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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TARE NICHOLAS BELTRAN,** **Defendant and Appellant.**

Case No. S192644

First Appellate District, Division Four, Case No. A124392
San Francisco County Superior Court, Case Nos. 175503, 203448
The Honorable Robert L. Dondero, Judge

OPENING BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Is provocation adequate to reduce murder to voluntary manslaughter by engendering passion that causes an ordinarily reasonable person to "act rashly" in general or, instead, must provocation engender a loss of reason and judgment regarding human life and potentially induce deadly passion?

2. Assuming adequate provocation consists of causing reasonable persons to "act rashly," does CALCRIM No. 570 constitute prejudicial error?

INTRODUCTION

California has long followed the common law approach to voluntary manslaughter in recognizing the equivalence between adequate provocation that causes an ordinary person of average disposition to act rashly and without due deliberation, and adequate provocation that causes an ordinary person to respond with lethal passion. This equivalence flows from society's recognition that an ordinary person, when confronted with adequate provocation, may have his reason overborne and respond with lethal violence. Mitigating a homicide due to such adequate provocation from murder to voluntary manslaughter is society's acknowledgement that while the killing was wrongful, the defendant acted out of human weakness, rather than from pique or from some improper motive like revenge.

People v. Najera (2006) 138 Cal.App.4th 212, 223, improperly severed this equivalence by disconnecting the objective standard for provocation from the resultant homicide. The Court of Appeal below perpetuated that error by invalidating an instruction that permits the jury to consider whether an ordinary person would kill in response to the provocation. *Najera* and the decision below improperly undermine the

standard for objective provocation and unacceptably cut loose California's law of voluntary manslaughter from its common law moorings.

STATEMENT OF THE CASE AND FACTS

A. Prosecution Case

Claire Joyce Tempongko, a 28-year-old single mother, lived in an apartment in San Francisco with her 10-year-old son J.N., and her 5-year-old daughter. (6 RT 439, 446-447; 9 RT 919, 10 RT 982-984.) She began dating appellant in November 1998, and he moved into her apartment in early 1999. (10 RT 1041; 12 RT 1295, 1307; 13 RT 1511-1512.) The couple's turbulent relationship thereafter was marked by domestic violence inflicted by appellant on Ms. Tempongko before he killed her.

1. Domestic violence evidence

On April 28, 1999, appellant demanded entry to the apartment and broke the back window. Once inside, he yelled at Ms. Tempongko, threw her to the floor, dragged her by her hair down a long hallway, and then left. The police were summoned and took a report. (11 RT 1195-1204.)

The night of May 17, 1999, after an evening of drinking, appellant grabbed Ms. Tempongko by the arms and legs and tried to forcibly drag her, kicking and screaming, from a friend's apartment. (12 RT 1398-1416.) The police were summoned. They detained appellant and took photographs of the bruises and injuries appellant inflicted on the victim. (11 RT 1228-1237; 12 RT 1279-1288.)

On November 18, 1999, police were summoned to Ms. Tempongko's apartment by her parents. Appellant had been arguing with her on their anniversary. He grabbed her hair, forcibly pulled her head back, and held her in that position. (12 RT 1307-1308.) When appellant finally released her, she called her parents. (12 RT 1308.) When they arrived and argued with appellant, he grabbed Ms. Tempongko by the shoulders and forced her

backward into the bedroom. He kept her locked in the bedroom against her will until the police arrived and convinced him to release her. (12 RT 1301-1309.)

On September 7, 2000, at 11:34 p.m., the police were again dispatched to the apartment. (12 RT 1423-1425.) They spotted appellant lurking in a corner by the garage door, attempting to conceal himself in the shadows. (12 RT 1425-1427.) Ms. Tempongko provided the officers with an emergency protective order she had obtained requiring appellant to stay 100 yards from her apartment. (12 RT 1431; 13 RT 1601-1602.)

2. Events surrounding the murder

In January 2000, Ms. Tempongko met Michael Houtz, who worked for Federal Express and made daily deliveries to a business where she worked as a receptionist. (11 RT 1114-1115, 1117.) In April 2000, Ms. Tempongko began referring to appellant as her ex-boyfriend. (11 RT 1118-1120.) Mr. Houtz took Ms. Tempongko out to dinner once, and they went to Macy's together a couple of times on work breaks. (11 RT 1121.) She told Mr. Houtz that she had tried to break up with appellant, but he would not let her go. Appellant had said it would be "over his dead body, over her dead body." (11 RT 1142.) In early October 2000, Ms. Tempongko had appellant leave for good. (8 RT 710-711; 11 RT 1140.) She began dating Mr. Houtz. (11 RT 1120, 1140.) In October, appellant realized his relationship with Ms. Tempongko was completely over. (11 RT 1141.)

On Sunday, October 22nd, Mr. Houtz took Ms. Tempongko and her children on an outing to Sacramento. (11 RT 1122, 1125-1133.) During their outing, appellant called Ms. Tempongko on her cell phone and yelled at her. (11 RT 1131-1133.) Mr. Houtz drove the family back to San Francisco that evening. (11 RT 1144-1145.) Around 7:00 p.m., they approached Ms. Tempongko's apartment, and she spotted a man at the wheel of a car parked near her door. She told Mr. Houtz to drive around

the block without stopping. (11 RT 1150-1151.) Mr. Houtz did so. As they again approached her apartment, Ms. Tempongko began frantically scanning the street, clearly very upset and frightened. (11 RT 1152-1153.) Ms. Tempongko turned her body away from the other car still parked by her building, and directed Mr. Houtz to circle the block again. (11 RT 1155.) She was now frantic. (11 RT 1155.) The other car was gone when they drove up again, but Ms. Tempongko directed Mr. Houtz to drive around one more time, this time in a bigger circle. (11 RT 1155.) After he completed that circuit, she had Mr. Houtz pull into the driveway, and she ran with the children from the car into her apartment building without saying goodbye. (11 RT 1158-1159.)

Around 8:15 or 8:30 p.m., Ms. Tempongko answered her cell phone. (10 RT 1024.) Her son heard her arguing with the caller and frantically repeating, "Please don't come to the house." (10 RT 1029.)

About 9:00 p.m., appellant burst into the apartment and immediately began yelling at Ms. Tempongko. (10 RT 1031-1034.) He demanded to know where she went and who she was with. (10 RT 1037-1039.) Ms. Tempongko did not respond and was not confrontational with appellant. She did not yell at, push, or strike him. (10 RT 1039-1040.) During his diatribe, appellant yanked the phone cord from the wall with such force that the phone jack came out as well. (6 RT 464, 471, 510-511, 514-515, 533, 535; 7 RT 572, 578; 12 RT 1348-1349, 1353-1355.) He also took away Ms. Tempongko's cell phone. (6 RT 543-544; 13 RT 1528.)

After yelling at her for five to ten minutes, appellant retrieved a six-inch carving knife from the kitchen. (6 RT 432; 7 RT 609; 9 RT 942-943; 10 RT 1043-1045.) Appellant returned and began stabbing Ms. Tempongko with the knife. (10 RT 1049-1050.) The force of appellant's attack drove her backward onto the couch. (10 RT 1049-1051, 1073.) He

continued stabbing her as she tried to ward off the blows. (10 RT 1052-1053.) When he finished his attack, he fled the apartment. (10 RT 1073.)

A neighbor in the top unit of the building heard the sounds of the fight. She heard furniture being knocked over, a person being thrown against the wall, the muffled sound of a male voice yelling, and the children screaming frantically, but not the victim's voice. (6 RT 455-457.) She called 911 and went downstairs. (6 RT 458.)

The neighbor from the middle unit was returning home with friends when he encountered the victim's son in the hallway, very distraught and frantic, saying that appellant had stabbed his mother. (6 RT 505-506; 7 RT 568-569, 594.) The neighbors found Ms. Tempongko slumped in a pool of blood in the corner of her apartment. (6 RT 508-511; 7 RT 670-573.) An autopsy established that she had 17 stab wounds and four blunt force injuries. She died from massive blood loss. (9 RT 908-919, 960.)

Appellant fled to Mexico and remained at large for nearly six years. (8 RT 785-787; 12 RT 1438.)

B. Defense Case

Appellant testified that his relationship with Ms. Tempongko had "ups and downs." (13 RT 1548.) He moved out of her apartment a month before the homicide. According to defendant, they had agreed to "take a timeout" and to "reevaluate" the relationship. However, they still stayed in touch afterward, according to him. (13 RT 1518.)

The night Ms. Tempongko died, she had called appellant and told him to come over to the apartment. (13 RT 1524.) He took the bus and arrived about 8:40 p.m. (13 RT 1524-1525.) He let himself in using his key. (13 RT 1525.) Ms. Tempongko ignored him, then demanded to know why he was so late getting to her place. (13 RT 1526.) Appellant had no concerns about her earlier outing that day. (13 RT 1528.) He told her that he was going to be starting a new job as a dishwasher on Monday morning. (13

RT 1528.) Hearing this, "she went off." (13 RT 1528.) She demeaned the job and insulted appellant for taking it. (13 RT 1528.) Appellant responded heatedly that he was making more money than her, and the two began arguing about money. (13 RT 1528-1529.) She insulted appellant and his family. (13 RT 1530-1531.) Appellant said he was leaving, and she became even more upset. (13 RT 1530-1532.) She told him she knew he would walk out on her someday. According to appellant, Ms. Tempongko shouted, "That's why I killed your bastard. I got an abortion." (13 RT 1531.)

This statement shocked appellant so much he had no recollection of what happened next. The next thing he knew, he was holding a bloody knife and had blood on his hands, and he ran out of the room. (13 RT 1532.)

C. Voluntary Manslaughter Instructions and Verdict

The trial court instructed the jury with the 2006 version of CALCRIM No. 570, modified slightly at appellant's request.

> A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.
>
> The defendant killed someone because of a sudden quarrel or in the heat of passion if:
>
> 1. The defendant killed another human being either with an intent to kill, or with conscious disregard for human life.
>
> 2. The defendant was provoked;
>
> 3. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment;
>
> AND

4. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.

Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection.

In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time.

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation and knowing the same facts.*

The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.

(5 CT 1455, italics added; 14 RT 1668-1669.)[1]

During deliberations, the jury sent a note to the court asking:

In Instruction 570: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts."

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[1] In 2008, CALCRIM No. 570 was modified to change the clause containing the above-italicized language to read: "In deciding whether the provocation was sufficient, consider whether a person of average disposition, *in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.*"

> Does this mean to commit the same crime -(Hom[i]cide) or can it be other, less severe, rash acts[?]"

(5 CT 1502.)

The court responded as follows:

> The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.

(5 CT 1503.)

The jury convicted appellant of second degree murder and found that he used a deadly weapon in the commission of the killing (Pen. Code, §§ 187, 12022, subd. (b)(1)). (2 CT 578.)

D. The Court of Appeal's Ruling

Relying on *People v. Najera* (2006) 138 Cal.App.4th 212, a divided panel of the First District Court of Appeal held that the above-italicized portion of the 2006 version of CALCRIM No. 570—directing the jury to consider in its assessment of the sufficiency of the provocation "how [a person of average disposition] would react in the same situation knowing the same facts"—was fatally ambiguous. The court reasoned that by inviting consideration of the killer's actions in evaluating the sufficiency of the provocation, the instruction implicitly suggests that the jury could not find heat of passion unless a person of average disposition would have killed under the same circumstances. (Maj. Opn. at pp. 15-20.) The court viewed any suggestion that heat of passion requires provocation substantial enough to cause a reasonable person to harbor homicidal rage as overly restrictive and erroneous. It held that "whether an average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient." (Maj. Opn. at p. 19.)

Disapproving the prosecutor's contrasting of adequate provocation with "examples of stubbing a toe, getting cut off in traffic, or being jealous to argue that minor provocation is not sufficient to cause a reasonable person to kill someone," the court found the argument "serve[d] to reinforce the problem with the jury instruction on provocation, because it encouraged the jury to resolve any ambiguity in the instruction's language in the manner rejected by *Najera*, *supra*, 138 Cal.App.4th 212." (Maj. Opn. at p. 20.) The court found the instructional error prejudicial under *People v. Watson* (1956) 46 Cal.2d 818, 836 and reversed the judgment.

Justice Reardon dissented. The dissent found the court's analysis of the alleged defect in the instruction unnecessary because any error was nonprejudicial on the facts of this case: "In my view, any alleged ambiguity in the instruction on provocation and voluntary manslaughter was harmless and the jury's verdict of second degree murder is well supported by the law and the evidence." (Dis. Opn. at p. 1.)

SUMMARY OF THE ARGUMENT

The doctrine of heat of passion manslaughter arose at common law out of recognition of the inherent weakness of human nature. It was an acknowledgement that even an ordinary person of average disposition, when confronted with sufficient provocation, had the potential to be overborne by passion and lash out and kill the provocateur. While society imposes a duty to control one's passions when facing even very serious provocation and punishes criminally the failure to exercise control, a homicidal reaction to such passion represents an inherent human failing, meriting less severe punishment than that imposed on one who kills in cold blood. Historically, the courts provided various descriptions of this objective component of provocation. They reflect three basic formulations: provocation that would cause an ordinary person to act rashly, from passion

rather than judgment; provocation that would give rise to an irresistible passion in an ordinary person; and provocation that would cause an ordinary person to commit the act. Courts have long recognized, notwithstanding these varying articulations, that all the formulations set the same standard, by requiring sufficient equivalence between the defendant's response to the provocation and the likely response of an ordinary person. This Court did not depart from that common law understanding when, in *People v. Logan* (1917) 175 Cal. 45, 48-50, it embraced the "act rashly" language.

This equivalence requirement remained an inherent component of California jurisprudence until *People v. Najera* (2006) 138 Cal.App.4th 212. That decision erroneously dissociates the actual homicidal effect of the provocation on the defendant from the likely effect on an ordinary person. *Najera*'s approach improperly divorces the objective test for provocation from its foundational principles and makes mitigation of homicide available in circumstances where it is inappropriate. This Court should reject *Najera*'s restructuring of the voluntary manslaughter standard and reassert the proper understanding of the phrase "act rashly" from its historical context to ensure voluntary manslaughter is available only when the killing is a product of human weakness rather than the defendant's own moral or emotional weakness.

Moreover, notwithstanding this dispute over the correct definition of "act rashly," there was no reasonable likelihood the jury would have understood the instruction in this case as requiring more than what the Court of Appeal deemed proper for the objective standard of provocation. The instructions—viewed as a whole and in context of the parties' arguments and the court's answer to the jury question—did not require that the jury find a reasonable person would have killed in response to the same provocation confronting appellant. Lastly, any potential error in the

instruction on the objective component of provocation was harmless in light of the overwhelming evidence of murder.

ARGUMENT

I. FOR VOLUNTARY MANSLAUGHTER, PROVOCATION IS LEGALLY ADEQUATE IF IT COULD INFLAME A DEADLY PASSION IN AN ORDINARY PERSON OF AVERAGE DISPOSITION

A. The Court of Appeal Erred

This Court has stated that "the test of adequate provocation is an objective one," that "[t]he provocation must be such that an average, sober person would be so inflamed that he or she would lose reason and judgment," and that "[a]dequate provocation and heat of passion must be affirmatively demonstrated." (*People v. Lee* (1999) 20 Cal.4th 47, 60; see also *id.* at p. 59 [examining record for evidence that the victim's conduct was sufficiently provocative as could "cause an average person to react with deadly passion"].)

The Court of Appeal, in finding instructional error, departed from *Lee* and the longstanding view of the nature of the rash action mitigating murder to voluntary manslaughter. The court questioned whether any potential reaction is needed to satisfy the objective component of provocation. It viewed this question as an issue of law that "has not yet been addressed by the California Supreme Court." (Maj. opn. at p. 15.) It purported to resolve the issue by concluding that when a homicide victim engenders in the defendant a passion that causes an ordinary person to "act rashly," without regard for what the defendant actually did, the killing can be deemed manslaughter.

To deduce its standard of adequate provocation, the Court of Appeal pointed to CALCRIM No. 570. That instruction provides the requisite provocation is that which "'would have caused a person of average

disposition to act rashly and without due deliberation, that is, from passion rather than from judgment.'" (Maj. opn. at p. 9, quoting CALCRIM No. 570; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 583-584 [same].) The court then elaborated on the qualitative standard of the requisite degree of "passion." It concluded that the passion need not be sufficient to

> trigger a certain heightened level of reactive *conduct*, specifically lethal force, in order to reduce murder to manslaughter. Such a notion is erroneous. What negates malice is simply *a state of mind obscured by passion*. (*People v. Carasi* [(2008)] 44 Cal.4th [1263,] 1306.) That state of mind can be induced by any violent, intense, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. (*People v. Lasko* (2000) 23 Cal.4th 101, 108.) Thus, in the context of voluntary manslaughter, provocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence.

(Maj. Opn. at p. 19.)

Under that holding, any provocation inciting passion that could result in any degree of rash action in an ordinary person is adequate provocation, even if the passion would be wholly insufficient to trigger a lethal or violent response by an ordinary person. In reaching that conclusion, the Court of Appeal relied on *People v. Najera* (2006) 138 Cal.App.4th 212 (*Najera*). *Najera* states, in relevant part, "The focus [of a heat of passion defense] 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." (*Id.* at p. 223; Maj. opn. at p. 16.)

In embracing *Najera*'s formulation, the Court of Appeal rejected two other decisions, *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, and *People v. Superior Court* (*Henderson*) (1986) 178 Cal.App.3d 516. (Maj. opn. at pp. 17-18.) *Fenenbock* found no error in a murder case where the

trial court failed to instruct on heat-of-passion voluntary manslaughter. The omission was not error because there was "no evidence . . . from which the jury could have found provocation so serious that it would produce a lethal response in a reasonable person." (46 Cal.App.4th at p. 1705.) Similarly, *Henderson* stated, "The concept of 'heat of passion' allows a defendant to reduce a killing from murder to manslaughter only in those situations where the provocation would trigger a homicidal reaction in the mind of an ordinary reasonable person under the given facts and circumstances." (178 Cal.App.3d at p. 524, fn. 4.) The court below rejected the standard identified in these cases as dictum. But *Najera*'s discussion of the qualitative nature of the passion was itself dictum. *Najera* addressed a claim of ineffective assistance of counsel for failure to object to alleged misconduct in the prosecutor's argument to the jury about the heat of passion instruction. (138 Cal.App.4th at pp. 223-226.) *Najera* ultimately rejected the ineffectiveness claim because the evidence was insufficient to warrant any instruction on heat of passion as a matter of law. (*Id.* at p. 226.)

In drawing a distinction between the "act rashly" language of the jury instruction and the "homicidal reaction" or "lethal response" language of *Fenenbock* and *Henderson*, the court below, like *Najera* before it, created a schism between two lines of Supreme Court authority that had coexisted harmoniously for nearly a century as alternate formulations of the same legal standard.

On the one hand, this Court has repeatedly discussed the objective standard for heat of passion voluntary manslaughter in terms of requiring "'provocation' sufficient to cause an '"ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163, alterations in original, citations omitted; see

also *People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253 ["'[T]his heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances'"]; *People v. Manriquez*, *supra*, 37 Cal.4th at pp. 583-584 [conduct "sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection"]; CALCRIM No. 570 ["The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment"].) As detailed below, this language first appeared in California jurisprudence in *People v. Logan* (1917) 175 Cal. 45, 49 (*Logan*) (provocation "sufficient to arouse the passions of the ordinarily reasonable man").

On the other hand, this Court has repeatedly evaluated objective provocation in terms of the likelihood of causing an ordinary person to react with homicidal rage or lethal violence. (See, e.g., *People v. Lee*, *supra*, 20 Cal.4th at p. 59 ["There was no direct evidence that [the victim] did or said anything sufficiently provocative that her conduct would cause an average person to *react with deadly passion*," emphasis added]; *People v. Pride* (1992) 3 Cal.4th 195, 250 ["To the extent defendant relies solely on criticism he received about his work performance three days before the crimes, such evidence is insufficient as a matter of law to arouse feelings of homicidal rage or passion in an ordinarily reasonable person"]; *People v. Avila* (2009) 46 Cal.4th 680, 706 [finding no substantial evidence of provocation, observing, "Reasonable people do not become homicidally enraged when hearing the term 'Carmelos,' even if it is understood as a fleeting gang reference or challenge"]; *People v. Carasi* (2008) 44 Cal.4th 1263, 1307 [referring to "homicidal rage or passion"]; *People v. Koontz* (2002) 27 Cal.4th 1041, 1086 [same].) The Courts of Appeal have followed this line of authority as well. (See *People v. Dixon* (1995) 32

Cal.App.4th 1547, 1556 ["would a reasonable person develop homicidal rage"]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1236 [same]; *People v. Fenenbock*, *supra*, 46 Cal.App.4th at p. 1705; *People v. Superior Court* (*Henderson*), *supra*, 178 Cal.App.3d at p. 524, fn. 4.)

The Court of Appeal below fundamentally misconstrued these two lines of authority as representing conflicting legal standards. They do not. The former line correctly identifies a broad approach to the class of provocations that may give rise to a claim of heat of passion. The latter line correctly reflects the degree of provocation or passion necessary to negate malice. The court below failed to apprehend the meaning of the phrase "act rashly" as first utilized by this Court in *Logan* and failed to consider the context in which this Court used that term.

Contrary to the Court of Appeal's decision, the provocation standard does not pertain exclusively to the mental state of the ordinary person. That analysis ignores this Court's express language, which focuses on whether the provocation was liable to cause an ordinary person to "*act*" rashly, not *think* rashly. Moreover, the effect of *Najera*'s and the lower court's preference for "act rashly" to the exclusion of "homicidal rage" is to dramatically water down both this Court's lines of authority and, thus, to dilute the objective requirement for mitigating murder to heat of passion manslaughter. Such an approach is in direct conflict with the historical understanding of voluntary manslaughter and was not contemplated when *Logan* employed the "act rashly" language.

B. Common Law Approach to Heat of Passion Manslaughter

Analysis of heat of passion manslaughter begins with the common law. The doctrine of voluntary manslaughter, based on sufficient provocation, developed originally as a means of mitigating the punishment of death, which was imposed for all unjustified killings. (See Dressler,

Understanding Criminal Law (1987) § 31.08, p. 474.) The availability of a manslaughter verdict was initially limited to a select class of provocations deemed legally sufficient to warrant the reduction from murder, and the existence of adequate provocation was determined by the court as a matter of law. (See, e.g., 1 East, Pleas of the Crown (1803) pp. 232-241 [discussing classes of legally adequate provocation]; Dressler, Understanding Criminal Law, *supra*, § 31.08, pp. 477-478.)

Over time, the existence and sufficiency of the provocation and passion became factual questions for the jury, and the reaction of an ordinary man of average disposition to the provocation was incorporated as definitional of the crime. (See, e.g., *Maher v. People* (1862) 10 Mich. 212 [1862 WL 1095] (*Maher*); see generally Wharton, The Law of Homicide (3d ed. 1907) § 172, pp. 271-272.) Thus, the legal adequacy of the provocation was judged not only subjectively, by its actual effect on the defendant, but also objectively based on its potential effect on an ordinary person of average disposition. (*Ibid.*)

Different jurisdictions have employed varying descriptions of what is essentially the same objective standard. For example, the Michigan Supreme Court in *Maher* used a variation of the "act rashly" language subsequently employed in *Logan*, observing, "the true general rule [is] that reason should, at the time of the act, be disturbed or obscured by passion to an extent which *might render* ordinary men, of fair average disposition, *liable* to act rashly or without due deliberation or reflection, and from passion, rather than judgment." (*Maher*, *supra*, at p. *5.)[2]

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[2] Although not explicitly stated, *Maher*'s italicized language, which focuses on the degree of likelihood, strongly indicates the court was looking not simply to the potential emotional state of the reasonable person, but also to the likely outcome of that passionate emotional state, namely whether the provocation might cause an ordinary person to react with lethal

(continued...)

Other courts stated the objective test in terms of whether the provocation would likely give rise to an "irresistible" passion. One of this Court's earliest pronouncements on the law of manslaughter utilized this formulation. (*People v. Hurtado* (1883) 63 Cal. 288, 292.) *Hurtado* observed, "In an abstract sense anger is never reasonable, but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control." (*Ibid.*; accord, *People v. Valentine* (1946) 28 Cal.2d 121, 138-140 [explaining that *Hurtado* remains a correct statement of the manslaughter standard]; see generally *People v. Rice* (Ill. 1933) 184 N.E. 894, 896 ["In voluntary manslaughter, while malice is not a factor, there must be some provocation which is apparently strong enough to make the passion to kill irresistible"]; *Lewis v. Commonwealth* (Ky.Ct.App. 1892) 19 S.W. 664 ["[T]he provocation must be such as was ordinarily calculated to excite the passions beyond control"]; *State v. Wheat* (La. 1903) 35 So. 955, 960 [requiring provocation sufficient to excite an irresistible passion in a reasonable person]; *State v. Hutchinson* (Nev. 1871) 7 Nev. 53 ["sufficient provocation in law to excite an irresistible passion in

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(...continued)
violence as the defendant did. *Maher* suggested that the appropriate standard was not whether an ordinary person would *always* react as the defendant did and kill, but rather that it *might* cause an ordinary person to have such a reaction. (See *id.* at p. *5 [explaining reasonable provocation is "anything the natural tendency of which would be to produce such a state of mind in ordinary men, and which the jury are satisfied did produce it in the case before them—not such a provocation as must, by the laws of the human mind, produce such an effect with the *certainty that physical effects follow from physical causes;* for then the individual could hardly be held morally accountable"].)

a reasonable being"]; *Territory v. Catton* (Utah 1888) 16 P. 902, 907 ["To reduce homicide to the degree of manslaughter on the ground solely that it was committed in the heat of passion, the provocation must have been considerable; in other words, such as was calculated to give rise to irresistible passion in the mind of a reasonable person"], revd. on other grounds *sub nom Calton v. Utah* (1889) 130 U.S. 83.)

Other courts were more explicit about identifying the nature of the rash actions that result from the irresistible passion, namely, that an ordinary person was liable to succumb to such provocation and act with lethal violence, just as the defendant had. Thus, in 1890, the Alabama Supreme Court described the objective component of manslaughter by noting that "an affray may occur or sudden provocation be given which, if acted on in the heat of passion produced thereby, might mitigate homicide to manslaughter, yet if the provocation, though sudden, be not of that character which would, in the mind of a just and reasonable man, *stir resentment to violence, endangering life*, the killing would be murder . . . ." (*Holmes v. State* (Ala. 1890) 7 So. 193, 194, italics added; accord, *Fields v. State* (1875) 52 Ala. 348 [explaining the provocation must be "of that character which would in the mind of a just and reasonable man stir resentment to violence endangering life"]; *Freddo v. State* (Tenn. 1913) 155 S.W. 170, 712 ["[B]ut, no matter how strong [the defendant's] passionate resentment was, it did not suffice to reduce the grade of the crime from murder to voluntary manslaughter, unless that passion were due to a provocation such as the law deemed reasonable and adequate—that is, a provocation of such a character as would, in the mind of an average reasonable man, stir resentment likely to cause violence, obscuring the reason, and leading to action from passion rather than judgment"]; see also *State v. Ferguson* (1835) 20 S.C.L. (2 Hill) 619 [1835 WL 1418] [noting

the line between adequate provocation and inadequate provocation was whether it was likely to "superinduce a great degree of violence"].)[3]

Ultimately, these various formulations did not purport to set different legal standards. They were simply alternative means of expressing essentially the same objective standard for adequate provocation. (*Johnson v. State* (Wis. 1906) 108 N.W. 55, 60.) The different formulations led the Wisconsin Supreme Court to observe in *Johnson*:

> The essentials of heat of passion, as the term is used in defining homicidal offenses, are not given in the authorities with that entire harmony which one would like to see respecting so important a matter. All, however, agree that the mental disturbance must be produced by such provocation as, reasonably, would ordinarily have *that effect* in case of an ordinary man, and actually had *such effect* in the given case. That is what is meant by the term adequate provocation.

(*Ibid.*, italics added.)

Johnson observed that the "act rashly" language used in *Maher*, *supra*, stated the objective standard "mildly," whereas those cases referring to provocation likely to cause an "irresistible" passion, e.g., "such as might naturally kindle ungovernable passion in the mind of an ordinary and reasonable man," stated the standard in a "more emphatic manner." (*Ibid.* [collecting cases].) *Johnson* found the latter statements to be preferable in describing provocation. (*Id.* at pp. 60-61 [heat of passion requires "adequate provocation as would ordinarily so overcome and dominate or suspend the exercise of the judgment of an ordinary man, as to render his mind for the time being deaf to the voice of reason: make him incapable of

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[3] English law likewise focused squarely on the potential for the ordinary man to kill as a result of the provocation. (See *Regina v. Welsh* (1869) 11 Cox Criminal Case 336, 338 ["The law contemplates the case of a reasonable man, and requires that the provocation shall be such that such a man might naturally be induced, in the anger of the moment, to commit the act"].)

forming and executing that distinct intent to take human life essential to murder in the first degree, and to cause him, uncontrollably, to act from the impelling force of the disturbing cause, rather than from any real wickedness of heart or cruelty or recklessness of disposition"].)

The Iowa Supreme Court likewise noted the equivalence of these different formulations for the objective standard, observing:

> Reasonableness is the test. The law contemplates the case of a reasonable man—an ordinary reasonable man—and requires that the provocation shall be such as *might naturally induce such a man*, in the anger of the moment, *to commit the deed.* The rule is that reason should at the time of the act be disturbed by passion to an extent which might render ordinary men, of fair, average disposition, liable *to act rashly* and without reflection, and from passion rather than judgment.

(*State v. Watkins* (Iowa 1910) 126 N.W. 691, 692, italics added, quoting Clark & Marshall, The Law of Crimes (2d ed. 1905) § 260, p. 355.)

These alternative formulations were also stated in Wharton's 1907 treatise on the Law of Homicide:

> A provocation is deemed to be adequate, so as to reduce the offense from murder to manslaughter, whenever it is calculated *to excite the passions beyond control.* It must be of such a character as would, in the mind of an average, just and reasonable man, stir resentment *likely to cause violence endangering life*, or as would naturally tend to disturb and obscure the reason and *lead to action from passion rather than judgment*, or to create anger, rage, sudden resentment, or terror *rendering the mind incapable of reflection.*

(Wharton, The Law of Homicide, § 172 at p. 271, italics added.)[4]

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[4] Accord, *Regina v. Welsh*, *supra*, 11 Cox Criminal Cases at page 338 (referring alternately to provocation giving rise to "violence of passion . . . likely to be aroused thereby in the breast of a reasonable man" and provocation "such that such a man might naturally be induced, in the anger of the moment, to commit the act").

Accordingly, these various formulations sought to describe the same objective component for manslaughter as understood in the common law. And viewed against this historical backdrop, the language that provocation must be sufficient to cause an ordinary person to "act rashly and without due deliberation" carries with it the common law understanding that the nature of the rash *action* likely to be engendered by adequate provocation is life-threatening violence or homicidal rage.

This common law understanding of the violent nature of the rash action induced by adequate provocation was recognized by the United States Supreme Court in *United States v. Frady* (1982) 456 U.S. 152. *Frady* involved the proper standard for collateral review of a murder conviction from the Federal District Court for the District of Columbia. The Supreme Court noted that Washington D.C. lacked a codified definition of manslaughter and relied on the common law for that definition. (*Id.* at p. 170, fn. 18.) The Supreme Court set out the common law standard for manslaughter, quoting from a D.C. Circuit Court opinion:

> ". . . An unlawful killing in the sudden heat of passion—whether produced by rage, resentment, anger, terror or fear—is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control *and commit the act* on impulse and without reflection." *Austin v. United States*, 127 U.S.App.D.C. 180, 188, 382 F. 2d 129, 137 (citations omitted).

(*Ibid.*, italics added.)

Frady ultimately found no prejudice from an alleged error in the instructions defining malice, a conclusion based in part on the fact the jury receive correct instructions on manslaughter. *Frady* quoted the trial court's instructions as accurately defining heat of passion manslaughter, as follows:

> Provacation, [*sic*] in order to bring a homicide under the offense of manslaughter, must be adequate, must be such as might naturally induce a reasonable man in anger of the moment

> *to commit the deed.* It must be such provocation would [*sic*] have like effect upon the mind of a reasonable or average man causing him to lose his self-control.

(*Id.* at p. 174, bracketed material in original, quotation marks omitted, italics added.)

Accordingly, the common law recognized that to mitigate murder to manslaughter, provocation was sufficient when it tended to induce an overwhelming passion as could cause even an ordinary person of average sensibilities to lose control and react with lethal violence akin to that in the charged case. In other words, the "rash action" that sufficient provocation induces in an ordinary person is lethal violence. Indeed, this equivalence between the *actual* lethal response of the defendant and the *potential* lethal response of an ordinary person is the very foundation for mitigating murder to manslaughter.

The rationale for allowing heat of passion to mitigate murder to manslaughter is societal acknowledgement of human weakness in the face of strong provocation. Some provocations are sufficiently severe that even the ordinary person of average disposition, when confronted with them, could be moved to respond with lethal violence under their influence. Of course, most ordinary individuals are capable of restraining their conduct or finding nonlethal outlets. For this reason, the law imposes a duty of restraint and criminalizes the failure to restrain one's passions. But the law also acknowledges the imperfections of human nature. As *Maher* observed almost 150 years ago, when one kills in the throes of overwhelming heat of passion based on adequate provocation, "the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of

manslaughter." (*Maher v. People*, *supra*, at p. *5; see also *Andersen v. United States* (1898) 170 U.S. 481, 510 [same].)

California has long echoed this common law rationale as the basis for mitigating murder to manslaughter based on heat of passion. (*People v. Freel* (1874) 48 Cal. 436, 437 ["But when the mortal blow is struck in the heat of passion, excited by a quarrel, sudden, and of sufficient violence to amount to adequate provocation, the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter"].)

It is against this historical backdrop—with this appreciation of how the law of manslaughter was constructed and with an understanding of the foundational principles underlying the doctrine—that the language in *Logan* must be evaluated.

C. California's Continuation of Common Law Manslaughter

This Court first employed the language "act rashly or without due deliberation and reflection" in 1917 in *Logan*, *supra*, 175 Cal. 45. Although *Logan* discussed various principles of heat of passion manslaughter generally and suggested a new formulation for how the jury should be instructed, the legal question confronting this Court did not involve the *degree* of objective provocation or passion necessary to negate malice, nor was it attempting to reformulate a standard for articulating the required degree of provocation or passion. Rather, *Logan* was addressing an improper limitation on the *types* of provocation deemed legally adequate to give rise to a heat of passion claim.

In *Logan*, the jury had received an instruction on heat of passion manslaughter that employed language taken from the pre-revision criminal code, the Crimes and Punishments Act of 1850 (hereinafter "1850 Act").

Manslaughter was defined in sections 22, 23, and 24 of the 1850 Act as follows:

> § 22. Manslaughter is the unlawful killing of a human being without malice express or implied, and without any mixture of deliberation. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible; or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection.
>
> § 23. In cases of voluntary manslaughter there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing.
>
> § 24. The killing must be the result of that sudden violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge and punished as murder.

(Stats. 1850, ch. 99, §§ 22-24, p. 231.)

These provisions spelled out the distinct common law components of heat of passion voluntary manslaughter, including the subjective component, the objective component, and the absence of cooling time. One notable feature of the 1850 Act manslaughter offense, however, was an express statutory limitation on the class of legally recognized types of provocation. Only a "serious and highly provoking injury inflicted on the person killing" or "an attempt by the person killed to commit a serious personal injury on the person killing" (§ 23) constituted legally adequate provocation negating malice.

The definition of manslaughter was greatly simplified in 1872 with the enactment of the Penal Code, as follows:

> Manslaughter is the unlawful killing of a human being, without malice. It is of two kinds:
>
> 1. Voluntary—upon a sudden quarrel or heat of passion.
>
> 2. Involuntary—in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution or circumspection.

(Ann. Pen. Code § 192 (1872 1st ed.).)

The Legislature employed this minimalist language in defining voluntary manslaughter as a straightforward means of incorporating the traditional elements of heat of passion, without the need to separately delineate them as the 1850 Act had done. Significant to the present discussion, the one major change to the statute was the elimination of any categorical limitation on the types of provocation necessary to render a claim of manslaughter legally available.

This legislative simplification tracked the ongoing evolution of the common law, which had shifted from a categorical approach to one which left the evaluation of adequate provocation to the jury regardless of the class of provocation. (See, e.g., *Maher v. People*, *supra*, at p. *6 [rejecting categorical approach and directing that the question of adequate provocation be for the jury in all cases].) Indeed, the Legislature in 1872 codified what was understood to be the precise common law definition of voluntary manslaughter. (See Wharton, The Law of Homicide, § 5 at p. 6 ["Voluntary manslaughter at common law is the unlawful killing of another, without malice, on a sudden quarrel or in heat of passion"].)

Although the 1872 enactment of the Penal Code removed the categorical limitations on provocation and followed the broader approach embraced by the evolving common law, the jury in *Logan* was instructed in the language of the 1850 Act on the law of manslaughter. Specifically, the

manslaughter instructions challenged in *Logan* provided that to reduce murder to manslaughter, "there must be a serious and highly provoking injury inflicted upon the person killing sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing," and, again, that the defendant's passion must have been "caused by some immediate serious or highly provoking injury inflicted, or attempted to be inflicted, on the person or reputation of the defendant." (*People v. Logan*, *supra*, 175 Cal. at p. 48.)

Logan held that these instructions, based on the former, more restrictive definition of manslaughter, improperly limited the jury's evaluation of the sufficiency of the provocation and the source of the defendant's passion in killing the victim. (*Logan*, *supra*, at pp. 48-50.) In addressing this instructional error claim, *Logan* engaged in an extensive discussion of the principles of heat of passion and how the jury should properly be instructed. *Logan* looked to the *Maher* decision as a leading case rejecting a categorical approach and advocating a jury of average citizens as best suited to evaluate the sufficiency of provocation and its effect on the ordinary person. *Logan* incorporated the language at issue from *Maher* to serve as a basis for new jury instructions. (*Id.* at pp. 49-50.)

It is readily apparent from the context of the discussion that *Logan* adopted this language as an endorsement of *Maher*'s approach of reserving for the jury the question of what type of provocation was sufficient, and as a rejection of the superseded categorical approach to adequate provocation. *Logan* immediately followed its discussion with examples of provocations held to be adequate in other jurisdictions, notwithstanding that they would not have satisfied the 1850 Act's requirements of an actual injury or attempted personal injury. The examples included observing an adulterous spouse, believing mistakenly that a spouse was committing an act of adultery, or being confronted with a relative attempting to remove one's

wife and children. (*Logan*, at pp. 49-50 [citing cases].) *Logan* concluded that "[t]he passion aroused may be one entirely disconnected with any fear of personal injury, the fundamental inquiry being, we repeat, whether it be sufficient to obscure reason and render the average man liable to act rashly." (*Id.* at p. 50.)

Logan's discussion and holding were the antithesis to repudiations of the common law principles of provocation and heat of passion. (Cf. *People v. Lasko* (2000) 23 Cal.4th 101, 110 [noting with respect to other aspects of heat of passion manslaughter that California's approach "is consistent with the common law"].) Nor did *Logan* reflect any fundamental shift in the understanding of the objective standard of provocation, which already equated the ordinary person "acting rashly" under the heat of passion with the ordinary person acting with lethal violence and "committing the deed." *Logan* cannot be read as adopting a definition of "act rashly" divorced from the history set out above, or as requiring mere rashness without regard to the crime actually committed, as suggested by the court below and by *Najera*. Long after this Court first employed the "act rashly" phraseology in *Logan*, California courts, including this one, continued to recognize the historical meaning and the underlying context of that phrase as equivalent to acting with lethal passion or homicidal rage. (See, e.g., *People v. Lee*, *supra*, 20 Cal.4th at p. 59 [lethal passion]; accord *People v. Avila*, *supra*, 46 Cal.4th at p. 706 [homicidal rage]; *People v. Carasi*, *supra*, 44 Cal.4th at p. 1307; *People v. Koontz*, *supra*, 27 Cal.4th at p. 1086; *People v. Pride*, *supra*, 3 Cal.4th at p. 250; *People v. Kanawyer*, *supra*, 113 Cal.App.4th at p. 1236; *People v. Fenenbock*, *supra*, 46 Cal.App.4th 1688; *People v. Dixon*, *supra*, 32 Cal.App.4th at p. 1556; *People v. Superior Court (Henderson)*, *supra*, 178 Cal.App.3d at p. 524, fn. 4.)

Moreover, defining provocation in terms of an ordinary person of average disposition reacting with lethal violence is fully consonant with

how other jurisdictions view adequate provocation for heat of passion. For example, the federal manslaughter statute, 18 U.S.C. § 1112, which is essentially identical to California's, is likewise a codification of the common law definition of manslaughter. (*United States v. Browner* (5th Cir. 1989) 889 F.2d 549, 551 ["[T]he federal homicide statutes simply adopt the language of the traditional common-law offenses of murder and manslaughter"]; *United States v. Alexander* (D.C. Cir. 1973) 471 F.2d 923, 944, fn. 54 [Noting that 18 U.S.C. § 1112 was first enacted in 1908 and was patterned on the common law definition of voluntary manslaughter].)[5]

The federal courts have held that reasonable provocation sufficient for heat of passion manslaughter requires that the provocation must be such as would incite a reasonable person to kill. The Ninth Circuit noted:

> The standard, however, is not a subjective one. "While the crime of manslaughter is in some sense 'irrational' by definition, in that it arises out of a person's passions, the provocation must be such as would arouse a reasonable and ordinary person to kill someone." [Citations.]
>
> The evidence in this case does not establish circumstances that would incite an ordinary, reasonable person to kill.

(*United States v. Wagner* (9th Cir. 1987) 834 F.2d 1474, 1487; accord, *United States v. Roston* (9th Cir. 1993) 986 F.2d 1287, 1291 ["The question then becomes whether there was sufficient evidence of provocation to

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[5] 18 U.S.C. § 1112, subdivision (a) provides: Manslaughter is the unlawful killing of a human being without malice. It is of two kinds:

Voluntary—Upon a sudden quarrel or heat of passion.

Involuntary—In the commission of an unlawful act not amounting to a felony, or in the commission in an unlawful manner, or without due caution and circumspection, of a lawful act which might produce death.

arouse a reasonable and ordinary person to kill the decedent"].)[6] Other circuits have held the same. (See, e.g., *United States v. Collins* (5th Cir. 1982) 690 F.2d 431, 437 ["[T]he provocation must be such as would arouse a reasonable and ordinary person to kill someone"]; *United States v. Bishop* (6th Cir. 1998) 149 F.3d 1185 [1998 WL 385898 at p. *6] ["In order to constitute manslaughter, there must be sufficient evidence of provocation to arouse an ordinary and reasonable person to kill the decedent"]; see generally *United States v. Benally* (10th Cir. 1998) 149 F.3d 1191[1998 WL 339688 at p. *2] [noting that difference in phraseology among "arouse a reasonable and ordinary person to kill someone," "cause the ordinary reasonable person to act rashly and without deliberation and reflection," and "would affect the ability to reason and to cause a temporary loss of self control in an ordinary person of average disposition," is a simply a matter of word choice without legal significance]; cf. *United States v. Eagle Hawk* (8th Cir. 1987) 815 F.2d 1213, 1215-1216 [utilizing "act rashly" language but also approvingly quoting "[cause] an ordinary person to kill" language].)

Decisions in other states are in accord. (See, e.g., *State v. Rollins* (Me. 1972) 295 A.2d 914, 920-921 ["[T]his Court explicitly alluded to the generally prevailing principle that, to be 'adequate', provocation must be '. . . of that character which would, in the mind of a just and reasonable man, stir resentment to violence, endangering life'"]; *Dennis v. State* (Md. 1995) 661 A.2d 175, 179 ["The law contemplates the case of a reasonable man—an ordinary reasonable man—and requires that the provocation shall be such as might naturally induce such a man, in the anger of the moment, to

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[6] See generally *People v. Lasko*, *supra*, 23 Cal.4th at page 111 (looking to decisions of the Fifth Circuit and Ninth Circuit interpreting the federal manslaughter statute as informative in evaluating California's manslaughter statute).

commit the deed," quotations omitted]; *State v. Buchanan* (Minn. 1988) 431 N.W.2d 542, 549 ["Both the heat of passion and justification statutes evince a legislative intent to excuse or mitigate a homicide where a defendant behaves as would a reasonable person"]; *State v. Smith* (N.H. 1983) 455 A.2d 1041, 1043 ["It is generally recognized that provocation is adequate to reduce a homicide from murder to manslaughter only if it would cause a reasonable person to kill another out of passion"]; *High v. United States* (D.C. 2009) 972 A.2d 829, 833 ["The test of sufficiency of such provocation is that which would cause an ordinary man, a reasonable man, or an average man, to become aroused as to kill another"]; see also *State v. Leggroan* (Utah 1970) 475 P.2d 57, 58 [noting that irresistible passion is passion that would "irresistibly compel an ordinary, reasonable person to commit the act charged"]; cf. *Rhode v. State* (Ga. 2001) 552 S.E.2d 855, 861; *State v. Coop* (Kan. 1978) 573 P.2d 1017, 1021 ["The provocation whether it be 'sudden quarrel' or some other form of provocation must be sufficient to cause an ordinary man to lose control of his actions and his reason"].)

Accordingly, as at common law, as when *Logan* imported the language from *Maher*, and as afterward decided by courts in this state and elsewhere, sufficient provocation for manslaughter is provocation that has the potential to induce an ordinary person to "act rashly," not in some abstract sense divorced from the resulting homicide, but rather to "act rashly" in the sense of responding with lethal violence. *Najera* and the court below went fundamentally astray by shattering this necessary equivalence between the response actually induced in the defendant by the provocation and the response such provocation would likely induce in an ordinary person of average sensibilities.

The court below discounted the significance of this Court's "cases referring to the mental state needed for voluntary manslaughter as

'homicidal rage,'" suggesting that "[t]his language, however, addresses the necessary *degree of arousal* in the defendant's mental state, not the nature of his conduct. None of these cases holds provocation is sufficient *only* if it would cause an ordinary person of average disposition to react with deadly force." (Maj. Opn. at p. 18.) This analysis is erroneous for two reasons.

First, it misconstrues the references to homicidal rage in the cited opinions as referring to the subjective component, i.e., the defendant's mental state. Instead, those opinions were referring to the objective component, i.e., the absence of a sufficient degree passion aroused in the mind of the ordinary person.

Second, and more fundamentally, that analysis erroneously attempts to draw a bright line distinction between the mental state of an ordinary person confronted by adequate provocation and the physical reaction such provocation is likely to evoke in an ordinary person. The court's error is laid bare when it states,

> More importantly, the *Najera* analysis protects the qualitative standard from being distorted by the quantitative notion that provocation must reasonably trigger a certain heightened level of reactive *conduct*, specifically lethal force, in order to reduce murder to manslaughter. Such a notion is erroneous. What negates malice is simply *a state of mind obscured by passion.* [Citation.] That state of mind can be induced by any violent, intense, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. [Citation.] Thus, in the context of voluntary manslaughter, provocation is sufficient if it would trigger such a *state of mind* in a reasonable person. It need not further cause a particular *level of conduct*, let alone cause a reasonable person to react with lethal violence.

(Maj. Opn. at p. 19.)

In attempting to draw a line between thought and action, the lower court ignores the central premise of heat of passion manslaughter that provocation is adequate when it is likely to generate a passion that is irresistible, one that could overwhelm the ability of even the ordinary

person to check his actions and conform his conduct to what the law requires. (*People v. Hurtado*, *supra*, 63 Cal. at p. 292.) That is the very crux of allowing mitigation for an unlawful killing; not that an ordinary person confronted with the provocation would harbor violent *thoughts*, i.e., a homicidal *state of mind*, but that an ordinary person of average sensibilities could be so overwhelmed by the passion induced by adequate provocation that he could not check his actions or prevent the homicidal thoughts from turning into homicidal deeds.

Indeed, the lower court's formulation makes little sense. There is nothing particularly noteworthy, let alone mitigating, about the fact that reasonable people when provoked are capable of thinking homicidal thoughts. Indeed, even in rural England where the common law took root, probably very little provocation was needed to generate such inner rage. Ordinary people, however, were quite capable of restraining such thoughts. Society places a duty on all to contain their actions notwithstanding such moments of ill will. Those who fail to do so and kill are guilty of murder. The doctrine of manslaughter, however, flows from the recognition that some provocations are so substantial that they can overwhelm the rational judgment of even ordinary people, causing them to lose control of those homicidal thoughts and act out with lethal violence. In those circumstances, and those circumstances alone, is mitigation of murder appropriate.

As Professor Dressler explains,

> [Manslaughter] represents a concession to human weakness, that the provoked killer's conduct does not arise from a "bad or corrupt heart, but from infirmity of passion to which even good men are subject." The more serious the provocation the more likely it is that the average person would have succumbed to passion and, therefore, the less basis there is for jurors to differentiate the character of the killer from their own. In essence, the provoked killer has fewer character flaws than the

> usual killer. The provoked killer acts due to anger, not evilness. She acts much like other humans would act in the same situation.

(Dressler, Understanding Criminal Law, *supra*, § 31.08, p. 475, footnotes omitted; see generally *Andersen v. United States*, *supra*, 170 U.S. at p. 510 ["The law in recognition of the frailty of human nature, regards a homicide committed under the influence of sudden passion, or in hot blood, produced by adequate cause, and before a reasonable time has elapsed for the blood to cool, as an offense of a less heinous character than murder"].)

One who succumbs to such human weakness and kills is properly punished for manslaughter because, "although we believe that we *might* act as [the killer] did in the same situation, we concede that this is a character flaw in [the killer] and us. After all, not all persons who are provoked kill their provoker." (Dressler, Understanding Criminal Law, *supra*, § 31.08, p. 475, fn. 16; see also 2 LaFave, Substantive Criminal Law (2d ed. 2003) § 15.2(b), p. 495 [explaining a killing is mitigated to manslaughter under sufficient provocation because a reasonable person's "homicidal reaction to the provocation is at least understandable"].)

Any attempt to cabin the lethal passion engendered in an ordinary person to a mental state (or a state of mind negating a mental state), rather than a potential for physical action, is plainly contrary to *Logan*. As a baseline, the *Logan* standard requires that the provocation cause passion sufficient to "render ordinary men of average disposition liable to *act* rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*People v. Logan*, *supra*, 175 Cal. at p. 49, italics added.) The benchmark for adequate provocation is not mere rash thought by an ordinary person, but rather the point where passion is so severe that thought

irresistibly turns to deed.[7] Accordingly, contrary to the decision below, the proper inquiry is, indeed, whether provocation could "cause a particular *level of conduct*" by an ordinary person.

The Court of Appeal's approach also runs afoul of a correlative principle announced in *Logan*, that no defendant can set up his own standard of conduct. *Logan* explained:

> The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as

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[7] Of course, the Court of Appeal is accurate in the very limited sense that there need not *always* be lethal conduct arising from overwhelming passion because an ordinary person will not always be incapable of controlling his actions. Rather it is a recognition of the potential or likely lethal response even in an ordinary person as a result of certain provocation objectively sufficient to trigger the manslaughter doctrine. (See, e.g., *Maher v. People*, *supra*, at p. *5 [explaining adequate provocation in terms of its natural tendency, "not such a provocation as must, by the laws of the human mind, produce such an effect with the *certainty that physical effects follow from physical causes;* for then the individual could hardly be held morally accountable"]; accord, *Regina v. Welsh*, *supra*, 11 Cox Criminal Case at p. 338 ["The law contemplates the case of a reasonable man, and requires that the provocation shall be such that such a man *might naturally be induced*, in the anger of the moment, to commit the act," emphasis added].)

would naturally tend to arouse the passion of the ordinarily reasonable man.

(175 Cal. at p. 49.)

Two key points flow from this passage. First, as *Logan* specifically observed, "the *conduct* of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances," as well as the passion. (*Ibid.*, emphasis added.) Because of the interrelation between the overwhelming passion and induced response, both must be gauged against the passion and response of the ordinary person. Thus, it is not sufficient or proper to view the mental aspect of passion in isolation without regard for the potential consequences.

Second, for this limitation to make sense, the "rash action" induced in a reasonable person must mean lethal violence. If one takes the term "act rashly" in its most literal sense without regard to the common law understanding at the time it was used, then the limitation that a defendant cannot set up his own standard of conduct is rendered nugatory.

"Rash" is defined in Webster's Third New International Dictionary (2002 ed.) at page 1883, as "characterized by or proceeding from lack of deliberation or caution : acting, done, or expressed with undue haste or disregard for consequences : imprudently involving or incurring risk: precipitate." The Random House Collegiate Dictionary (rev. ed. 1984) at page 1095 defines "rash" as "1. tending to act too hastily or without due consideration. 2. characterized by or showing excessive haste or lack of consideration: *rash promises*." (See also American Heritage Dictionary, New College Edition (1980) p. 1082 [defining "rash" as "1. Acting without forethought or due caution; impetuous. 2. Characterized by ill-considered haste or boldness"].) Notably, the common definitions of rashness do not carry any meaningful measure of degree nor convey any sense of being overborne by passion.

Relying strictly on a literal translation, without due consideration of the underlying context, the phrase "acting rashly" means nothing more than acting hastily or imprudently, without consideration. Employing this literal meaning of "act rashly" as the standard for the objective prong of manslaughter renders the objective prong illusory. Under that approach, any provocation that is adequate enough to cause an ordinary person to act hastily or imprudently would be deemed sufficient to mitigate murder to manslaughter.

There are countless experiences in everyday life which would cause an ordinary person to act "rashly," such as being cut off on the road by an inattentive driver, having coffee spilled on him by a careless waiter, receiving a negative evaluation from a supervisor, or an observing umpire's bad call at his child's little league game. Any of these pedestrian events could easily cause a reasonable person to rashly shout an inappropriate curse, display a rude gesture, or send a hostile or intemperate E-mail. But none would cause a reasonable person to kill. Under *Najera*'s and the lower court's formulation, the defendant who kills the inattentive driver, the clumsy waiter, the critical supervisor, or the distracted umpire, would be entitled to a heat of passion defense merely because such errors may cause ordinary people to "act rashly." Such a standard fails to properly value the degree of provocation necessary for manslaughter and permits, even encourages, defendants to set up their own standard of conduct in response to otherwise trivial provocations. This is contrary to the law of manslaughter. Put simply, relying on a standard of mere "rashness," disconnected from the resultant homicide, mitigates murder too cheaply.

As *Logan* made clear, no person is allowed to set up his own standard of conduct. A defendant's homicidal conduct in response to provocation must fall within the same range of responses as an ordinary person's likely conduct when confronted with the same provocation. If an ordinary person

of average sensibilities could be moved to kill as a result of the provocation, then the defendant's act of killing is understandable and properly mitigated. However, if a provocation would cause an ordinary person merely to act imprudently, but never induce him to kill, the defendant's homicidal act is a reflection not of the weakness of human nature, but rather of the defendant's own nature, and should not be mitigated to manslaughter.

D. CALCRIM No. 570 Does Not Misstate the Objective Component of Provocation, But Should Be Modified to Convey that Standard More Precisely

The instruction on voluntary manslaughter given in this case, former CALCRIM No. 570, does not contain an erroneously restrictive definition of provocation. The instruction correctly directed the jury to consider the reaction of an ordinary person under the same circumstances.

The challenged portion of CALCRIM No. 570 provided:

> It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation and knowing the same facts.*

(5 CT 1455, italics added; 14 RT 1668-1669.)

The challenged portion of the instruction is nothing more than a mild reference to the objective standard. It requires a sufficient equivalence between how the defendant reacted and how an ordinary person of average disposition is likely to react to the same provocation. It directly tracks the instructional requirements laid down in *Logan*, which specifically charged the courts with instructing the jury on the principle that no defendant can set up his own standard of conduct. As noted above, *Logan* expressly

observed, "further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances, the jury is properly to be told that the exciting cause must be such as would naturally tend to arouse the passion of the ordinarily reasonable man." (*People v. Logan*, *supra*, 175 Cal. at p. 49.) CALCRIM No. 570, as given in this case, contained both of these instructional components. The challenged language tracks *Logan*'s component that the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances.

If any error exists in the instruction, it is in *understating* the objective component of provocation, which only could inure to appellant's benefit. In both former CALCRIM No. 570 and the newly revised version, the only direct explanation of the objective component of provocation is that "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment." The phrase "act rashly and without due deliberation" might not readily be understood by modern jurors to mean an act of lethal violence, a homicidal act. (Cf. *Victor v. Nebraska* (1994) 511 U.S. 1, 14 [noting with respect to the phrase "moral certainty" that "[w]ords and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror"].)

The additional reference in the challenged instruction that the jury should "consider whether a person of average disposition would have been provoked and how such a person would react in the same situation and knowing the same facts," only hints at the correct meaning of "act rashly." The 2008 revision to the instruction—which now provides that "[i]n deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment"—eliminated

any suggestion of the true nature of "act rashly." In bowing to *Najera*, the instruction effectively emasculates the objective standard by removing any necessity of finding an equivalence between the defendant's actions in response to provocation and the likely response of an ordinary person to that provocation. Yet, as explained above, that equivalence is the very foundation for mitigating murder to manslaughter.

Accordingly, CALCRIM No. 570 should be modified to define the objective component of heat of passion manslaughter in a direct manner. Specifically, the third prong of the definition heat of passion manslaughter should be modified as follows:

> The defendant killed someone because of a sudden quarrel or in the heat of passion if:
>
> 1. The defendant was provoked;
>
> 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;
>
> AND
>
> 3. *The provocation could have caused a person of average disposition to lose self-control and commit a lethal act rashly, that is, from passion rather than from judgment.*

Such a modification correctly states the objective adequacy of the provocation in terms of the likely reaction induced in an ordinary person of average disposition and informs the jury of the degree of rashness necessary for mitigation. (Accord, *United States v. Frady*, *supra*, 456 U.S. at p. 170, fn. 18 ["adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control and commit the act on impulse and without reflection"]; *United States v. Wagner*, *supra*, 834 F.2d at p. 1487 ["[T]he provocation must be such as would arouse a reasonable and ordinary person to kill someone"]; Wharton,

The Law of Homicide, § 172 at p. 271 [provocation that "would, in the mind of an average, just and reasonable man, stir resentment likely to cause violence endangering life"]; see also *People v. Hurtado*, *supra*, 63 Cal. at p. 292 ["provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control"].)

Similarly, the 2008 revision to CALCRIM No. 570, designed to comply with *Najera*, should be returned to the pre-*Najera* language:

> It is not enough that the defendant simply was provoked. The defendant is not allowed to set up his own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation and knowing the same facts.*

Together, these changes would identify the correct objective standard for provocation sufficient to reduce murder to voluntary manslaughter.

II. EVEN IF THE COURT OF APPEAL'S INTERPRETATION OF PROVOCATION IS CORRECT, THERE WAS NO INSTRUCTIONAL ERROR IN THIS CASE

The Court of Appeal held the 2006 version of CALCRIM No. 570 misinstructed the jury on the "act rashly" standard for voluntary manslaughter. Assuming that the objective prong of provocation merely requires that a person of average disposition would act rashly, i.e., hastily and imprudently, but without any requirement of *lethal* passion, the jury still was not misinstructed in this case. There is no reasonable likelihood the jury would have understood the benign instructions given here as requiring lethal passion.

A. Applicable Legal Standard

For a claim of instructional error, the reviewing court must consider whether there is a reasonable likelihood of misapplication by evaluating the

whole record, including the instructions in their entirety and the arguments that counsel presented to the jury. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.) The challenged instruction "'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." (*Estelle v. McGuire*, *supra*, 502 U.S. at p. 72, citation omitted.) Thus, a party urging instructional error must "establish a reasonable likelihood that the jury misunderstood the instructions as a whole." (*People v. Brown* (2000) 77 Cal.App.4th 1324, 1335, citing *People v. Cain* (1995) 10 Cal.4th 1, 36; see also *People v. Kelly*, *supra*, 1 Cal.4th at p. 526.) Moreover, arguments of counsel may be considered in clarifying the instructions given. (See *People v. Kelly*, *supra*, 1 Cal.4th 495, 526-527 [considering explanatory closing arguments in determining whether jury correctly understood the law as presented by the instructions as a whole]; cf. *Middleton v. McNeil* (2004) 541 U.S. 433, 438 [noting that courts may look to closing arguments as clarifying ambiguous instructions].) Applying that standard, there was no reasonable likelihood of confusion by appellant's jury. The challenged instruction, viewed alone and in conjunction with all the instructions and arguments, did not misinform the jury on the legal standard for voluntary manslaughter.

B. The Instruction Did Not Misdirect the Jury

The court below found problematic the portion of the instruction suggesting how to evaluate sufficient provocation for voluntary manslaughter.

> You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked *and how such a person would react in the same situation and knowing the same facts.*

(5 CT 1455; 14 RT 1668-1669, italics added.)

The court concluded that the italicized language misstated the correct legal standard by suggesting that heat of passion can only be found based on a reasonable person reacting with homicidal rage. We disagree.

The instruction begins by informing the jury of both the subjective component and the objective component, describing the latter as a requirement that "[t]he provocation would have caused a person of average disposition to act rashly and without due deliberation." (5 CT 1455.) The instruction continues by elaborating on the subjective component and then on the objective component. In that latter elaboration, the instruction provides, "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation and knowing the same facts." (5 CT 1455.) This merely reminds the jury of the objective component and offers instruction to the jury on how to conduct the applicable inquiry. In deciding whether the provocation was objectively sufficient, the instruction invites the jury to consider: (1.) whether the average person would have been provoked; and (2.) how the average person, standing in the defendant's shoes, would have reacted, namely, would the average person have reacted by *acting rashly*.

When the components of the instruction are viewed together, the challenged clause builds upon the earlier stated objective component, by requiring the jury to find that (1.) an average person would be provoked and (2.) an average person would have responded to that provocation, not with reason or judgment, but by acting rashly under the influence of passion. Nothing in the instructions suggests that the jury must find anything more than that an average person would have "acted rashly." The instruction does not misstate the legal standard for provocation even as interpreted by the Court of Appeal.

Appellant argued below, and the Court of Appeal agreed, that the challenged clause directed the jury to decide whether the average person would have killed. The court identified the problem as a failure to prevent the jury from considering whether an ordinary person would harbor lethal passion:

> We agree with appellant that the provocation instruction given in this case did not expressly limit the jurors' focus to whether the provocation would have caused an average person to act out of passion rather than judgment. Instead, the challenged language invited the jurors to consider what would and would not be a reasonable response to the provocation. More specifically, it allowed, and perhaps even encouraged, jurors to consider whether the provocation would cause an average person to do what the defendant did; i.e., commit a homicide. As we have explained, however, whether an average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient. Thus, insofar as the instructional language permits a jury to decide a crucial issue based on proper and improper considerations, it is ambiguous.

(Maj. Opn. at 19.)

This analysis is flawed, even under the lower court's interpretation of "act rashly." The court finds fault in permitting the jury "to consider what would and would not be a reasonable response to the provocation." (*Ibid.*) However, that consideration of likely response is the essence of the objective standard for provocation, whether an average person would have *acted rashly*, out of passion rather than judgment. If an ordinary person of average disposition would not have acted rashly in response to the provocation, then the provocation is not legally sufficient for manslaughter. To make this determination, the jury must necessarily consider what the reaction of the reasonable person would be to the provocation.

Obviously, if the jury finds that an average person would be provoked to kill, then the provocation is necessarily sufficient. That is a perfectly

proper consideration. If the jury finds an average person would not be provoked to kill, that finding—as the first step in the jury's analysis—in no way precludes the jurors from moving down the chain in a logical progression to evaluate other degrees of rashness. The lower court's analysis effectively requires the jury consider *only* those rash acts that fall short of homicide when evaluating the sufficiency of the provocation for a reasonable man. There is no legal basis for such a constraint.

The court below invalidated the instruction because it allowed the jury "to consider whether the provocation would cause an average person to do what the defendant did; i.e., commit a homicide." (Maj. Opn. at 19.) This view, however, imposes an improper limitation on the degree of rashness the jury may consider with respect to the objective standard.

As discussed, the phrase "act rashly," by itself, contains no inherent measure or degree. It merely requires that one act hastily or imprudently, without consideration. The universe of possible rash acts is not limited to mildly rash acts, and certainly includes passionate homicides, which are the quintessence of rash acts. Contrary to the lower court's suggestion, the jury must be free to consider whether an ordinary person would have killed in response to the provocation. Indeed, the rash act of homicide is the easiest starting point for the jury's evaluation. If an ordinary person could be moved to kill in response to the provocation, then the defendant has plainly satisfied the objective standard and would be entitled to voluntary manslaughter if he also met the other requisite criteria. By contrast, if an ordinary person would not kill in response to the provocation, the jury's inquiry becomes more nuanced in deciding whether the ordinary person would have acted with a lower degree of rashness without due deliberation. While the jury is not required to find that an average person necessarily would kill, there is no basis for the lower court's suggestion that the jury must be foreclosed from considering whether an ordinary person could kill

or for a conclusion that an instruction permitting such an inquiry is erroneous.

Any such analysis conflates a permissible inquiry with a mandatory test. Allowing a jury to *consider* whether the average person would kill does not direct the jury that it *must* find lethal passion by the average person for manslaughter. By allowing jurors to consider every type of rash act, which necessarily includes lethal acts, the instructions did not misdirect the jurors. The court's suggestion that "whether an average person would be provoked to kill is not a proper consideration in determining whether provocation was sufficient," (Maj. Opn. at p. 19), is both incorrect and misguided. It is akin to saying it is error to fail to prevent a jury from considering whether the defendant premeditated and deliberated when the charge is only second degree malice murder.

Even assuming the Court of Appeal's formulation of the objective provocation standard is correct, the challenged instruction would be erroneous only if it directed that an average person must have a lethal response to the provocation to satisfy the objective standard. The instruction did not so state.

C. The Prosecutor's Argument Did Not Misstate the Law nor Render the Instructions Erroneous

The Court of Appeal also held the prosecutor's argument exacerbated the purported defect in the instructions. Although the court did not decide if the prosecutor's argument constituted misconduct, it did suggest that the prosecutor misstated the law in a manner inconsistent with *Najera*, which in turn misled the jury. (Maj. Opn. at p. 20.) We disagree. The prosecutor's argument was proper and not misleading as to the applicable legal standard.

"'The prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper.'"

(*People v. Panah* (2005) 35 Cal.4th 395, 463, citation omitted.) In evaluating whether the prosecutor misstated the law "based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]" (*People v. Frye* (1998) 18 Cal.4th 894, 970, overruled on other grounds by *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

The Court of Appeal focused on the prosecutor's "examples of stubbing a toe, getting cut off in traffic, or being jealous to argue that minor provocation is not sufficient to cause a reasonable person to kill someone." (Maj. Opn. at 20.) It found that this argument "reinforce[d] the problem with the jury instruction on provocation, because it encouraged the jury to resolve any ambiguity in the instruction's language in a manner rejected by *Najera*, *supra*, 138 Cal.App.4th 212." (*Ibid.*) This conclusion is flawed in two key respects. First, it relies on an erroneous prohibition on permissible argument imposed in *Najera*, and, second, it assumes the jury drew from the argument the most damaging meaning of prosecutor's discussion of the applicable standard.

In criticizing the prosecutor's argument, the court relied upon language in *Najera* stating, "The focus [of a heat of passion defense] 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*, 138 Cal.App.4th at p. 223; see Maj. opn. at p. 16.) *Najera* rests on its view that the objective component of manslaughter only requires provocation that causes a reasonable person to "act rashly," not to act with lethal

passion. Thus, it concluded the prosecutor committed misconduct by referencing the defendant's resulting homicidal conduct in describing the objective component because, in the court's view, a homicidal act was not a necessary part of the objective "rash act." (*Najera*, at p. 223.)

Regardless of whether the proper degree of provocation is that suggested by *Najera* and the court below, the per se rule set out by *Najera*—that "[h]ow the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion"—is not a correct statement of law. This statement in *Najera* places an overly-broad restriction upon what juries may consider and what prosecutors may argue. If accepted as law, it would impermissibly interfere with the jury's ability to evaluate whether the particular defendant was actually provoked and whether the defendant's act of killing was the product of any provocation, or instead, was the product of a longstanding hatred, combined with a clear, deliberate intent to kill formed upon pre-existing reflection. This evaluation turns on the defendant's state of mind, which must often be evaluated based on circumstantial evidence viewed through the lens of the jury's understanding of human nature and what is known about the defendant.

Najera's per se limitation would also effectively preclude the jury from considering whether, following the alleged provocation, a reasonable person would have cooled off, and whether the defendant actually did cool off from the earlier provocation. The determination of whether sufficient cooling time had elapsed is directly connected to how an ordinary person would have responded to the provocation. (*People v. Avila* (2009) 46 Cal.4th 680, 705 [""[I]f sufficient time has elapsed for the passions of an ordinarily reasonable person to cool, the killing is murder, not manslaughter""]; *People v. Gingell* (1931) 211 Cal. 532, 545 ["The test was not the condition in life, education, habits, and conduct of this

particular defendant, but rather the 'cooling time' to be considered was the time within which an ordinary reasonable man would cool under like circumstances"'].) Accordingly, the lower court's reliance on *Najera*'s dictum was erroneous.

Second, the lower court's criticism of the prosecutor's argument in this case imposes an excessive limitation on how a prosecutor may argue the phrase "act rashly." As discussed, homicide can be one example of "acting rashly" and certainly falls within the meaning of that phrase, regardless of any conflict in definition. Thus, a prosecutor should be free to argue whether or not a reasonable person would have killed in response to the provocation, as a form of acting rashly. It is not erroneous to argue that an ordinary person would not have killed in response to the provocation faced by the defendant, just as it is not erroneous to argue that an ordinary person would not have thrown a punch, yelled, cursed, wept, or exhibited fear. All of these can be rash acts. Prohibiting a prosecutor from disputing the reasonableness of any particular form of rash action as a way of conveying his or her point in argument to the jury is unwarranted.

Prosecutors have a wide-ranging right to discuss the case in closing argument, provided they do not misstate the controlling legal standard or mislead the jury into applying an incorrect standard. Thus, the prosecution was prohibited from arguing that, to find the provocation sufficient for manslaughter, the jury *must* find the provocation would have caused a reasonable person to kill. But the prosecutor never suggested that here.

To the contrary, the prosecutor began her argument on this point with a legally accurate paraphrasing of the jury instruction for voluntary manslaughter, explaining that "the provocation has to be such that a person of average disposition to [*sic*] act with passion rather than judgment." (14 RT 1698.) The prosecutor followed this statement of the law with a generalized discussion, not tied to the particular facts of this case, but

offered as guideposts for evaluating whether there was any reasonable provocation. The prosecution then suggested the evidence did not support appellant's account and ended the general statement that "murder is unreasonable." (14 RT 1699.) The defense made a specific objection to this final clause. (14 RT 1699 ["Judge, I'm going to object to that as a misstatement of the law, Your Honor, that last part."].)

Appellant contended below that "murder is unreasonable" is a misstatement of the law because the provocation need not elicit a murderous response in a reasonable person. However, the prosecutor had not argued that the jury had to find that a reasonable person would kill to satisfy the objective provocation requirement for manslaughter. Rather, the prosecutor made an uncontroversial statement about the charged crime, namely, "murder is unreasonable." There is little likelihood that the jury would have understood this statement as somehow applying to the definition of manslaughter. The prosecutor specifically referred to the greater offense of "murder," the charge that the jury had to evaluate *before* it could return a verdict of voluntary manslaughter.

The Court of Appeal's concern was that the jury would have understood the statement, "murder is unreasonable," as misstating the degree of rashness necessary to find adequate provocation. That reads far too much into the prosecutor's straightforward statement. In light of the entire argument, the Court of Appeal erred in presuming the jury would understanding this argument as setting out an objective standard that differs from "acting rashly."

Even if the jury could have construed the challenged argument as an incorrect statement of law, any misunderstanding was checked when the court essentially sustained the defense objection by referring the jury to its instructions for the law. (14 RT 1699.) Defense counsel also took pains to clarify any misunderstanding the jury may have harbored by reiterating the

applicable legal standard in closing argument and referring the jury back to the CALCRIM instruction. (14 RT 1712-1714 [explaining the reasonable person standard with respect to acting rashly for voluntary manslaughter].) Consequently, there was no reasonable likelihood the jury misunderstood the legal standard.

D. The Court's Response to the Jury Question Cured Any Ambiguity

The trial court eliminated any possible lingering confusion by its response to the jury's question. During deliberations, the jury sent a note to the court asking:

> In Instruction 570: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would have been provoked and how such a person would react in the same situation knowing the same facts."
>
> Does this mean to commit the same crime -(Hom[i]cide) or can it be other, less severe, rash acts[?]"

(5 CT 1502.)

The court responded with the following clarification:

> The provocation involved must be such as to cause a person of average disposition in the same situation and knowing the same facts to do an act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured. This is an objective test and not a subjective test.

(5 CT 1503.)

The trial court's response reaffirmed that the jury's duty was to determine, not whether an average person would kill, but whether an average person would commit a rash act, under passion and emotion rather than judgment. By responding to the jury's question with that portion of the jury instruction specifically referencing the "act rashly" standard, the court plainly endorsed the latter alternative posed the jury question, i.e., "other, less severe, rash acts," while rejecting the former, i.e., "the same

crime -(Hom[i]cide)." The court wisely did not simply parrot back the language of the jury question, "other, less severe, rash acts," because that is not a precise articulation of the standard. Rather, the court used the language from the instructions, namely "act rashly and under the influence of such intense emotion that his judgment or reasoning process was obscured." The trial court can hardly be faulted for using the language of the jury instructions to instruct the on the very standard endorsed by *Najera* and the Court of Appeal below.

Accordingly, to the extent the original instruction contained any ambiguity which was echoed by the prosecutor's argument, that ambiguity was resolved correctly by the trial court's response to the jury question. It focused the jury on the precise "act rashly" language of the instruction. No cognizable error occurred in this case.

III. APPELLANT WAS NOT PREJUDICED BY ANY INSTRUCTIONAL ERROR

With little analysis, the Court of Appeal held that the disputed clause in the provocation instruction was prejudicial error. (Maj. Opn. at pp. 20-21.) That conclusion was incorrect. Given the overwhelming evidence demonstrating malice and negating provocation, there was no reasonable likelihood appellant would have received a more favorable outcome had the challenged clause not been included. (See generally *People v. Lasko*, *supra*, 23 Cal.4th at pp. 111-113 [explaining that misdirection on the lesser-included offense of voluntary manslaughter was state law error subject to the prejudice test in *People v. Watson*, *supra*, 46 Cal.2d at p. 836]; accord, *People v. Breverman*, *supra*, 19 Cal.4th at pp. 164-178.)[8]

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[8] In Argument I, we assert that the CALCRIM instructions were potentially misleading because the "act rashly" standard *understated* the (continued...)

The evidence overwhelmingly demonstrated the absence of provocation. Mr. Houtz testified that Ms. Tempongko had ended her relationship with appellant several weeks before the murder and that she had started to date Mr. Houtz instead. (11 RT 1120-1121, 1140-1142.) She did not plan on meeting anyone after Mr. Houtz dropped her off that evening. (11 RT 1161.) Mr. Houtz described Ms. Tempongko's fear upon getting a call from appellant during their trip to Sacramento and her terror upon returning home and believing that appellant might be watching her house. (11 RT 1131-1133, 1138-1139, 1150-1159.)

Justin Nguyen testified about Ms. Tempongko begging appellant not to come over to the apartment that evening. (10 RT 1024, 1029.) He recounted how appellant came over, began yelling at Ms. Tempongko, and then got a knife and stabbed her without provocation. (10 RT 1031-1053.) The upstairs neighbor, Ms. Maldonado, testified that, along with the children crying, she heard only a man's voice yelling during the altercation, not a woman's voice. (6 RT 455-457.)

There was also ample evidence of prior acts of unprovoked violence by appellant against Ms. Tempongko. On one occasion in May 1999, appellant became jealous of Ms. Tempongko when he overheard two men at a nightclub commenting on how Ms. Tempongko used to frequent the club before she started dating appellant. Later that evening, appellant attacked Ms. Tempongko when she refused to go home with him. (12 RT 1279-1288, 1398-1421; 5 CT 1487-1488.) On another occasion in April 1999, when Ms. Tempongko told appellant he could no longer stay at her

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(...continued)
degree of provocation necessary for mitigating murder. That defect in the instruction was beneficial to appellant and therefore necessarily harmless. (See *People v. Prieto* (2003) 30 Cal.4th 226, 255; *People v. Mayfield* (1993) 5 Cal.4th 142, 180.)

apartment, appellant knocked her down, grabbed her by the hair, and dragged her down the service hallway along the garage. (10 RT 1040-1043; 11 RT 1195-1203.)

By contrast, appellant's account was so completely contrary to the evidence as to be wholly lacking in plausibility. Appellant's claim that the victim called him up and asked him to come over (13 RT 1524-1526) is belied by the victim's terrified state in the hours preceding the crime. Appellant's claim that the victim spontaneously began berating and provoking appellant (13 RT 1524-1528), is likewise incompatible with the victim's overwhelming fear preceding the encounter, and with the neighbor's testimony that she did not hear a woman's raised voice. (6 RT 455-457.) Appellant's claim that she bemoaned appellant's leaving her (13 RT 1531), was plainly contrived as she was dating Mr. Houtz and appellant had not lived with her for some time. Appellant's claim that he did not touch the phone cord, is belied by the testimony and photographs depicting the phone cord having been yanked with sufficient force to have dislodged the entire jack from the wall. (Compare 6 RT 464, 471, 510-511, 514-515, 533, 535; 7 RT 572, 578; 12 RT 1348-1349, 1353-1355, with 13 RT 1531.) Appellant's claim that he did not intend to flee to Mexico but merely accompanied Ezekiel Perez who was going to visit his family is belied by the fact that appellant went to significant lengths to say goodbye to his sister before his departure and remained at large in Mexico for six years. (8 RT 781-785; 12 RT 1438; 13 RT 1534.)

Finally, appellant's claim that Ms. Tempongko told him she had an abortion rang hollow. Appellant asserted that she made this revelation while lamenting that she knew he would walk away from her some day. (13 RT 1531.) The account is wholly inconsistent with the termination of their relationship earlier and with the protective order she obtained against appellant. (12 RT 1431; 13 RT 1601-1602.) Moreover, the claimed

accusation is illogical. Ms. Tempongko had the procedure three months earlier in July, and had never mentioned to appellant that she was pregnant (13 RT 1469, 1531), which is not behavior consistent with someone hoping to secure a life with appellant as he suggested.

Given the minimal evidence of provocation, there is no reasonable likelihood the jury would have found appellant guilty of voluntary manslaughter instead of murder had the jury been instructed in conformity with the Court of Appeal's views.

As Justice Reardon observed in dissent,

> Whether the instruction is a correct statement of the law or "ambiguous, if not misleading," the bottom line is that it was not prejudicial. In short, given the overwhelming evidence of second degree murder, it is not reasonably probable that the jury would have returned a more favorable verdict in favor of appellant had the above language been deleted from the instruction.

(Dis. Opn. at 2.)

CONCLUSION

Accordingly, respondent respectfully requests that the Court of Appeal's decision be reversed.

Dated: September 13, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
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STAN HELFMAN
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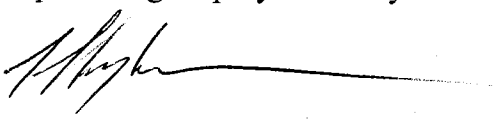

JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Respondent

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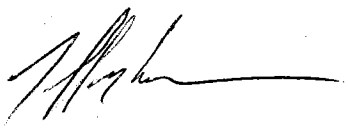
CERTIFICATE OF COMPLIANCE

I certify that the attached OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 16,719 words.

Dated: September 13, 2011

KAMALA D. HARRIS
Attorney General of California



JEFFREY M. LAURENCE
Deputy Attorney General
Attorneys for Respondent

DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. Tare Nicholas Beltran***

No.: **S192644**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On September 13, 2011, I served the attached **OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Linda M. Leavitt
Attorney at Law
PMB No. 312
5214-F Diamond Heights Boulevard
San Francisco, CA 94131-2118
(2 copies)

The Honorable George Gascon
District Attorney
San Francisco County District Attorney's Office
Hall of Justice
850 Bryant Street, Room 325
San Francisco, CA 94103

County of San Francisco
Hall of Justice
Superior Court of California
850 Bryant Street
San Francisco, CA 94103

First Appellate District, Division Four
Court of Appeal of the State of California
350 McAllister Street
San Francisco, CA 94102-3600
(via hand delivery)

Attention: Executive Director
First District Appellate Project
730 Harrison St., Room 201
San Francisco, CA 94107

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on September 13, 2011, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature