whether the Ninth Circuit's

internal publication practices allows another panel to rely on that reasoning does nothing to restore the properly instructed jury Mr. Burciaga was denied, and it does not insulate from this Court’s review a departure from the otherwise uniform approach of five federal circuits and 13 state high courts.

III. The government ignores the due process problem Justice Sotomayor identified: jury instructions that render a legitimate defense unreachable cannot survive the Due Process Clause.

The government’s opposition does not address *Black v. Tennessee*, 606 U.S. ___, 145 S. Ct. 2622 (2025) (Mem.), even though the due process concern Justice Sotomayor identified there is squarely presented on the developed trial record here. Pet. 30–31. In *Black*, Justice Sotomayor found it “hard to imagine” that jury instructions “rendering it legally impossible for the jury to accept a legitimate defense” could survive due process scrutiny, where the murder instruction required no finding on provocation and the manslaughter instruction—which did include it—was reachable only if the jury first acquitted or could not unanimously decide on the murder offense. 145 S. Ct. at 2623–24. Justice Sotomayor “encourage[d] the Tennessee Supreme Court to resolve” the due process concern arising from Tennessee’s manslaughter instructions “in the first instance,” *id.* at 2623, and left the underlying constitutional question unresolved by any court.

Mr. Burciaga’s trial presents an identical structural defect, now squarely before this Court on a complete federal trial record. The murder instruction said nothing about heat of passion; it required only findings of malice, premeditation, and the absence of self-defense. Pet. App. 6a–7a. Heat of passion appeared only in the voluntary manslaughter instruction—an offense the jury was told to reach only

“if [it found] the defendant not guilty” of murder or could not reach unanimous agreement. Pet. App. 9a, 18a–21a. Under Justice Sotomayor’s reasoning in *Black*, no jury instructed this way could ever credit Mr. Burciaga’s heat-of-passion defense once it found the elements of murder proved. 145 S. Ct. at 2624.

And unlike *Black*, this case supplies the very record Justice Sotomayor’s statement anticipated a future case would need: it shows precisely how a legally impossible verdict structure comes to pass. The district court initially agreed that heat of passion belonged in the murder instruction itself, explaining that the government would have to “negate heat of passion” as part of proving malice. Pet. 9 (quoting App. Dkt. 20, 8-ER-2056). It reversed course only after the government argued that including the defense in both instructions would confuse the jury. Pet. 9–10 & nn.52–55 (citing App. Dkt. 20, 8-ER-2077–80).

The government cannot now credibly treat the resulting structural defect as unremarkable by ignoring Justice Sotomayor’s statement in *Black* when its own objection produced it. The due process question *Black* leaves open—whether the Constitution tolerates instructions that make a legitimate defense legally unreachable—is presented here on a full trial record, with a preserved objection, further supporting this Court’s review.

IV. The government’s harmlessness argument relies on the wrong standard of review and is circular.

The government’s three principal harmlessness authorities are all collateral-review decisions. Br. in Opp. 13–14. *Fraday*, 456 U.S. at 167–68, arose under 28 U.S.C. § 2255’s “cause and actual prejudice” standard. *Demetrulias v. Davis*, 14

F.4th 898 (9th Cir. 2021), was federal habeas against a state warden, reviewed under the “substantial and injurious effect” standard in *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993). *Lannon v. Hogan*, 719 F.2d 518 (1st Cir. 1983), likewise arose on habeas. None of these cases applied the standard that governs here: a preserved trial objection, App. Dkt. 20, 2-ER-342–347, that entitles Mr. Burciaga to direct appellate review and requires the government to prove the instructional error was harmless beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 7–8 (1999); *Chapman v. California*, 386 U.S. 18, 24 (1967); *see also Lofton*, 776 F.2d at 920–22 (finding plain error where heat of passion defense and its effect on the government’s burden of proof was referred to only in the manslaughter instruction and not the murder instruction). It is inappropriate for the government to seek to substitute a habeas standard that substantially understates the government’s actual burden.

The government’s procedural mismatch compounds a distinction Mr. Burciaga addressed in the petition. The *Frady* Court found no prejudice because Frady never offered evidence of mitigation, only innocence. Pet. 25–26 (quoting *Frady*, 456 U.S. at 171). In contrast, Mr. Burciaga offered largely unrebutted evidence that he acted in the heat of passion and confessed to stabbing Ms. Davis in direct response to her statement that she did not want his baby. Pet. 8–9, 25–27. *Frady* fits neither the facts nor the procedural posture of this case.

The government’s final remaining premise—that a jury convicting of premeditated murder “could not also have believed” the defendant acted in the heat of passion—assumes the jury weighed that evidence as part of finding malice. Br. in Opp. 13–14 (quoting *Frady*, 456 U.S. at 174). It could not, however, as the murder

instruction given to the jury required findings only on malice, premeditation, and self-defense, but not heat of passion. Pet. App. 7a. Indeed, while the district court initially found it appropriate to require a heat-of-passion finding as an element of murder, Pet. 9, it abandoned that plan at the government’s urging. Pet. 10 & n.54. Instead, the court included Mr. Burciaga’s heat of passion defense only in the lesser-included manslaughter instruction—an instruction the jury never reached once it convicted on the greater murder charge. Pet. App. 6a–9a, 18a–21a. As a result of the government’s litigation position in the district court, the verdict reveals only that the jury was never asked the constitutional question—not that it answered it.

Because the government’s harmlessness defense rests on the same mistaken premise as the instructions themselves, this case presents no independent “vehicle” problem. The harmlessness question and the merits question rise or fall together, and, as shown in Part I, the underlying due process concern is not novel to this case—it is the same concern Justice Sotomayor recently identified as warranting resolution. *See supra*, Part III.

Conclusion

The petition for a writ of certiorari should be granted.

Dated: September 21, 2026.

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