

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**PEOPLE OF THE STATE OF
CALIFORNIA,**

Plaintiff,

vs.

TARE NICHOLAS BELTRAN,

Defendant.

Case No. S192644

Appellate Case No. A124392

**San Francisco County
Case Nos. 175503; 203443**

**SUPREME COURT
FILED**

ANSWER TO PETITION FOR REVIEW

MAY 18 2011

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**After the Unpublished Decision by the Court of Appeal^{Deputy}
First Appellate District, Division Four
Filed March 30, 2011**

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**By appointment to the Court under the
First District Appellate Program
Independent Case System**

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ANSWER TO PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE CANTIL-SAKAUYE, AND TO
THE HONORABLE ASSOCIATE JUSTICES OF THE SUPREME
COURT OF CALIFORNIA:

Summary of Relevant Facts

For purposes of this petition, appellant adopts the procedural history
and statement of facts from the unpublished Court of Appeal Opinion
appended to the State's petition for review as Exhibit A.

ARGUMENT

THIS IS NOT A REVIEW-WORTHY CASE BECAUSE THIS UNPUBLISHED DECISION DOES NOT CHANGE EXISTING LAW, DOES NOT RESULT FROM A CONFLICT IN THE LAW, CALCRIM 570 HAS BEEN MODIFIED AND THE DISSSENT WAS BASED ONLY ON PREJUDICE AND DOES NOT OTHERWISE CONFLICT WITH THE MAJORITY OPINION

A. Introduction

Respondent asserts that review is necessary to resolve the fundamental and long-standing conflict in the proper standard for provocation in heat of passion manslaughter and to establish the proper scope of permissible argument by the prosecution in inviting the jury to consider an ordinary person's potential reaction to the provocation.

(Respondent's Petition, p. 9.)

Appellant disagrees.

Basically, there is no conflict. The instant case relied on *People v. Breverman* (1998) 19 Cal.4th 142, 163 and *People v. Najera* (2006) 138 Cal.App.4th 212. *Najera* also relied on *Breverman*, which in turn relied on previous cases decided by this Court. As noted below, the cases cited by respondent as causing a conflict are not in conflict with the issue in this case.

Since *Najera* was decided, in 2005, no published or unpublished case

has disagreed with its ruling that the focus in a voluntary manslaughter case “is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion” (*People v. Najera, supra*, at p. 223) and that it is prosecutorial misconduct to focus on the killer's response to the provocation. Thus, there is no conflict in the appellate courts in applying the *Najera* decision.

In addition, following *Najera*, CALCRIM 570 was modified a few months later, in December 2008, on the precise issue raised by appellant here. The jury instruction has now corrected the error contained in CALCRIM 570 and the issue in this case is unlikely to recur. Thus, this case focusing on the previous version of the instruction is not the best vehicle to decide this issue.

Finally, the dissent in this case did not disagree with the legal analysis in the majority opinion, it only decided that the error was harmless under the facts and circumstances in this case. A fact based analysis such as this, is not worthy of review because it is limited to this case only.

B. The Unpublished Opinion Is Based on *Najera*, Which Is Based on Long-Standing Precedent, and There Is No Disagreement with *Najera*

In *People v. Najera, supra*, 138 Cal.App.4th at pp. 223-224, the court found that portions of the prosecutor's statements were incorrect. The court then stated:

"An unlawful homicide is upon " 'a sudden quarrel or heat of passion' " if the killer's reason was obscured by a " 'provocation' " sufficient to cause an ordinary person of average disposition to act rashly and without deliberation. (*People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal. Rptr. 2d 870, 960 P.2d 1094].) The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion."

(*People v. Najera, supra*, at p. 223) The quotation from *Breverman* cited *People v. Berry* (1976) 18 Cal.3d 509, 515, quoting *People v. Valentine* (1946) 28 Cal.2d 121, 139 and cited *People v. Borchers* (1958) 50 Cal.2d 321, 328-329. (*People v. Breverman, supra*, at p. 163.) Thus, the decision in this case, reversing appellant's convictions were the result of long-standing holdings in this Court.

Respondent is incorrect that under the holding in this case any activity of the victim igniting the passion that results in any degree of rashness in an ordinary person is adequate provocation even if "the passion

would be wholly insufficient to triggering legal or violent response by that person." (Respondent's Petition, p. 11.) Case law has long defined the type of triggering events which are adequate which have been held to constitute legally adequate provocation for voluntary manslaughter provocation (See, *People v. Brooks* (1986) 185 Cal.App.3d 687 [the murder of a family member]; *People v. Elmore* (1914) 167 Cal. 205, 211 [a sudden and violent quarrel]; *People v. Berry* (1976) 18 Cal.3d 509, 515 [infidelity of wife]; *People v. Borchers* (1958) 50 Cal.2d 321 [infidelity of paramour] and those which are not, such as simple trespass or simple assault. (See *People v. Flannel* (1979) 25 Cal.3d 668, 684-685; 1 Witkin & Epstein, Cal.Criminal Law, (2d ed. 1988) Crimes Against the Person, § 513, pp. 580-581.) That standard is not changed by this decision.

Respondent did not argue in the appellate court that the provocation in this case was insufficient to allow a voluntary manslaughter defense and instruction. Respondent does not challenge that decision in this petition for review. Thus, this case does not present that issue and review is not required on this issue.

Respondent stated that the Court of Appeal rejected two other decisions, *People v. Fenebock* (1996) 46 Cal.App.4th 1688 and *People v. Superior Court (Henderson)* (1986) 170 Cal.App.3d 516. (Respondent's

Petition, p. 11, citing Opinion, pp. 17-18.) Respondent misrepresents the decision by the Court of Appeal. The Court of Appeal did not “reject” the two other decisions, it stated that “[i]n our view, neither of these cases supports such a proposition. (Opinion, p. 11.)

Appellant agrees that these decisions do not stand for the proposition represented by respondent. The *Fenebock* case distinguished the necessity for acting rashly in the heat of passion from what was adequate provocation. It did use the shorthand "produce a lethal response" but it did not purport to create a new standard. (*People v. Fenebock, supra*, at pp. 1703-1704.) In *People v. Henderson, supra*, the court was dealing with the dismissal of murder charges and the refusal to reinstate them after a preliminary hearing where the court found that the crime could be no more than voluntary manslaughter. The court reversed that decision, and issued a peremptory writ allowing the prosecution to proceed on murder charges. It did describe the concept of heat of passion as being one "where the provocation would trigger a homicidal reaction" but again, it used the phrase as a shorthand description and did not purport to create a new standard. *Henderson* did not concern jury instructions or prosecutorial misconduct and did not discuss the propriety of the issues addressed here; it is mere dicta in relation to this case. (*People v. Henderson, supra*, at p.

524.)

In the same light, the cases cited by respondent where the court used the phrase "deadly passion" or "homicidal rage" was again the court's use of shorthand to describe the adequacy of certain types of provocation. (See, Respondents Brief, pp. 13-14.) They did not discuss the standard by which a defendant would then act if the provocation had been sufficient. This is particularly true in *People v. Lee* (1999) 20 Cal.4th 49. The quoted phrase: "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim" is based on *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798. *In re Thomas C.* found that the objective or reasonable person element of sufficient provocation had not been met by the Minor's depressed mental state and that it could not be the provocation, because the provocation must be from the victim. *In re Thomas C.* never used the phrase "homicidal conduct." Thus, *Lee*'s description of the "conduct" as "homicidal conduct" is not based on precedent and was never meant to change precedent; it merely was a phrase used by the court as shorthand.

Basically, there is no conflict. *Najera* relied on *Breverman* and *Breverman* relied on previous cases decided by this Court. *Najera* does not disapprove or conflict with precedent; this unpublished opinion does not

conflict with precedent.

In addition, since *Najera* has been decided, no published or unpublished decision has disagreed with it. There is no conflict.

C. The Challenged Jury Instruction Has Been Modified; Review Is Unnecessary on This Issue

Respondent second question involves whether CALCRIM 570 constitutes prejudicial error. The version of CALCRIM 570 discussed in this unpublished Opinion was modified in 2008. The modified instruction is now similar to CALJIC 8.42 which preceded it. The issue in this case is unlikely to recur. Thus, the modified instruction now is a correct statement of the law as stated in *Breverman* and other cases cited herein. This case, focusing on the previous version of the instruction, is not the best vehicle to decide this issue.

Finally, the dissent in this case did not disagree with the legal analysis in the majority opinion; it only decided that the error was harmless under the facts and circumstances in this case. A fact based analysis such as this, is not worthy of review because it is limited to this case only.

CONCLUSION

For the reasons stated above, appellant requests that the Court deny review.

Dated: May 15, 2011

Respectfully Submitted,

Linda M. Leavitt
Attorney for Appellant
Tare Nicholas Beltran

CERTIFICATE OF LENGTH

I, Linda M. Leavitt, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 1606 words, excluding the tables, this certificate, and any attachment permitted under rule 8.504. This document was prepared in WordPerfect X5, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California on May 15, 2011.

Linda M. Leavitt
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Tare Nicholas Beltran

PROOF OF SERVICE

I, the undersigned, declare: I am over eighteen years of age and not a party to the above action. My business address is PMB NO. 312, 5214-F Diamond Hts. Blvd., San Francisco, California, 94131.

On May 17, 2011, I served a copy of

ANSWER TO PETITION FOR REVIEW

by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the U.S. mail at San Francisco, addressed to:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on May 17, 2011 at San Francisco, California.

LINDA M. LEAVITT