IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

Case No. S192644

v.

TARE NICHOLAS BELTRAN,

Defendant and Appellant.

First Appellate District, Division Four No. A124392
San Francisco County Superior Court Case Nos. 175503; 203443
The Honorable Robert L. Dondero, Judge

APPELLANT'S ANSWERING BRIEF ON MERITS

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ISSUES PRESENTED [1]

(1) Was the jury misinstructed with former CALCRIM No. 570 on provocation and heat of passion as a basis for a conviction of voluntary manslaughter?

(2) Did the prosecutor misstate the applicable law on the subject in argument?

(3) Did the trial court accurately respond to a jury question on the subject?

(4) If there was error, was defendant prejudiced?

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[1] Appellant has followed the issues for review, as stated in this Court's order of June 15, 2011, granting review; thus, appellant's issues presented differ from those created by respondent.

INTRODUCTION

Appellant defended the charge of murder in this case by presenting evidence that the killing was provoked by the victim informing appellant—for the very first time—that she had aborted his child. But this theory of the case, which was not an effort to justify the killing but only to reduce the offense to voluntary manslaughter, did not get full and fair consideration by the jury. A confluence of factors—including instructional error, prosecutorial argument, and an incorrect answer to a jury question—caused the jury to incorrectly conclude that heat of passion does not negate malice and reduce murder to voluntary manslaughter unless the jury finds that the provocation would have caused an average person to kill. This was incorrect because, under California law, provocation negates malice when the jury finds that it would have caused an average person to act rashly, without regard to whether the average person would have also killed.

Voluntary manslaughter is the unlawful killing of another person without malice "upon a sudden quarrel or heat of passion." (Pen. Code[2] § 192, subd. (a); see *People v. Koontz* (2002) 27 Cal.4th 1041, 1086.) Under this theory, an unlawful killing is voluntary manslaughter "'if the killer's

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2 All undesignated statutory references are to the Penal Code.

reason was actually obscured as the result of a strong passion aroused by a "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 judgment.'" [Citation.]" *(People v. Breverman* (1998) 19 Cal.4th 142, 163.) This definition became the law in California in 1917 and has been reiterated in subsequent opinions of this Court and appellate courts. (*People v. Logan* (1917) 175 Cal. 45, 49; accord *People v. Lee* (1999) 20 Cal.4th 47, 59; *People v. Lasko* (2000) 23 Cal.4th 101, 108.)

Based on long-standing California precedent, the 2006 version of CALCRIM No. 570 given in this case incorrectly described the provocation element by asking "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."* This italicized phrase altered the long-standing standards cited in cases during the last century and given to juries for decades under CALJIC No. 8.72, creating a reasonable likelihood that the jury applied the instruction in an unconstitutional manner by incorrectly concluding that heat of passion does not negate malice unless the provocation would have caused an average person to kill.

The likelihood that the jury applied the instruction in an incorrect

way was increased by both (1) the prosecutor's argument expressly stating that heat of passion requires that an ordinary person would have killed, and (2) the court's failure to—in response to a question from the jury—correctly instruct the jury that "acting rashly" does not require that an average person would commit the same crime (homicide) but could be "other less severe rash acts." Even if this Court concludes, as urged by respondent, that it is not improper for a jury to merely consider whether an average person would have killed in determining whether the provocation would cause a person to act rashly, in this case there is error because the combination of the instruction, the prosecutor's argument, and the judge's response to the jury's question made it likely that the jury understood that heat of passion *requires* a showing that an average person would have killed.

The 2008 correction to CALCRIM No. 570, which returns the question to the long standing definition of whether "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,"* restores the jury instruction to the correct formulation and its use should be continued.

In addition to contributing to the likelihood that the jury applied the instruction in an unconstitutional way, the prosecutor's closing argument was error independent of the instruction. The prosecutor committed

misconduct by repeatedly misstating the law regarding the standard for determining whether the victim's conduct was sufficiently provocative so that the malice element for murder was negated, thereby making the crime voluntary manslaughter. It is misconduct when the prosecutor argues that heat of passion requires that an ordinarily reasonable person would have committed murder. *(People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21 [misconduct to misstate the law in argument]; *People v. Najera* (2006) 138 Cal.App.4th 212, 223).

The *Najera* decision did not constitute a shift in the law in holding that "How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion" (*id.* at p. 223); it appropriately relied on *Breverman, supra,* 19 Cal.4th at p. 163 which in turn relied on previous cases decided by this Court, including *People v. Berry* (1976) 18 Cal.3d 509, 515, *People v. Valentine* (1946) 28 Cal.2d 121, 139 and *People v. Borchers* (1958) 50 Cal.2d 321, 328-329. It was the prosecutor's comments and the 2006 version of CALCRIM No. 570 which were incorrect based on the century-old doctrine under *Logan, supra*, 175 Cal. at p. 49. Thus, the argument was misconduct.

The trial court's response to the jury question ["Does this mean to commit the same crime (homicide) or can it be other, less severe, rash acts"]

during deliberations on the challenged phrasing in CALCRIM No. 570, contained an inaccurate phrase:

> 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.

(5CT 1503, emphasis added.) This was inaccurate and failed to correctly instruct the jury that "acting rashly" does not require "commit[ting] the same crime (homicide) but could be "other less severe rash acts" Thus, the trial court's answer was not a correct statement of the law and did not eliminate the errors in the 2006 version of CALCRIM No. 570.

The erroneous instructions violated appellant's state and federal constitutional rights to due process, right to proof beyond a reasonable doubt, right to a jury trial (i.e. jury determination of every element) and right to present a defense and to correct instructions on the elements of murder and the defense theory of the case. The prosecutorial misconduct also was prejudicial and both errors required reversal under federal constitutional standards.

This case requires reversal because respondent cannot show beyond a reasonable doubt that the trial court's incorrect instruction, coupled with the prosecutor's misstatement of the law and the judge's response to the

jury question, did not affect the outcome of the case. The erroneous instruction on provocation completely misdirected the jury away from the critical question in this case: whether the provocation – the surrounding circumstances – was sufficient to cause a person of average disposition to act rashly, *not* how appellant responded to it.

The record below contained strong evidence of legally adequate provocation and evidence that appellant acted rashly as a result of that legally adequate provocation. The jury clearly disagreed with the prosecution's theory of the case because it acquitted appellant of first-degree murder. The jury clearly focused on the exact issue raised here when they asked the court to explain how to construe CALCRIM No. 570. Thus, the errors in the instruction, the misstatements of law by the prosecutor, and the court's insufficient answer to the jury's question clearly affected the jury's decision, thus rendering it prejudicial under any standard of law.

As noted in the Court of Appeal's opinion, the errors in this case were prejudicial even under the *Watson* standard. Thus, reversal is required.

STATEMENT OF THE CASE AND FACTS

A. Trial Court

On November 21, 2007 appellant was charged with first degree premeditated murder under section 187, subdivision (a). (2CT 578.)

The jury found appellant not guilty of first-degree murder. (5CT 1518.) The jury found appellant guilty of the lesser included offense of second-degree murder. (5CT 1517.)

The court sentence appellant to a total term of 16 years to life in state prison, consisting of 15 years to life with the possibility of parole for second degree murder plus one year for the use of the knife. (16RT 1812.)

B. The Prosecution Case

1. The Day of the Homicide

Michael Houtz made arrangements on October 22, 2000, to meet Claire Tempongko and her two children. (11RT 1113.) Tempongko and Houtz formally began going out two weeks prior to October 22, 2000. (11RT 1120.) They went to Macy's a few times. They hung out. They talked on the phone quite often. (11RT 1121.) It was not a romantic relationship; they were friends. (11RT 1122.)

They planned to go look at Halloween costumes for her son, Justin Nguyen. (11RT 1122.) After they arrived at their destination in old

Sacramento, Tempongko's cell phone rang. Justin took it from Tempongko's purse. (11RT 1130-1131.) Justin gave the phone back to his mother and said "dad is mad." (11RT 1132.) After the phone call Tempongko's demeanor was different and upset. (11RT 1138.) Tempongko said appellant kept bothering her and she did not want to be bothered. (11RT 1139-1140.) Tempongko said that in her mind the relationship was over in January but he would not let her go. Two weeks earlier appellant realized it was over. (11RT 1141.) Tempongko told Houtz that prior to the end of her relationship, appellant said that it would be "over his dead body, over her dead body." (11RT 1142.)

They left old Sacramento and drove to the Richmond District. (11RT 1143.) Tempongko said she had to be home by 7 PM; she said she had no plans that evening. (11RT 1144.) Tempongko turned her phone back on and received a few telephone calls in which she spoke Tagalog. (11RT 1145.) She sent another call to voicemail. (11RT 1146.) She acted fidgety. She said "don't worry it's okay like it was none of his business." (11RT 1147.)

When they were a few car lengths from her house, she said "don't stop, go around the back." There was a green Honda, four door sedan in the area. (11RT 1150.) Houtz could see a Caucasian or Hispanic man, very

short or crouched down, behind the steering wheel. (11RT 1151.) They drove around again and she was scanning the area. (11RT 1152-1153.) She appeared frightened. The green Honda was still there during the next circle and she was panicking. (11RT 1153-1154.) On the third time around the car was gone and she said to go around one more time. (11RT 1155.) On the fourth time around he stopped the car and she and the kids ran out and they ran inside and shut the door. (11RT 1157.) They did not say goodbye or wave goodbye. (11RT 1158-1159.)

Houtz called her home phone, the landline, and Justin answered and said his mommy is not home and slammed the phone down. (11RT 1163.) Houtz tried the cell phone but it went straight to voicemail. (11RT 1164.)

Justin was 18 years old at the time of trial and 10 years old at the time of the incident. (10RT 982.) He and his sister witnessed the killing of his mother. (10RT 983-984.) He identified appellant as the man who stabbed her. (10RT 984-985.) At the time they called him daddy, but he is not their father. Appellant had been living in their home on that date and on and off for a year. (10RT 985-986.)

The cell phone rang one to five times while they were home. Justin could not hear the conversations or the voices. (10RT 1024.) He assumed somebody was coming. (10RT 1025.) After looking at his prior statements,

he remembered his mother saying "please don't come to the house."[3] She was frantic.[4] (10RT 1029.) Justin had heard from his mother that appellant was not welcome in the house. (10RT 1055-1056.)

Thirty to forty-five minutes later appellant came to the house and broke in. (10RT 1030-1031.) No one opened the door for him. (10RT 1032.) Justin heard very loud banging noises and then appellant came through. (10RT 1033.)

Appellant came in yelling at Justin's mother. (10RT 1033.) Justin went to see what was happening. (10RT 1034.) Appellant was yelling at her face to face.[5] They were in the living room in front of the couch. (10RT 1035.) Justin remembers appellant saying "where were you?" (10RT 1037.) After refreshing his recollection, he remembered appellant saying "where were you and who were you with?" (10RT 1039.)

The yelling continued in front of the sofa for five to ten minutes. Nobody attempted to run out the front door. (10RT 1043.) At some point during the argument appellant went toward the kitchen. (10RT 1044.) At

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[3]In Justin's earlier interview he had said that he was not sure if his mother said "don't come to the house" or "come to the house." (10RT 1060.)

[4] In Justin's earlier interview he said when his mother hung up the phone she was a little bit upset but not crying or shaking. (10RT 1075.)

[5]In Justin's earlier interview he had stated that they were both "saying their parts," that is, participating in the argument. (10RT 1077.)

Justin's earlier interview he said something "triggered" appellant, who then turned around and grabbed the knife by the sink . (10RT 1069.) Justin cannot remember if appellant said anything. (10RT 1045, 1047.) He held the knife pointing toward the floor. (10RT 1048.) Then appellant stabbed Tempongko repeatedly. She fell back towards the couch and onto the floor. (10RT 1049.) Tempongko was trying to push him away or grab the knife. (10RT 1050, 1052.) Appellant kept on stabbing her [6]. (10RT 1051,1053.)

Appellant fled and took the knife with him. (10RT 1055.) Justin tried to use the phone and noticed it was not working. He went outside to go to the neighbors. (10RT 1054.)

Officer Jason Hui interviewed Justin after the homicide. (8RT 800.) Neither Hui or Inspector Michael Johnson had anything in their notes about a telephone or anything on the floor. (9RT 833, 875.) Officer Dharmani interviewed neighbors Stork, Keagy and Papac who did not say anything about a broken or cut phone cord. (11RT 1222-1223.) Others recalled the phone line had been ripped from the wall or on the floor. (6RT 511, 7RT

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Dr. Amy Hart, chief medical examiner of the City and County of San Francisco opined that Tempongko was stabbed multiple times and the cause of death was certified as hypovolemic shock due to multiple sharp force injuries; she bled to death. (9RT 960.)

569, 572-573.)[7]

On Sunday, October 22, appellant came to a bar he frequented around midnight. He was alone and seemed a little nervous. (8RT 625, 630.)

Oscar Sanchez, appellant's friend and sometimes roommate, testified that appellant spent the night at their apartment on October 21, 2000 and they spent time that day drinking. (8RT 719.) Sanchez testified that a woman, appellant's girlfriend who said her name was Tempongko, called him on the phone, asked for appellant, and called him names. (8RT 726-727, 741.) They talked for about 10 minutes. Appellant was calm and did not use any profanity. (8RT 728.) Appellant hung up the phone, showered, dressed up, and left after the noon hour. (8RT 729, 733.) When Sanchez got home, appellant called him and said "I did something wrong" in Spanish. Sanchez just hung up. (8RT 734.)

A friend drove appellant to say goodbye to his sister and then to the Greyhound bus station in San Francisco that day or the following day. (8RT 779-785.) Appellant said he was going to Mexico. (8RT 786.)

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[7]Exhibit 10 shows a phone cord lying on the ground. It was to the left of Tempongko's body. (6RT 534.)

2. The Prior Bad Acts

On April 28, 1999, Tempongko said she did not initially allow appellant to enter because she was afraid of him; appellant broke a window. He was standing in the backyard demanding entry into the premises. (11RT 1198.) She then allowed him to enter. (11RT 1199.)

Tempongko told Officer Dharmani that when she told appellant that he was not allowed in her home, appellant began gathering his belongings and then he suddenly grabbed her, threw her to the ground and picked her up again and dragged her by the hair into the hallway. He kissed her and then left the scene. (11RT 1203.) Dharmani did not see any visible injuries to her face. (11RT 1206.)

Appellant was living at the residence at the time. They were both the registered owners of the truck. (11RT 1218.) Dharmani asked Tempongko whether she wanted to go to a friend's house or relative's house. She said she did not, that she would be more comfortable at home. (11RT 1219.)

Teofilo Miranda testified that on May 17, 1999, he went to a club with some friends: appellant and his girlfriend, who were celebrating an anniversary and invited him to go with them. (12RT 1399-1400.) The three of them went to his house. (12RT 1405.) Appellant wanted to leave. Somebody called a cab, but the girlfriend did not want to leave; she wanted

to leave in a separate cab. (12RT 1411.) Appellant tried to take the girlfriend out, but she threw herself down on the floor; appellant was trying to pick her up, but he was not able to. (12RT 1413.) Miranda called the police. (12RT 1414.) He did not see any weapon. (12RT 1416.)

Officer John Tack was dispatched to 624 22nd Avenue on November 18, 1999, because of a fight between a man and a woman. (12RT 1295.) He encountered Tempongko's mother, Clara, and Clara's husband, Ignacio Puig. (12RT 1296.) Tempongko's mother was upset and stated that her daughter's boyfriend beat her daughter.[8] (12RT 1298.)

Tack tried to open the bedroom door but it was either locked or blocked. (12RT 1302.) They demanded entry and the door opened a few inches and they saw appellant by the door. (12RT 1304.) Tempongko said they were celebrating their one year anniversary and she was drinking with appellant. They had gotten into an argument. Appellant had grabbed her by the back of the hair and pulled her head back and held her for several seconds. She became afraid. (12RT 1307.) She left the apartment to call her parents and returned back into the apartment. Tempongko's parents arrived and appellant started to yell at Tempongko's mother. Tempongko's

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[8] The court gave an admonition that it was being offered not for the truth of the matter but to explain why the officer checked it out.

mother left the apartment to call for the police. (12RT 1308.) Appellant forced Tempongko into the bedroom and kept her there for about five minutes. (12RT 1308-1309.) The officers did not see any injury on Tempongko's head. (12RT 1311.)

Officer Noel Schwab was dispatched to 624 22 nd Avenue, on September 7, 2000 at 11:34 PM. (12RT 1423.) He spotted appellant about ten or fifteen feet from the front door of the victim's residence. (12RT 1425.) He appeared to be avoiding detection. (12RT 1424.) Appellant was slightly disheveled and had signs of drinking. (12RT 1430.)

Tempongko told Schwab she had in an emergency protective order but Schwab never saw the order.[9] (12RT 1431, 1436.)

It was related to Schwab that appellant had a key to the apartment. Tempongko did not say the that he did not live there. She did not say they had he broken up. (12RT 1434.) Appellant's address was listed in the report is 624 22nd Avenue, Apartment A. (12RT 1435.)

C. The Defense Case

Appellant testified that he met Tempongko in November 1998 at a

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Respondent incorrectly states that Tempongko provided the officers with an emergency protective order. (Respondent's Brief, p. 3.) The officer stated he had never seen it. (12RT 1436.)

bar. They played pool. (13RT 1511.) They became boyfriend and girlfriend after a month. They moved in together on January 17, 1999. (13RT 1512.) The children called him dad. (13RT 1513.) When she asked if he would help with the children, appellant replied that he loves kids and he does not mind. (13RT 1514.) Tempongko did not want him to see his sister and said that from now on she and the children were his only family. Appellant agreed. (13RT 1515.)

Appellant and Tempongko discussed having their own child together. They thought the child would be beautiful. She was worried that he would walk away like the fathers of her other two children did. At one point they decided that she would try to get pregnant, but he did not know that she ever got pregnant. (13RT 1517.)

The month prior to the incident appellant moved out. They decided to take a timeout to reevaluate the relationship. They were having their ups and downs. He does not recall pulling her hair. He would check up on them through phone calls and would meet with them once a week and kept contributing financially and let them know where he was staying. (13RT 1518, 1549.)

Appellant stated that Tempongko did not communicate with him on Saturday that she was going out with the children and a friend on Sunday.

He stayed in the rest of the night. (13RT 1553.) He might have gone out for dinner and came back up. (13RT 1554.)

On October 22, 2000, appellant was awakened by a phone call from Tempongko. Oscar gave him the phone. Appellant and Tempongko were supposed to have lunch that Sunday. (13RT 1521.) Tempongko informed him that a female friend was taking her and the children to Vallejo to buy Halloween costumes. (13RT 1522.) Appellant and Tempongko still planned to see each other when she returned. She asked him to call her to check out what time she would be coming home. (13RT 1523.)

He called her in the afternoon around 3:00 PM. He was not upset or yelling during the call. He was at a pay phone and might have spoken loudly. He was not mad at Tempongko for changing their plans. (13RT 1523-1524.) At 3:00 PM she said she would still call him later when they were done. She did not say she would be home by 7:00 PM. (13RT 1524.) He did not tell her she had to be home by seven o'clock. He never told her he had to be home at a certain time for him to call her. (13RT 1556.)

Tempongko never told him about a new guy that she met at work. She never told him about Michael Houtz. (13RT 1557.)

Appellant took the bus from the Tenderloin to Tempongko's house that evening; he did not have a car that night. (13RT 1524-1525.) He

arrived at 8:40 PM. He had a key and let himself in. He did not knock because they were expecting him. He was not angry. He did not bang on the door. He was in normal mode, not excited and not angry. He knew the children were in the house. (13RT 1562.)

Appellant denied being angry and yelling at her. He denied taking her cellphone; she had handed it to him earlier. (13RT 1567-1568.) Appellant was eager to see what she had to say about why she wanted him to come over. (13RT 1525.) It was kind of late and he was worried about getting up early for work. (13RT 1526.)

When appellant got there she was serious and looked at her watch and asked why it took him so long to get there. She was upset that he was late. (13RT 1526.) She did not believe he was taking a nap. She thought he was somewhere else. (13RT 1527.) She said she was with a friend and handed him a cell phone and said to call the friend. Appellant said he was not going to call anyone. Appellant said that it was their business; he does not tell anyone their business. (13RT 1528.)

When appellant told Tempongko he was starting a new job on Monday she went off and said so you are just going to "fucking clean dishes once again. Do you like that kind of job." He said he was bringing in more money than she was. (13RT 1528.) He said he needed to do this job.

(13RT 1529.)

Tempongko told appellant that his sister was a whore because she left her two children with his mother and had a boyfriend in San Rafael. He said, "well, just look who's talking." She said, "how dare you talk to me like that. You know you're a fucking illegal. You're nobody. You're never going to be anybody and I could get better than you." (13RT 1530.) At this point he said that he was tired of this and he was out of there. (13RT 1531.)

Tempongko became even more upset and was gesturing and said "fuck you. I was right. I knew you were going to walk away someday. That's why I killed your bastard. I got an abortion[10]." (13RT 1531:18-20.) This was the first time appellant had heard that Tempongko had an abortion. (13RT 1531.) She was yelling and using her hands. He was shocked after this happened. He did not remember anything until he found himself holding a knife and there was blood on his hands. He did not remember going to the sink or picking up the knife and stabbing Tempongko. He looked at the kids, took the knife with him, and ran. He took a taxi. He was in shock. (13RT 1532-1533.)

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The medical examiner testified that there were signs that there had been a previous pregnancy which could have shown a previous abortion. (9RT 973.) Defense exhibits 334, subpoenaed records from UCSF/Mount Zion Medical Center showed an abortion. (13RT 1469.)

Appellant remembered a landline, but the main phone was a cordless phone inside the bedroom. (13RT 1565.) He did not remember seeing a telephone hanging on the wall or pulling the telephone cord of the telephone off the wall or out of the jack. (13RT 1526, 1566.)

D. The Court of Appeal's Ruling and Opinion

The Court of Appeal reversed appellant's conviction. (Opn. at p. 21.) The court agreed that the 2006 version of the provocation instruction given in this case erroneously allowed the jury to consider whether the provocation would have caused an average person to kill because it:

> 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.

(Opn. at p. 19.) The Court of Appeal explained that the instructional error was accentuated by the trial court's failure to properly clarify the definition of provocation when the jury questioned the meaning of the provocation instruction:

> As appellant points out, the existence of the ambiguity, and its effect on this case, is highlighted by the fact that the jury asked a question during deliberations on precisely the relevant issue—i.e., whether the provocation must be sufficient to induce a reasonable person to commit homicide, or other, less severe rash acts. The trial judge's response was that the provocation "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." As appellant's trial counsel unsuccessfully argued below, this answer did not really focus on the jury's question, and did not really clarify the aspect of the instruction at issue.

(Opn. at pp. 19-20.)

The Court of Appeal also found that the prosecutor's argument reinforced the instructional error:

> Specifically, appellant points to a passage from the closing argument in which the prosecutor used the 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. This argument may not have risen to the level of misconduct, but it did serve 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.

(Opn. at p. 20.)

The court found the error prejudicial under the *Watson* standard because the jury rejected the prosecutor's argument that the killing was pre-meditated and because the jury, which was confused by CALCRIM No. 5.70, was considering the provocation evidence:

> Here, the jury acquitted appellant of first degree murder, thus rejecting the prosecution's argument that his killing of Tempongko was premeditated. Moreover, the jury's question to the court, discussed *ante*, shows that the jury was confused by CALCRIM No. 5.70, and that it actively considered whether the provocation evidence was sufficient to negate malice. That confusion was certainly exacerbated by the prosecutor's closing argument, as we note above. Therefore, we agree with appellant that under all of these circumstances, the error in the jury instructions cannot be characterized as harmless.

(Opn. at pp. 20-21.)

Judge Reardon dissented, without analyzing the arguments regarding the instruction or prosecutorial misconduct, finding that any error would not be prejudicial. (Opn., dissent of Reardon, J.)

ARGUMENT

I

THE COURT ERRONEOUSLY INSTRUCTED THE JURY WITH THE WRONG STANDARD FOR DECIDING WHEN PROVOCATION REDUCES A HOMICIDE FROM MURDER TO VOLUNTARY MANSLAUGHTER DEPRIVING APPELLANT OF DUE PROCESS, THE RIGHTS TO PROOF BEYOND A REASONABLE DOUBT, TO A JURY TRIAL (I.E. JURY DETERMINATION OF EVERY ELEMENT) AND TO PRESENT A DEFENSE AND TO CORRECT INSTRUCTIONS ON THE ELEMENTS OF MURDER AND THE DEFENSE THEORY OF THE CASE, UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

A. Introduction and Summary of Argument

Although this Court has never construed the 2006 version of CALCRIM No. 570 given in this case, this Court has consistently held that for purposes of voluntary manslaughter, for provocation to negate malice, the provocation must be "sufficient to obscure reason and render the average man liable to act rashly." This definition became the law in California in 1917 and has been reiterated in cases cited by this court and appellate courts since that time. (*Logan, supra,* 175 Cal. at p. 49; *Breverman, supra,* 19 Cal.4th at p. 163; *Lee, supra,* 20 Cal.4th at p. 59; *Lasko, supra,* 23 Cal.4th at p. 108.)

Respondent's attempt to redefine this phrase used for over 100 years

to require that "the provocation could have caused the person of average disposition to lose self-control *and commit a lethal act rashly*, that is from passion rather than from judgment" (Respondent's Brief, p. 39; proposed version of CALCRIM No. 570, emphasis added) is inapposite to the holding in these cases. The distinction between these two phrases is that the first uses the word "act," as a noun (the result) and the second phrase uses the word "acting," which is a verb. It is the verb phrase of "acting rashly" which negates malice (the intent) and which thereby reduces the crime from murder to manslaughter.

Respondent has asserted that the basis for this unsubstantiated argument is that California courts have continued to "recognize" what respondent believes is the "historical meaning and the underlying context of that phrase as equivalent to acting with lethal passion or homicidal rage." (Respondent's Brief, p. 27.) To support this leap in logic respondent cites nine cases which used a shorthand phrase such as "lethal passion" or "homicidal rage." (*Ibid.*) However, as discussed *infra*, each of these cases uses these phrases as mere dicta and none of these cases stand for the proposition that any court meant to change the century old "act rashly" standard.

Based on long-standing California precedent, the version of

CALCRIM No. 570 given in this case incorrectly misdescribed this element by asking "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.*" This italicized phrase altered the long-standing standards cited in cases during the last century and given to juries for decades under CALJIC No. 8.72.

The 2008 correction to CALCRIM No. 570 which returns the question to the long standing definition of whether "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*" returns the jury instructions to the correct formulation and its use should be continued.

B. The Instruction Describing the Provocation Sufficient to Negate the Malice Necessary for Murder was Contrary to the Statutory Meaning of "Heat of Passion," as Established By California Supreme Court Law

1. Voluntary Manslaughter-an Overview

Voluntary manslaughter is the unlawful killing of another person without malice "upon a sudden quarrel or heat of passion." (§ 192, subd. (a); see *People v. Koontz, supra,* 27 Cal.4th 1041.) Under this theory, an unlawful killing is voluntary manslaughter "'if the killer's reason was actually obscured as the result of a strong passion aroused by a "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 judgment.'" [Citation.]" (*Breverman, supra,* 19 Cal.4th at p. 163; accord *Lee, supra,* 20 Cal.4th at p. 59*; Lasko*, *supra*, 23 Cal.4th at p. 108.)

The 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, because 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. (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) Moreover, the passion aroused need not be anger or rage, but can be any "'[v]iolent intense, high-wrought or enthusiastic emotion'" [citations] other than revenge [citation]." (*Breverman, supra,* 19 Cal.4th at p. 163; see also *People v. Manriquez* (2005) 37 Cal.4th 547, 585-586 [the provocative conduct may be verbal as long as it is such that an average, sober person would be so inflamed that he or she would lose reason and judgment]; *Logan, supra,* 175 Cal. at p. 49 [provocation "sufficient to arouse the passions of the ordinarily reasonable man"]; 1 Witkin & Epstein, California Criminal Law (3d ed. 2000) Crimes Against the Person, § 213, p. 824 .)

2. In 1917, *People v. Logan* Defined Adequate Provocation As "Sufficient to Obscure Reason and Render the Average Man Liable to Act Rashly."

Nearly a century ago, in *People v. Logan, supra,* this Court set forth the fundamental inquiry of the doctrine of adequate provocation for voluntary manslaughter by stating it must be "sufficient to obscure reason and render the average man liable to act rashly." (*Id.* at p. 50.) In *Logan*, the defendant, like appellant herein, was charged with the crime of murder and was convicted of murder in the second degree. (*Id.* at p. 45.) This Court held that the instruction which was given was erroneous and prejudicial as "there was at least some evidence tending to reduce the crime from murder to manslaughter, for the due consideration of which evidence defendant was of right entitled that the jury should be correctly instructed." (*Id.* at p. 50.) This Court stated the provocation standard—sufficient cause an average man liable to act rashly—without referring to any requirement that the provocation would cause an average man to act lethally:

> 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. But as to the nature of the passion itself, our law leaves that to the jury, under these proper admonitions from the court. For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion -- not necessarily fear and never, of course, the passion for

> revenge -- to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment. (*Maher v. People*, 10 Mich. 217, [81 Am. Dec. 781].)... The 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 (*Mack v. State*, 63 Ga. 693; *Flannagan v. State*, 46 Ala. 703).

(*Logan, supra,* 175 Cal. at pp. 49-50.)

Although respondent attempts to read in some non-explicitly stated analysis, (see Respondent's Brief, p. 16, n. 2), the actual holding from *Maher v. People* (1862) 10 Mich. 217 relied on by this Court in *Logan*, explicitly explains this doctrine:

> The principle involved in the question, and which I think clearly deducible from the majority of well considered cases, would seem to suggest as the true general rule, 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 v. People, supra*, at pp. 220-221.)

3. *People v. Lasko* Redefined Voluntary Manslaughter to Eliminate the Need for Intent to Kill, but Reiterated That the Adequate Provocation Standard Would Cause an Ordinary Person of Average Disposition To Act Rashly or Without Due Deliberation and Reflection, and from Passion Rather Than Judgment

A decade ago, in *People v. Lasko, supra,* 23 Cal.4th 101, this Court

conducted a lengthy review of the common law as well as the statutory law in most states and held that, contrary to earlier California opinions intent to kill is not a necessary element of voluntary manslaughter:

> a killer who acts in a sudden quarrel or heat of passion lacks malice and is therefore not guilty of murder, irrespective of the presence or absence of an intent to kill. Just as an unlawful killing *with* malice is murder regardless of whether there was an intent to kill, an unlawful killing without malice (because of a sudden quarrel or heat of passion) is voluntary manslaughter, regardless of whether there was an intent to kill. In short, the presence or absence of an intent to kill is not dispositive of whether the crime committed is murder or the lesser offense of voluntary manslaughter.

(*Id.* at pp. 109-110.)

In making this review, *Lasko* stated that,

> In a recent decision, we discussed what facts will reduce an *intentional* killing from murder to manslaughter, when based on heat of passion: "An intentional, unlawful homicide is 'upon a sudden quarrel or heat of passion' (§ 192(a)), and is thus voluntary manslaughter (*ibid.*), if the killer's reason was actually obscured as the result of a strong passion aroused by a '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 judgment."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 163 [77 Cal. Rptr. 2d 870, 960 P.2d 1094].) No specific type of provocation is required, and "the passion aroused need not be anger or rage, but can be any '"'[v]iolent, intense, high-wrought or enthusiastic emotion'"' [citations] other than revenge [citation]." (*Ibid.*) Thus, a person who *intentionally* kills as a result of provocation, that is, "upon a sudden quarrel or heat of passion," lacks malice and is guilty not of murder but of the lesser offense of voluntary manslaughter.

(*Lasko, supra*, at p. 108.)

Thus, as recently as 2000, in a decision reviewing the doctrine of voluntary manslaughter under the adequate provocation heat of passion standard, this Court defined voluntary manslaughter and reiterated the standard that adequate provocation would cause the defendant "[t]o act rashly or without due deliberation and reflection, and from this passion rather than judgment." Respondent's attempt to redefine this century old standard, to require one to "commit a lethal act rashly" is inapposite to the holding in *Lasko*.

4. The Shorthand Phrases Such As "Lethal Passion" or "Homicidal Rage" Are Dicta and Were Not Intended to and Did Not Create a New Standard for Jury Instructions on Adequate Provocation under a Heat of Passion Theory.

Despite the clear statements in *Logan* and *Lasko*, respondent argues that the derivation of the language from *Logan* did not "reflect any fundamental shift." (Respondent's Brief, p. 27.) Respondent's basis for this unsubstantiated argument is that California courts have continued to "recognize" what respondent believes is the "historical meaning and the underlying context of that phrase as equivalent to acting with lethal passion or homicidal rage." (*Ibid.*) To support this leap in logic respondent cites nine cases which used a shorthand phrase such as "lethal passion" or

"homicidal rage." (*Ibid.*) The Court of Appeal in this case, stated that this language, however, addresses the necessary degree of arousal in the defendant's mental state, not the nature of his conduct. (Opn. at p. 18.)

Rather than requiring an "equivalence," a word used by respondent but not found historically in any of the cases describing the doctrine of voluntary manslaughter as it relates to adequate provocation and heat of passion, the courts have separated the initial requirement or threshold for an instruction to be given to the jury from the elements that the jury should be instructed upon when that threshold is met. In this regard, historically the courts have used the shorthand "homicidal reaction" when discussing the failure to meet the threshold. (See, e.g. *People v. Avila* (2009) 46 Cal.4th 680, 705-706.) However, historically the courts have consistently used the phrase "act rashly" when describing the instructions that the jury should receive and the element of voluntary manslaughter. *(Logan, supra,* at p. 50.)

Case law has long defined the type of triggering events which are adequate which have been held to constitute legally adequate provocation for voluntary manslaughter provocation (See, *People v. Brooks* (1986) 185 Cal.App.3d 687 [the murder of a family member]; *People v. Elmore* (1914) 167 Cal. 205, 211 [a sudden and violent quarrel]; *People v. Berry, supra,*

18 Cal.3d at p. 515 [infidelity of wife]; *People v. Borchers, supra,* 50 Cal.2d 321 [infidelity of paramour] and those which are not, such as simple trespass or simple assault. (See *People v. Flannel* (1979) 25 Cal.3d 668, 684-685; 1 Witkin & Epstein, Cal.Criminal Law, (3d ed. 2000) Crimes Against the Person, § 214, p. 826.) That standard is not changed by the Opinion in this case.

In this case, the trial court did not question that appellant's testimony that he reacted to the provocation of learning that the victim had an abortion, terminating the pregnancy of his child, was sufficient provocation caused by the victim to support provocation instructions. Although the prosecutor did not believe appellant's testimony, there was no argument or debate that sufficient testimony was presented to support a voluntary manslaughter under the adequate provocation standard. (13RT 1613.)

Further, as will be demonstrated, each of the cases relied on by respondent uses shorthand phrase such as "lethal passion" or "homicidal rage," but these phrases are mere dicta; none of these cases stand for the proposition that any court meant to change the century old "act rashly" standard.

What is also instructive in the *Lasko* decision is this Court's statement that "for instance, in *Drown v. New Amsterdam Casualty Co.*

(1917) 175 Cal. 21, 24 [165 P. 5], this court observed in passing that "to constitute voluntary manslaughter there must be an intent to kill . . . . Thereafter, this court repeated that fleeting observation in a number of cases. (Citations) In each of these cases, that observation was mere dictum. None of them said that a defendant who kills in a sudden quarrel or heat of passion, with conscious disregard for life but without intent to kill, is *guilty of murder*." (*Lasko, supra*, at p. 110, emphasis in original.)

Initially, respondent discussed two cases and stated that the Court of Appeal Opinion in this case rejected these two decisions: *People v. Fenebock* (1996) 46 Cal.App.4th 1688 and *People v. Superior Court (Henderson)* (1986) 170 Cal.App.3d 516. (Respondent's Brief, p. 12, citing Opn. at pp. 17-18.) Respondent misrepresents the decision by the Court of Appeal. The Court of Appeal did not "reject" the two other decisions, it stated that "[i]n our view, neither of these cases supports such a proposition." (Opn. at p. 17.) "None of these cases holds provocation is sufficient *only* if it would cause an ordinary person of average disposition to react with deadly force. To the extent their language suggests otherwise, it was not the result of the court's consideration and analysis of an argument actually raised in the case, and thus is not a precedential holding. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10 ['cases are not authority

for propositions not considered']." (Opn., at p. 18.)

Appellant agrees that these decisions do not stand for the proposition represented by respondent. The *Fenebock* case involved the question of whether there was adequate provocation as a matter of law to require an instruction where the defendant's alleged provocation was a day old report of an allegedly abused child who was not a relative of defendant and defendant did not even have any close personal bond with the child or her parents. Initially the court noted that "the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion--not necessarily fear and never, of course, the passion for revenge--to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment." (*Fenebock*, *supra*, at p. 1704.) Thus, the court cited the correct standard that is at issue in this case. The court later used the shorthand "produce a lethal response" when it determined the provocation was inadequate as a matter of law and stated "[w]e conclude there is no evidence here from which the jury could have found provocation so serious that it would produce a lethal response in a reasonable person." This shorthand dicta did not purport to create a new standard. (*Id.* at p. 1705.)

In *People v. Henderson, supra*, the court was dealing with the dismissal of murder charges and the refusal to reinstate them after a preliminary hearing where the court found that the crime could be no more than voluntary manslaughter. The court reversed that decision, and issued a peremptory writ allowing the prosecution to proceed on murder charges. It did describe the concept of heat of passion as being one "where the provocation would trigger a homicidal reaction" but again, it used the phrase as a shorthand description and did not purport to create a new standard. *Henderson* did not concern jury instructions or prosecutorial misconduct and did not discuss the propriety of the issues addressed here; it is mere dicta in relation to this case. (*Henderson, supra*, at p. 524.)

None of the other cases cited by respondent include a holding that the voluntary manslaughter instruction should include the phrase lethal passion or homicidal rage. In *Lee*, supra, 20 Cal.4th 47, the sole question presented was whether the Court of Appeal erred in concluding that even though the evidence was sufficient to support a conviction of second degree murder, defendant's conviction of voluntary manslaughter must be reversed because evidence of provocation was insufficient. The court held that it need not decide this issue because, even assuming *arguendo* that the instruction and the verdict were erroneous, any such error was favorable to

defendant. Although the court did use the phrase "deadly passion" in its discussion of the adequacy of the provocation, this was after it had cited with approval its analysis in *Breverman* and repeated the "act rashly" phraseology citing *People v. Berry, supra,* 18 Cal.3d at p. 515 and *People v. Valentine, supra,* 28 Cal.2d at pp. 138-139. In addition, the quoted phrase: "[t]he provocation which incites the defendant to homicidal conduct in the heat of passion must be caused by the victim" was based on *In re Thomas C.* (1986) 183 Cal.App.3d 786, 798. The court in *Thomas C.* found that the objective or reasonable person element of sufficient provocation had not been met by the minor's depressed mental state and that it could not be the provocation, because the provocation must be from the victim. *Thomas C.* never used the phrase "homicidal conduct." Thus, *Lee's* description of the "conduct" as "homicidal conduct" is not based on precedent and was never meant to change precedent; it merely was a shorthand phrase used by the court. It was mere dicta.

All of the other cases cited by respondent clearly involved the refusal of the trial court to instruct on voluntary manslaughter as a matter of law due to insufficient evidence of adequate provocation or too long a cooling off. (See *People v. Avila, supra,* 46 Cal.4th at pp. 705-706 [no substantial evidence of provocation when the gang name was shouted];

People v. Carasi (2008) 44 Cal.4th 1263, 1306-1307 [no substantial evidence of provocation, actively planned the murders with codefendant for at least one week]; *People v. Koontz, supra,* 27 Cal.4th at p. 1086 [any provocation arising out of defendant's prior arguments with the victim was no longer immediately present]; *People v. Pride* (1992) 3 Cal.4th 195, 250 [defendant's reliance solely on criticism he received about his work performance three days before the crimes is insufficient as a matter of law]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1235-1236 [defendant had not been in contact with his grandparents for two weeks before he killed them]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1550-1556 [no sua sponte duty to instruct where evidence of provocation was refusing to engage in sexual relations after having provided drugs].)

Thus it is clear, that respondent's citations are to cases using shorthand phrases such as "lethal passion" or "homicidal rage" when analyzing an issue different from the issue in this case and do not control this case. Instead, this shorthand phrase is merely dicta which respondent would like to become default holdings in the manner that was criticized in *Lasko, supra*, at p. 110. This Court should not elevate shorthand phrasing into a legal requirement which has never been the law in California. Instead, this Court should continue to uphold the instructional phrase

"acting rashly" which has been the standard as seen by the long-standing predecessor instruction , CALJIC No. 8.42[11] which includes the correct phraseology under the long-established doctrine and case law in California.

5. The Version of CALCRIM No. 570 Given in This Case Misdescribes the Provocation Requirement; It Is Reasonably Likely That the Jury Applied the Challenged Instruction in a Way That Violates the Constitution

a. Standard of Review

Both the United States Supreme Court and this Court apply the "reasonable likelihood" standard for reviewing ambiguous instructions under the United States Constitution, inquiring whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation of that document. If ambiguity appears, the reviewing court "inquire[s] 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. omitted; *People v. Clair* (1992) 2 Cal.4th 629, 663.)

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"The question to be answered is whether or not, at the time of the killing, the reason of the accused was obscured or disturbed *by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from passion rather than from judgment."* (CALJIC No. 8.42 Sudden Quarrel or Heat of Passion and Provocation Explained (§ 192, subdivision (a)) emphasis added.)

b. The Instruction in This Case Misdescribed the Provocation Sufficient to Reduce a Homicide to Voluntary Manslaughter

Under the continuing analysis of the law, described *supra*, there is no question that the instruction in this case was incorrect. In relevant part, the trial court instructed the jury that:

> Now, provocation may reduce a murder from first degree to second-degree and may reduce a murder to manslaughter. The weight and significance of the provocation, if any are for you to decide. If you consider – – if you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. Also consider the provocation in deciding whether the defendant committed murder or manslaughter.
>
> 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 heat of passion if, number one, the defendant killed another human being without malice aforethought but either with an intent to kill or with a conscious disregard of human life; number two, the defendant was provoked; number three, as a result of that provocation, the defendant acted rashly and under the influence of intense emotion that obscured his reasoning or judgment; and, number four, 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've defined it.

While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation can occur over a short or long period of time.

Now, 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 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 knowing the same facts.

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

(14RT 1668:17-1670:4, emphasis added.)

The italicized portion of the instruction directed the jury to decide whether appellant had the malice necessary for murder despite provocation by considering "whether a person of average disposition would be provoked" and "how such a person would react in the same situation knowing the same facts." This instruction misdefined the provocation sufficient to reduce a homicide to voluntary manslaughter because the true question is whether the provocation would cause a person of average disposition to act rashly and without judgment, not whether a person of

average disposition would kill in the circumstances presented.

Based on the history detailed *supra*, it is clear that the test for provocation is an objective one. (*Lee, supra,* 20 Cal.4th at p. 60.) The jury's task is to determine "whether a reasonable person in the circumstances would have acted out of passion rather than judgment ... It is not asked to determine that a reasonable person's responsive act would have been an intentional killing." (*People v. Coad* (1986) 181 Cal.App.3d 1094, 1107, emphasis added.) 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.

The fundamental inquiry [into whether provocation negates malice] is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would 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. Rich* (1988) 45 Cal.3d 1036, 1112; *Logan, supra,* 175 Cal. at p. 49, italics added; *Lasko*, *supra,* 23 Cal.4th at p. 108; *Breverman, supra,* 19 Cal.4th at p. 163; 2 Wharton's Criminal Law (15th ed. 1993) § 157, pp. 350-351.) This objective standard – that the

provocation be of a type that would cause an ordinary person to act rashly or without deliberation or reflection – does *not* incorporate a requirement that the provocation be such that the average person would react, like the defendant, by committing a homicide.

The version of CALCRIM No. 570 given in this case misdescribes the provocation requirement. This issue, regarding the propriety of the instruction or jury argument involving how *such a person would react in the same situation knowing the same facts* was considered in *People v. Najera, supra,* 138 Cal.App.4th 212, in the context of whether the prosecutor committed misconduct by arguing that the defendant's response to the provocation in that case was not reasonable as discussed in Argument II, *infra*. In *Najera,* the defendant argued that the prosecutor misstated the law by asserting that sudden quarrel or heat of passion manslaughter was limited to situations in which the defendant's conduct was a reasonable *response* to the provocative circumstances. (*Id.* at p. 220, italics added.)

The *Najera* court reviewed the defense allegations that the prosecutor committed misconduct because he misstated the law and found italicized portions of the prosecutor's statements were incorrect:

> Heat of passion is not measured by the standard of the accused. We don't care what the accused did. We don't care what the standard is for the accused. As a jury, you have to apply a reasonable, ordinary person standard, okay. [¶] Going

> back to that intruder hypothetical. *Any reasonable, ordinary person walking in on a child being molested, if they had a gun in their hand, would probably do the same thing.* It's that same hypothetical that was given to you in voir dire by defense. Remember the spider in the sink, the reasonable spectrum? *Would a reasonable person do what the defendant did*? Would a reasonable person be so aroused as to kill somebody? That's the standard."
>
> During rebuttal, the prosecutor stated: "[*T*]*he reasonable, prudent person standard* ... [*is*] *based on conduct, what a reasonable person would do in a similar circumstance*. Pull out a knife and stab him? I hope that's not a reasonable person standard."

(*Najera, supra,* 138 Cal.App.4th at p. 223, italics in original.)

Since *Najera* was decided, in 2005, no case has disagreed with its ruling that the focus in a voluntary manslaughter case "is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion." (*Najera, supra*, at p. 223.) Thus, there has been no conflict in the appellate courts in applying the *Najera* decision. In addition, following *Najera,* CALCRIM No. 570 was revised in December 2008 shortly after this case concluded. The revised instruction now provides, in relevant part:

> It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) 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, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment.

(CALCRIM No. 570 (Dec. 2008).)

The Court of Appeal in this case noted that the aspect of *Najera*, *supra*, on which appellant relies was dictum. The *Najera* court had concluded that this was not sufficient provocation to entitle the defendant to a voluntary manslaughter instruction; thus, the defendant's trial counsel's failure to object to the prosecutor's incorrect statement of the law on voluntary manslaughter was not ineffective assistance of counsel, because the defendant was not prejudiced by it. For the same reason, the *Najera* court declined to consider whether the voluntary manslaughter instruction given in that case was defective on the same issue. (Opn. at p. 16.) However, *Najera* also relied on *Breverman, supra,* 19 Cal.4th at p. 163 for its reasoning, which in turn relied on previous cases decided by this Court. (*Najera, supra*, at p. 223.)

The instructions in the current case misstated the law in the same manner as the prosecutor did in *Najera*. By directing the jury to consider how "a person [of average disposition] would *react* in the same situation knowing the same facts," the instruction added an extra hurdle for the defendant to overcome – not only must the provocation be such that would

cause an ordinary[12] person to act rashly, but it must also be the type that would cause such a reasonable person to react in a homicidal fashion.

This is not a proper statement of the law of voluntary manslaughter because situations in which the provocation would cause a "reasonable person of average disposition" to kill are those in which the homicide would be *justifiable or excusable* and hence not unlawful. (CALCRIM No. 505 [justifiable homicide].) The voluntary manslaughter instruction given to appellant's jury improperly required them to find the level of provocation necessary for justifiable homicide rather than that necessary for voluntary manslaughter. This was error.

The doctrine does not require that a reasonable person would kill for that would sanction murder in certain circumstances and that is not what the adequate provocation doctrine means. The issue is not one of making appellant's conduct non-criminal. Instead, it recognizes that under the most provoking instances, an ordinary person would be driven to "act rashly," thus eliminating the malice element of murder and guilty instead of voluntary manslaughter . This is based on the historic concession to "human frailty" (2 Wharton's Criminal Law (15th ed. 1993) § 155, pp.

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Professor Dressler notes that it should be the ordinary person rather than the reasonable person standard. (Dressler, Understanding Criminal Law (5th ed. 2009), § 31.07 (1) (b) (ii), p. 538.)

347-348) or "human weakness." (Dressler, Understanding Criminal Law (5th ed. 2009), § 31.07 (2) (b), p. 544.)

c. The Likelihood the Jury Applied the Instruction in an Unconstitutional Way Was Increased by the Prosecutor's Argument Misstating the Elements and the Court's Failure to Properly Guide the Jury When Answering the Jury's Question About Provocation

Under the facts of this case, there is a strong likelihood the jury applied the instruction in an unconstitutional way. In support of this conclusion one need only look to the prosecutor's argument, asserted as prosecutorial misconduct in Argument II, *infra,* which misstated the law of provocation. The prosecutor's argument clearly compounded the instructional error, making it reasonably likely that the jury erroneously believed they had to find appellant's response to the provocation reasonable in order to return a verdict of voluntary manslaughter. The court can clearly consider the arguments of counsel in determining the likelihood the jury misconstrued the ambiguous instructions. (*Middleton v. McNeil* (2004) 541 U.S. 433, 438; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 594-595.) Thus, there was a reasonable likelihood that the jury applied the challenged instruction in a way that violated the Constitution. *(Estelle v. McGuire, supra,* 502 U.S. at p. 72.) Correctly instructed, the jury could have little doubt that the provocation in this case culminating in the announcement

that the victim had killed appellant's bastard child through an abortion could incite or provoke a person of average disposition to act rashly, without judgment or reason.

Also, as discussed in Argument III, *infra,* the jury was confused about this exact issue when it asked a question during deliberations. (5CT 1502.) The court's response continued to focus on appellant's *doing an act* rashly instead of *acting* rashly. This answer did not dispel the jury's confusion about whether the provocation required a reasonable person to do an act such as murder rashly instead of the provocation causing a rash emotional response which then resulted in a homicidal act. It also did not clear up the problem found in *People v. Najera, supra*, and the Court of Appeals in the instant case for the proposition that an average person need not have been provoked to kill, but only to act rashly and without deliberation as evidenced by the change to CALCRIM No. 570 in December 2008. Thus, there is a strong likelihood the jury applied the original instruction in an unconstitutional way.

Thus, in this case this Court should find that the confluence of the instructional error, the prosecutor's misstatement of the law and the jury's question on the specific issue in the courts demonstrate that there was a strong likelihood the jury applied the original instruction in an

unconstitutional way.

C. The Erroneous Instruction Violated Appellant's Rights to Due Process and to Correct Instructions on the Elements of Murder and the Defense Theory of the Case; The Proper Standard of Review Is Federal Constitutional Error

This instructional error violated appellant's state and federal constitutional rights to due process and a fair trial. (U.S. Const., Amends. V, VI, & XIV.) The erroneous instruction violated appellant's Sixth and Fourteenth Amendment right to have a jury determine, beyond a reasonable doubt, every element of the charged crime. (*United States v. Gaudin* (1995) 515 U.S. 506, 522-523; *In re Winship* (1970) 397 U.S. 358, 364; *Carella v. California* (1989) 491 U.S. 263, 265; see *Mullaney v. Wilbur* (1975) 421 U.S. 684, 704.) Appellant's Sixth and Fourteenth Amendment rights to a jury trial and to due process are violated by an instruction, such as that given in this case, which misinstructed the jury on the circumstances under which heat of passion or provocation is present or absent. (*Carella v. California, supra,* 491 U.S. at 265; *United States v. Gaudin, supra,* 515 U.S. at 510-511, 522-523.) The instruction given here improperly limited appellant's defense to circumstances in which only a *reasonable* person would *respond* in a homicidal manner. This was error of federal constitutional dimension.

Further, instructions that omit, misdescribe or distort elements of the

offense or are ambiguous are scrutinized for harmless error under the *Chapman* [*Chapman v. California* (1967) 386 U.S. 18, 24] standard. *(Neder v. United States* (1999) 527 U.S. 1; *People* v. *Flood* (1998) 18 Cal.4th 470, 479-480; *Estelle v. McGuire, supra,* 502 U.S. at pp. 72-73 *People v. Sakharias* (2000) 22 Cal.4th 596, 621.) Under *Chapman,* a conviction must be reversed unless it appears beyond a reasonable doubt that the improper instruction did not contribute to the verdict. (*Chapman, supra,* at pp. 23-24.) The court must ask whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted or mis-described element. (*Neder v. United States, supra,* 527 U.S. at p. 19.)

Although the United States Supreme Court has held that a jury in a capital case must be given an instruction on lesser included noncapital offenses where the evidence warrants such a charge, the Court explicitly reserved the question whether the Due Process Clause of the United States Constitution requires a lesser included offense instruction in noncapital cases. (*Beck v. Alabama* (1980) 447 U.S. 625, 627, 638 n. 14.)

Further, this Court has acknowledged manslaughter instructional error in a murder prosecution may trigger federal constitutional concerns (see, *People v. Elliot* (2005) 37 Cal.4th 453, 474-475*; People v. Prince* (2007) 40

Cal.4th 1179, 1267), while saying otherwise in dictum. Because the prosecutor has the burden to prove the absence of heat of passion (the presence of malice) (*Mullaney, supra,* 421 U.S. at p. 704), misinstruction on the heat-of-passion element constitutes an error regarding an element (malice) of the charged offense (murder). Accordingly, as Justice Kennard explained in dissenting opinion in *Breverman*, the error is of federal constitutional dimension. (*Breverman, supra*, 19 Cal.4th at pp. 142, 188-190 (Dis. opn. of Kennard, J.).)

This Court has not decided whether to adopt Justice Kennard's approach, concluding both in *Breverman* and in the recent case of *People v. Moye* (2009) 47 Cal.4th 537, 558 that the question was not properly before the court:

> Justice Kennard disagrees with the prejudice test mandated by our state Constitution and found applicable to this category of instructional error by a majority of this court in *Breverman, supra*, 19 Cal.4th at pages 142, 178. (Dis. opn. of Kennard, J., post, at pp. 563–565.) As in *Breverman*, defendant has not raised the claim advanced by Justice Kennard—that the lesser included offense instructions given below were defective under federal law because they incompletely defined the malice element of murder, requiring application of the prejudice test for federal constitutional errors set forth in *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L. Ed. 2d 705, 87 S. Ct. 824]. (*Breverman*, at p. 170, fn. 19.) Accordingly, the claim must properly await a case in which it has been clearly raised and fully briefed. (*Ibid.*)

Unlike *Breverman* and *Moye*, this case properly presents the

question[13] and the Court can expressly address the federal claim and determine whether the error was harmless under federal law. This is precisely what Justice Kennard did in writing for the majority in *Lasko, supra,* 23 Cal.4th 101, where Justice Kennard acknowledged the *Breverman* language but also analyzed the error under federal law and ruled that the court's instructional error did not violate defendant's federal constitutional rights to trial by jury or to due process of law. (*Id.* at p. 113.)

> Having concluded that the failure to give instructions on heat of passion was federal constitutional error, Justice Kennard stated that "Instructions omitting or misdescribing an element of an offense are subject to harmless error analysis under the test of *Chapman v. California, supra*, 386 U.S. 18, as applied in *Sullivan v. Louisiana* (1993) 508 U.S. 275 [113 S. Ct. 2078, 124 L. Ed. 2d 182]. (*People v. Flood, supra*, 18 Cal.4th 470, 503-507; accord, *id.* at p. 548 (dis. opn. of Kennard, J.).) The essential inquiry "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana, supra*, 508 U.S. 275, 279 [113 S. Ct. 2078, 2081], original italics.)"

(*Breverman, supra*, at p. 194, (dis. opn. of Kennard, J.).)

A distinct ground for finding federal constitutional error is that appellant was denied his federal constitutional right to present a defense. In

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13 Appellant asserted below that the proper standard of review in this case is federal constitutional error. (See AOB, argument VII (C).

this case, appellant's defense was that he did not harbor malice because there was adequate provocation and he acted in the heat of passion and was guilty of voluntary manslaughter rather than murder. As a Court of Appeal case recently noted: "The right to present a defense is a component of the federal guarantee of due process of law." *(People v. Woodward* (2004) 116 Cal.App.4th 821, 824.) And as the United States Supreme Court has observed: "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment, or in the Compulsory Process or Confrontation clauses of the Sixth Amendment, the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690, citations and internal quotation marks omitted; see also *California v. Trombetta* (1984) 467 U.S. 479, 485.)

An important aspect of the right to make a defense is the right to have the jury instructed on the defense. For even if the defendant is allowed to present all admissible evidence supporting his defense, this is meaningless unless the jury is given instructions which correctly explain the nature of the defense. (*Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 740.)

The Third Circuit Court of Appeal explained that instruction on the lesser included offense is required because there is "a risk that a defendant

might otherwise be convicted of a crime more serious than that which the jury believes he committed simply because the jury wishes to avoid setting him free." *(Vujosevic v. Rafferty* (3d Cir. 1988) 844 F.2d 1023, 1027, citing the non-capital case *Keeble v. United States* (1973) 412 U.S. 205, 212-213.)

D. Assuming *Arguendo* That the Court Decides That the "Act Rashly" Standard Is Not the Correct Standard for Adequate Provocation Voluntary Manslaughter, Retroactive Application of a New Standard Would Be Unconstitutional

The homicide in this case occurred on October 22, 2000. Assuming *arguendo* that the Court decides that the "act rashly" standard is not the correct standard for adequate provocation voluntary manslaughter, retroactive application of a new standard would be unconstitutional.

As can be seen, the law in California has been settled for 100 years that a criminal defendant only is required to "act rashly" and no specific homicidal act is required under the doctrine of adequate provocation voluntary manslaughter. If this Court were to decide that this century-old doctrine is incorrect, it would be unconstitutional to apply a new doctrine to appellant. As this court noted in *People v. Blakely* (2000) 23 Cal.4th 82, where this Court altered long-standing California law, retroactive application of that significant change in the law was not permitted under the due process protection against judicial enlargement of a penal provision, which is akin to the ex post facto clause. (*Id.* at pp. 91-93.)

"A statute 'which makes more burdensome the punishment for a crime, after its commission,' violates article I, section 9, clause 3, of the United States Constitution as an ex post facto determination of criminal liability [citations], as well as its California counterpart, article I, section 9 of the state Constitution [citation]. Correspondingly, an unforseeable judicial enlargement of a criminal statute, applied retroactively, operates in the same manner as an ex post facto law. (Citations.) Courts violate constitutional due process guarantees (U.S. Const., 5th and 14th Amends.; Cal. Const., art. I, § 7) when they impose unexpected criminal penalties by construing existing laws in a manner that the accused could not have foreseen at the time of the alleged criminal conduct." (*People v. Blakely, supra,* at p. 92.)

Thus, even if this Court makes a significant change in the standard for adequate provocation and instructions related to that doctrine, appellant is still entitled to be instructed under the doctrine as it applied to him at the time of his conduct, under *Logan*, *Breverman* and *Lasko*. Therefore, the new law would not be applicable to him.

II

THE PROSECUTOR MISSTATED THE LAW, THEREBY COMMITTING MISCONDUCT, BY ARGUING THAT THE DEGREE OF PROVOCATION REQUIRED TO REDUCE THE UNLAWFUL KILLING TO MANSLAUGHTER WAS SUCH AS WOULD CAUSE A REASONABLE PERSON TO KILL, THEREBY LOWERING THE PEOPLE'S BURDEN OF PROOF AND VIOLATING APPELLANT'S DUE PROCESS RIGHT TO A FAIR TRIAL[14]

A. Factual Background

Appellant was charged with first degree murder. The defense never contended that appellant did not stab Tempongko to death. Instead, defense counsel contended that the proper verdict on the evidence presented was voluntary manslaughter based on adequate provocation when Tempongko shouted out that she had killed appellant's bastard child by having an abortion. (See, defense closing argument, 14RT 1707-1751.)

During his closing argument, the prosecutor repeatedly misstated the law regarding the standard for determining whether Tempongko's conduct was sufficiently provocative so that the malice element for murder was negated, thereby making the crime voluntary manslaughter.

The prosecutor argued:

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The question of prosecutorial misconduct is an issue fairly included in issue 2 of the Court's order of June 15, 2011: whether the prosecutor misstated the law. (Cal. Rule of Court, Rule 8.516 (a)(1).)

And the provocation has to be such that a person of average disposition to act with passion rather than judgment. We would have probably millions more homicides a year if everyone could use words that may be – – although I don't disbelieve. I don't agree that this is what happened. It's an illogical interpretation of the facts. You stub your toe. You're angry, might cuss a few words. You don't go out and kill somebody.

We've all gotten cut off in traffic. We say the few choice words, "Oh, my God." We don't gun the pedal and start trying to hit the car in front of us to try to kill the person who cut us off. Can you imagine if that was permissible, "Oh, my God, I acted with without judgment and rash. I got so angry. I was insulted." That's not the standard. It's a reasonable person, and you're all reasonable people and you know that it's illogical that even these words were uttered.

The evidence does not support it. Being jealous is not enough. You can't take – – by his own account is not jealous and he doesn't know what abuse is. He needed that defined. "He" the defendant.

He was always jealous, possessive and controlling. The reasonable reaction – murder is unreasonable. This defendant-

Defense counsel objected: judge I'm going to object to that as a misstatement of law, your honor, the last part.

The court responded: the jury will get the jury instructions. (14RT 1698:22-1699:19.)

B. Arguing That the Degree of Provocation Required to Reduce the Unlawful Killing to Manslaughter Was Such As Would Cause a Reasonable Person to Kill Was Prosecutorial Misconduct

It is well-established that while a prosecutor may strike hard blows,

the prosecutor is not at liberty to strike foul ones. (*Berger v. United States* (1934) 295 U.S. 78, 88.) Because of this overriding societal interest, "restraints are placed on [the district attorney] to assure that the power committed to his care is used to further the administration of justice in our courts and not to subvert our procedures in criminal trials designed to ascertain the truth." (*In re Ferguson* (1971) 5 Cal.3d 525, 531.) Prosecutorial misconduct implies the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Strickland* (1974) 11 Cal.3d 946, 955.) To establish prosecutorial misconduct, it is not necessary to show the prosecutor acted in bad faith, but it is necessary to show the right to a fair trial was prejudiced. (*People v. Bolton* (1979) 23 Cal.3d 208, 213-214; *People v. Nguyen* (1995) 40 Cal.App.4th 28, 35-36.) "Injury to appellant is nonetheless an injury because it was committed inadvertently rather than intentionally." *(People v. Bolton, supra,* at pp. 213-214, quoting Note, The Nature and Consequences of Forensic Misconduct in the Prosecution of a Criminal Case (1954) 54 Colum. L.Rev. 946, 975.)

As argued, *supra,* in the previous argument and incorporated herein by this reference, an unlawful killing is voluntary manslaughter "'if the killer's reason was actually obscured as the result of a strong passion aroused

by a "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 judgment'"' [Citation.]" (*Lasko*, *supra,* 23 Cal.4th at p. 108.) The test for provocation is an objective one. (*Lee, supra,* 20 Cal.4th at p. 60.) The jury's task is to determine "whether a reasonable person in the circumstances would have acted out of passion rather than judgment ... It is not asked to determine that a reasonable person's responsive act would have been an intentional killing." (*People v. Coad, supra,* 181 Cal.App.3d at p. 1107.) 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.

Accordingly, it would misstate the law, and constitute misconduct, if a prosecutor were to argue that heat of passion requires that an ordinarily reasonable person would have committed murder. *(People v. Huggins* (2006) 38 Cal.4th 175, 253, fn. 21 [misconduct to misstate the law in argument].)

In *People v. Najera, supra,* 138 Cal.App.4th 212, the trial court instructed the jury on voluntary manslaughter. In arguing the case to the jury, the prosecutor focused on the killer's response to the provocation, contending that it was disproportionate as the provocation would not cause

an average person to kill. On appeal, the court concluded that this argument was erroneous and improper, explaining that "[t]he 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." (*Id.* at p. 223.)

The instant case was tried after the decision in *Najera, supra*, but the prosecutor's closing argument contains language focusing on the reasonableness of the response, although *Najera* had found such language improper.

The Court of Appeal found that "this argument may not have risen to the level of misconduct, but it did serve 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. (See *People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 [when defendant contends jury instruction was unclear, issue is whether there is reasonable likelihood jury misconstrued or misapplied law in light of instructions, trial record, and arguments of counsel].)" (Opn. at p. 20.)

The prosecutor's argument in this case shared many similarities with

the improper argument in *Najera* because it focused on "[h]ow the killer responded to the provocation and the reasonableness of the response . . . ." (*Najera, supra*, at p. 223.) It invited jurors to consider what would or would not be a reasonable response to the provocation. More specifically, the prosecutor's argument allowed, if not encouraged, jurors to consider whether the provocation would cause an average person to do what appellant did—kill the victim or as the prosecutor stated "murder" the victim. Under the decision in *Najera supra*, this was misconduct. It clearly was a misstatement of the law under the long-standing doctrine in California that "[t]he 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." (*Id.* at p. 223, citing *Breverman, supra,* 19 Cal.4th at p. 163 which in turn relied on previous cases decided by this Court: *People v. Berry, supra,* 18 Cal.3d at p. 515, quoting *People v. Valentine, supra,* 28 Cal.2d at p. 139 and cited *People v. Borchers, supra,* 50 Cal.2d at pp. 328-329. *(Breverman, supra,* at p. 163.)

Respondent asserts that regardless of whether the proper degree of provocation is that suggested by *Najera* and the court below, this statement in *Najera* would place an overly broad restriction upon what juries may consider and what prosecutors may argue. Respondent continues that 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 result of any provocation or instead was the product of a long-standing hatred, combined with the clear, deliberate intent to kill formed upon pre-existing reflection. Respondent also argues it would not allow the jury to consider whether the reasonable person had cooled off and whether the defendant actually did cool off. (Respondent's Brief, p. 47.)

Appellant disagrees that these issues are restricted by the holding in *Najera* or the opinion below. Respondent was at liberty to argue that appellant acted out of malice and was not provoked by the inciting event of the victim shouting out that she had killed appellant's bastard child by having an abortion. Nothing in *Najera* or the opinion below would restrict respondent from argument that appellant was lying or that, even if such a statement was made, he was not actually provoked. Nothing in *Najera* or the opinion below would restrict respondent from argument that appellant acted from malice or ill will, rather than from the provocation. The version of CALCRIM No. 570 given in this case instructed the jury that the defendant must have acted under the direct and immediate influence of the provocation. (5CT 1455, 14RT 1668-1669.) Argument of this type was not objected to in this case and was not affected by *Najera* or the opinion in this

case. (13RT 1613.)

Nothing in *Najera* or the opinion below would restrict respondent from argument that a criminal defendant would not have cooled off that the defendant actually did cool off from earlier provocation, although the trial court herein noted that the cooling-off issue was not applicable in this case because, if believed, the inciting provocation by the victim shouting out that appellant killed appellant's bastard child by having an abortion, either occurred seconds before appellant stabbed her or did not occur at all.

Respondent also asserts that it is not erroneous to argue that an ordinary person would not have killed in response to the provocation faced by the defendant. (Respondents Brief, p. 48.) However, society as a whole should not decide that killing another person is ever a reasonable response. It would not be proper to argue that it was reasonable to kill someone because you discovered them committing adultery with your spouse or injuring or killing a family member. This is not the genesis of the common law regarding voluntary manslaughter based on adequate provocation. Instead, the voluntary manslaughter doctrine based on adequate provocation resulted from the common understanding that an individual who is faced with certain provoking events does not act maliciously when they act rashly as a result of these provoking events. When an individual acts rashly under

circumstances deemed adequate provocation as a matter of law, as it was in the instant case, the question for the jury is whether or the provocation actually occurred and whether the accused was acting under the immediate influence of the provocation. If so, the jury may determine that malice is lacking and, the prosecution has failed to prove beyond a reasonable doubt that the defendant acted maliciously and as a reach a verdict of voluntary manslaughter.

It is not the prosecutor's prerogative to disparage the recognized doctrine of adequate provocation voluntary manslaughter by belittling it with references to trivial provoking events such as stubbing one's toe or getting cut off in traffic. Instead, proper argument should attack whether the prerequisites for a legal doctrine were established under the facts of the case. While it would be entirely proper to argue that the provoking event did not occur or to argue that appellant was not definitely provoked by the situation, it is improper to equate the adequacy of the provocation between learning of the death of one's child, through a disclosure of an unknown abortion, with stubbing one's toe. Society does not recognize the adequacy of provocation for the trivial events argued by the prosecutor, but does recognize that an individual in appellant's situation could be adequately provoked and then the question was did such a situation occur and was he provoked. (See, e.g.

People v. Brooks, supra, 185 Cal.App.3d 687 [death of a family member]

Next, respondent argues that even if the challenged argument could be construed as an incorrect statement of law, the misunderstanding was corrected by stating that the court "essentially sustained" appellant's objection by referring the jury to the instructions for the law. (Respondent's Brief, p. 49.) Appellant disagrees. This is a distortion of the record. In this case, the court did not sustain the objection, it merely referred the jury to the instructions for the law. Such a comment does not notify the jury that the prosecutor misstated the law as appellant argued in his objection. Contrary to that, it allowed the misstatement to stand uncorrected. When the court does nothing to disabuse the jury of the defect that it could have cured with a preclusive instruction, it ratified the prosecutor's error. (*People v. Morales* (2001) 25 Cal.4th 34, 43)

C. The Error Was Prejudicial

The prosecutor's misstatements of law require reversal under federal standards. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales, supra*, 25 Cal.4th at p. 44; *Darden v. Wainwright* (1986) 477 U.S. 168, 180-181; see *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 643.) Improper remarks by a prosecutor can constitute misconduct that violates due process. (*Darden v.*

Wainwright, supra, 477 U.S. at 181.)

Under the facts of this case, there is a strong chance the jury found the provocation sufficient to provoke a person of average disposition to have acted rashly, without judgment or reason, but decided against a verdict of manslaughter on the grounds that appellant's response to the provocation was not reasonable. The prosecutor's argument clearly compounded the instructional error, making it reasonably likely that the jury erroneously believed they had to find appellant's response to the provocation reasonable in order to return a verdict of voluntary manslaughter. The court can clearly consider the arguments of counsel in determining the likelihood the jury misconstrued the ambiguous instructions. (*Middleton, supra,* 541 U.S. at p. 438; *Ho v. Carey, supra,* 332 F.3d at pp. 594-595.) Thus there was a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *(Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

Here the prosecutor's statements were not ambiguous and they were wrong. There could be no way for the jury to construe them other than that there was no basis for a verdict of voluntary manslaughter unless they found that there was provocation sufficient to cause an average person to kill. Since that states a far more stringent test than the law requires, it must be

concluded that is reasonably likely that the jury construed the remarks in an objectionable fashion.

III

THE TRIAL COURT'S RESPONSE TO THE JURY QUESTION DURING DELIBERATIONS CONTAINED AN INACCURATE PHRASE AND FAILED TO CORRECTLY INSTRUCT THE JURY THAT "ACTING RASHLY" DOES NOT REQUIRE "COMMIT[TING] THE SAME CRIME (HOMICIDE) BUT COULD BE "OTHER LESS SEVERE RASH ACTS," DEPRIVING APPELLANT OF DUE PROCESS, THE RIGHTS TO PROOF BEYOND A REASONABLE DOUBT, TO A JURY TRIAL (I.E. JURY DETERMINATION OF EVERY ELEMENT) AND TO PRESENT A DEFENSE AND TO CORRECT INSTRUCTIONS ON THE ELEMENTS OF MURDER AND THE DEFENSE THEORY OF THE CASE, UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

The jury's confusion about the instructions on adequate provocation discussed, *supra*, was demonstrated by its question during deliberation when it asked:

> 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 (homicide) or can it be other, less severe, rash acts

(5CT 1502.)

As noted in the previous argument, the court responded:

> 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.

(5CT 1503, emphasis added.)

The "reasonable likelihood" standard for reviewing ambiguous instructions applies to this instructional issue. (*Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

The erroneous instruction violated deprived appellant of due process, the rights to proof beyond a reasonable doubt, to a jury trial (i.e. jury determination of every element) and to present a defense and to correct instructions on the elements of murder and the defense theory of the case, under the Fifth, Sixth, and Fourteenth amendments. The proper standard of review is federal constitutional error; appellant incorporates herein the analysis and authorities from Argument I(C).

This response continue to focus on appellant's *doing an act* rashly instead of *acting* rashly. This answer did not dispel the jury's confusion about whether the provocation required a reasonable person to do an act, such as murder, rashly, instead of the provocation causing a rash emotional response which then resulted in a homicidal act. It also does not clear up the problem found in *Najera, supra*, based on long-standing California law, that an average person need not have been provoked to kill, but only to "act rashly" and without deliberation as evidenced by the predecessor CALJIC No. 8.42 and the change to CALCRIM No. 570 in December 2008 after

Najera, incorporating this definition.

Under the facts of this case, as shown by the jury's question, there is a strong chance the jury found the provocation sufficient to provoke a person of average disposition to have acted rashly, without judgment or reason, but decided against a verdict of manslaughter on the grounds that the act of killing based on the provocation was not reasonable, although acting rashly based on the provocation was reasonable.

This instruction and this focus on the doing of an act rather than the acting rashly, contains the problem discussed *supra*, that it is never reasonable to do the act, that is, it is not reasonable to kill someone, even though something so egregious to be adequate provocation under the law occurred. Thus, the trial court's answer was not a correct statement of the law and did not eliminate the errors in the 2006 version of CALCRIM No. 570. Thus the court's insufficient answer to the jury's question clearly affected the jury's decision, thus rendering it prejudicial under any standard of law.

IV

APPELLANT WAS PREJUDICED BY THE ERRORS IN THIS CASE AND REVERSAL IS REQUIRED

A. The Erroneous Instructions and/or Prosecutorial Misconduct Violated Appellant's Rights to Due Process and to Correct Instructions on the Elements of Murder and the Defense Theory of the Case

In the Opinion, the court found prejudice after applying "the *Watson* test," and found that it was "reasonably probable that appellant would have obtained a more favorable result in the absence of the error," citing *Breverman*, *supra*, 19 Cal.4th at pp. 164-179. (Opn. at p. 20.)

Appellant asserts that the proper standard of review is federal constitutional error, as explained in Arguments I(C) and II (C) and III, incorporated herein by this reference, but that the error is prejudicial, requiring reversal under either the *Chapman* or *Watson* standard.

B. Reversal Is Required Because Respondent Cannot Show Beyond a Reasonable Doubt That the Trial Court's Incorrect Instruction, Coupled with the Prosecutor's Argument and/or the Incorrect Response to the Jury's Question Did Not Affect the Outcome of the Case

This case requires reversal because respondent cannot show beyond a reasonable doubt that the trial court's incorrect instructions did not affect the outcome of the case.

The erroneous instruction on provocation, CALCRIM No. 570 completely misdirected the jury away from the critical question in this case:

whether the provocation – the surrounding circumstances – was sufficient to cause a person of average disposition to act rashly, *not* how appellant responded to it.

As discussed in Argument III, *infra,* the jury was confused about this exact issue when it asked a question during deliberations. (5CT 1502.) The court's response continued to focus on appellant's *doing an act* rashly instead of *acting* rashly. This answer did not dispel the jury's confusion about whether the provocation required a reasonable person to do an act such as murder rashly instead of the provocation causing a rash emotional response which then resulted in a homicidal act. It also did not clear up the problem found in *People v. Najera, supra*, and the Court of Appeals in the instant case for the proposition that an average person need not have been provoked to kill, but only to act rashly and without deliberation as evidenced by the change to CALCRIM No. 570 in December 2008.

Under the facts of this case, there is a strong chance the jury found the provocation sufficient to provoke a person of average disposition to have acted rashly, without judgment or reason, but decided against a verdict of manslaughter on the grounds that appellant's response to the provocation was not reasonable. In support of this conclusion one need only look to the prosecutor's argument, asserted as prosecutorial misconduct in Argument II,

infra, which misstated the law of provocation. The prosecutor's argument clearly compounded the instructional error, making it reasonably likely that the jury erroneously believed they had to find appellant's response to the provocation reasonable in order to return a verdict of voluntary manslaughter. (See, *Middleton, supra,* 541 U.S. at p. 438; *Ho v. Carey, supra,* 332 F.3d at pp. 594-595.) Thus there was a reasonable likelihood that the jury applied the challenged instruction in a way that violates the Constitution. *(Estelle v. McGuire, supra,* 502 U.S. at p. 72.)

Correctly instructed, the jury could have little doubt that the provocation in this case culminating in the announcement that she had killed appellant's bastard child through an abortion could incite or provoke a person of average disposition to act rashly, without judgment or reason.

Even if it is presumed that the jury followed the court's instructions as to provocation (see *People v. Sanchez* (1995) 12 Cal.4th 1, 70; *Boyde v. California* (1990) 494 U.S. 370, 384), that provides no assurance that they did not also follow the prosecutor's refined, but incorrect, statement of the test. Moreover, when the prosecutor first argued this incorrect refinement to the jury, the court overruled defense counsel's objection. What message could this have conveyed to the jury other than that the court agreed with the prosecutor's statement of the test, and did not see it as conflicting with the

instructions it gave? When the court does nothing to disabuse the jury of the defect that it could have cured with a preclusive instruction, it ratified the prosecutor's error. (*People v. Morales, supra,* 25 Cal.4th at p. 43)

In addition, in evaluating whether the jury was reasonably likely to accept the prosecutor's assertions as correct and apply them in its deliberations, it must be remembered that "A prosecutor ... exercis[es] the sovereign power, of the State ...." (*People v. Hill* (1998) 17 Cal.4th 800, 819-820; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) On that account, his or her remarks are accorded greater weight by jurors than those of other counsel because of the imprimatur of reliability from which prosecutors benefit because of their role as representatives of the state. As the court noted in *People v. Criscione* (1981) 125 Cal.App.3d 275, 292-293:

> Prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige. It is their duty to see to it that those accused of crime are afforded a fair trial ....

For all these reasons, it is reasonably likely that the jury construed or applied the misstatements of law in an objectionable fashion.

Alternatively, on the record here, absent the prosecutor's repeated misstatements of law, there is more than a reasonable probability, that is, an "abstract possibility" that the jury would have returned a manslaughter

verdict. (*People v. Watson*, 46 Cal.2d at p. 836.)

C. The Facts and Case Specific Factors Demonstrate That This Was a Close Case for the Jury regarding the Question of Adequate Provocation and Defining of the Lesser Included Offense of Voluntary Manslaughter Due to Lack of Malice

In addition, as noted, the jury acquitted appellant of first-degree murder based on premeditation. Thus it is clear that the prosecution's theory of the case was not believed by the jury.

The record below contained strong evidence of legally adequate provocation and evidence that appellant acted rashly as a result of that legally adequate provocation. Appellant testified that during his argument Tempongko called him and his family names and castigated him about his illegal status and failure to amount to anything. (13RT 1530.) She then became even more upset and was gesturing and said "fuck you. I was right. I knew you were going to walk away someday. That's why I killed your bastard. I got an abortion." (13RT 1531:18-20.) He did not know she had an abortion before this. (13RT 1531.) At Justin's earlier interview he said something triggered appellant and then he turned around and grabbed the knife. (10RT 1069.) Correctly instructed, the jury could have little doubt that the provocation in this case culminating in the announcement that she had "killed appellant's bastard child" could incite or provoke a person of average disposition to act rashly, without judgment or reason.

Turning to the case specific factors which may serve to show prejudice, the most obvious indication of a close case is lengthy jury deliberations.[15] (*People v. Cardenas* (1982) 31 Cal.3d 897, 907 [six hours of deliberations is evidence of a close case]; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612 [nine hours of deliberations "deemed protracted."].) While the Supreme Court has indicated that lengthy deliberations are not significant in a complex case (*People v. Cooper* (1991) 53 Cal.3d 771, 837), such deliberations in a short case can only mean that the jurors found some deficiency in the government's case. When the jury is troubled by the case, the appellate court is required to take heed. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [harmless error analysis requires the court to look at the impact of an error on the jury]; see also *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852; overruled on an unrelated point in *People v. Martinez* (1995) 11 Cal.4th 434, 452 [reversal ordered where the length of the jury deliberations exceeded the length of the evidentiary phase of the

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The arguments and evidentiary portion of the jury trial began on September 8, 2008 and ended on September 18, 2008. (4CT 1168-1169, 1172-1177, 1201-1217, 5CT 1490-1491.) Deliberations began on September 18, 2008 at 1:09 PM (5CT 1490-1491), continued all day September 19, 2008 from 9:10 AM through 4:31 PM (5CT 1494), all day September 22, 2008, from 8:23 AM until 4:18 PM (5CT 1506-1507) and the jury returned the verdict on September 30, 2008 at 9:47AM, the next date in court.

trial].)

The jury's requests for additional instructions or the readback of testimony may establish that the case was a close one. (*People v. Markus* (1978) 82 Cal.App.3d 477, 480 [request for testimony read-back indicative jury struggling and areas jury seriously considering] *People v. Filson* (1994) 22 Cal.App.4th 1841, 1852 [request for additional instructions]; *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1295 ["[j]uror questions and requests to have testimony reread are indications the deliberations were close. [Citations.]."; *People v. Williams* (1971) 22 Cal.App.3d 34, 38-40 [request for readback of critical testimony].)

Here, the jury asked for evidence to review (5CT 1493), read back of a witness's testimony regarding appellant leaving the scene (5CT 1504), and specifically questioned the court about CALCRIM No. 570 and the necessary findings for provocation for voluntary manslaughter. (5CT 1500, 1502.) Moreover, if the jury hears an erroneous instruction or erroneously admitted testimony for a second time, it is manifest that the degree of prejudice to the defendant was only heightened. (*People v. Williams* (1976) 16 Cal.3d 663, 669 [reversal ordered where the jury requested a rereading of an erroneously admitted statement and then quickly returned a guilty verdict]; see also *LeMons v. Regents of University of California* (1978) 21

Cal.3d 869, 876 [rereading of an erroneous instruction warrants reversal]; *People v. Thompkins* (1987) 195 Cal.App.3d 244, 249-252 [erroneous response to a deliberating jury's question requires reversal].)

In this case, the jury was focused specifically on the question of whether appellant needed to "act rashly" as a result of the provocation or whether a reasonable person under these circumstances would need to have the intent to kill or react the same way that appellant did. The jury's specific question demonstrated the prejudice from the error of the erroneous instruction; the incorrect or imprecise answer that the court gave did not resolve the jury's question or remove the prejudice.

Added to this, was the prosecution's argument here reinforcing the concept that a reasonable person would not commit murder in this case, like the prosecutor asserted appellant did. Further, the prosecutor argued that the doctrine of adequate provocation under its reasonable person concept would permit an individual to claim provocation for such mundane issues as stubbing one's toe or getting cut off in traffic.

Therefore, this was a close case and reversal is required because it cannot be said that the murder verdict was "surely unattributable to the error." (*Sullivan v. Louisiana*, *supra*, 508 U.S. at p. 279.)

D. Reversal Is Also Required under the *Watson* Standard

Appellant also agrees with the Court of Appeal that the errors in this

case were prejudicial under the *Watson* standard. The record below contained strong evidence of legally adequate provocation and evidence that appellant acted rashly as a result of that legally adequate provocation. The jury clearly disagreed with the prosecution's theory of the case because it acquitted appellant of first-degree murder. The jury clearly focused on the exact issue raised here when they asked the court to explain how to construe CALCRIM No. 570. Thus the errors in the instruction, the misstatements of law by the prosecutor, and the court's insufficient answer to the jury's question clearly affected the jury's decision, thus rendering it prejudicial under any standard of law.

The errors herein, were prejudicial and require reversal.

V

IF THIS COURT FINDS THE ERRORS HARMLESS BY THEMSELVES, A CUMULATIVE ASSESSMENT OF THEM COMPELS REVERSAL

The courts of this state recognize their obligation to assess the cumulative effect of errors on a criminal conviction. (See, e.g., *People* v. *Ryner* (1985) 164 Cal.App.3d 1075, 1087; *People* v. *Williams*, *supra,* 22 Cal.App.3d 34, 40, 58.) A series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (Citations omitted.) (*People v. Hill*, *supra*, 17 Cal.4th at p. 844; see *In re Jones* (1996) 13 Cal.4th 552, 583; *In re Sixto* (1989) 48 Cal.3d 1247, 1264-1266; *In re Cordero* (1988) 46 Cal.3d 161, 190.)

State law errors "that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Cooper v. Sowders* (6th Cir, 1988) 837 F.2d 284, 286-288; see *Lincoln v. Sunn* (9th Cir. 1987) 807 F.2d 805, 814, fn. 6; *Menzies v. Procunier* (5th Cir. 1984) 743 F.2d 281, 288-289; *Greer v. Miller* (1987) 483 U.S. 756, 764; *Rose v. Lundy* (1982) 455 U.S. 509, 531, fn. 8, concurring opinion; *Taylor v. Kentucky* (1978) 436 U.S. 478, 488; *Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-643.

Assuming arguendo that the errors individually do not compel reversal of the convictions, their cumulative prejudice must be assessed in any determination of prejudice within the meaning of article VI, section 13 of the State Constitution. (See *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Cardenas, supra*, 31 Cal.3d 897, 907.)

The prejudice from the *Chapman* errors must be combined with other errors and all these errors must be assessed cumulatively under the *Chapman* standard. *(People v. Rodriguez* (1981) 119 Cal.App.3d 457, 469-470; *People v. Williams, supra,* 22 Cal.App.3d 34, 58-59.) As these multiple errors include *Chapman* errors, their cumulative impact compel reversal unless they are found to be harmless beyond a reasonable doubt.

It is asserted that the cumulative effect of the errors cited herein require reversal.

CONCLUSION

As asserted above the judgment must be reversed.

Dated: December 19, 2011

Respectfully Submitted,

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Linda M. Leavitt
Attorney for Appellant
Tare Nicholas Beltran

CERTIFICATE OF LENGTH

I, Linda M. Leavitt, counsel for appellant, certify pursuant to the California Rules of Court, that the word count for this document is 18105 words, excluding the tables, this certificate, and any attachment permitted under rule 8.520(c)(1). This document was prepared in WordPerfect X5, and this is the word count generated by the program for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed, at San Francisco, California on December 19, 2011.

_____

Linda M. Leavitt
Attorney for Appellant
Tare Nicholas Beltran

PROOF OF SERVICE

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

On December 21, 2011, I served a copy of

ANSWERING BRIEF ON MERITS

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

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_____

LINDA M. LEAVITT