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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **TARE NICHOLAS BELTRAN,** **Defendant and Appellant.**	Case No. S192644

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

REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

COURT RULES

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page

ARGUMENT

I. REDUCING MURDER TO VOLUNTARY MANSLAUGHTER REQUIRES PROVOCATION LIKELY TO INDUCE AN ORDINARY PERSON TO REACT WITH LETHAL PASSION

The respondent's opening brief laid out the common law roots that form the foundation of California's heat of passion voluntary manslaughter doctrine. We detailed the historical context in which the term "act rashly" was first employed, to explain its understood legal meaning at the time. We showed that, from the common law onward, courts including this one have recognized that the requisite rash action—action an ordinary person of average sensibilities is likely to commit in response to adequate provocation—is a lethally violent or homicidal act. We further explained the requirement that sufficient provocation could cause an ordinary person to commit a lethal act rashly reflects fundamental policy justifications for the mitigation of murder to voluntary manslaughter.

Appellant responds by pointing to the fact that the phrase "act rashly" has been used repeatedly since this Court's decision in *People v. Logan* (1917) 175 Cal. 45, 50. Appellant eschews our historical and multijurisdictional analysis of that phrase and stands by the literal meaning of the words divorced from historical context. Appellant's position begs the question of the proper understanding of the doctrine of heat of passion voluntary manslaughter without justifying its conclusion.

A. Historical Understanding of Adequate Provocation and the "Act Rashly" Standard

As detailed in respondent's opening brief, heat of passion manslaughter evolved from a categorical approach, in which the court determined sufficient provocation as a matter of law, to a factual approach under an objective standard. The latter was predicated on the jury's evaluation of how an ordinary person of average sensibilities would

respond to the provocation. (See OBM 15-23.) Courts generally employed one of three formulations to articulate this objective standard, referring to provocation (1) causing an ordinary person to "act rashly," (2) exciting an "irresistible passion," or (3) as might induce an ordinary man to "commit the deed." (OBM 17-21.) These remained alternative ways of stating the same test, namely, whether the provocation could cause an ordinary person of average sensibilities to react the way the defendant did by killing the provoker. (OBM 17-21, 27-37.)

One of the earliest of the modern articulations of the objective standard was set out by the Michigan Supreme Court in *Maher v. People* (1862) 10 Mich. 212. *Maher* first employed the "act rashly" language that was subsequently echoed by this Court in *Logan*. (*Id.* at p. 220.) Appellant views that language as resolving the question of the proper standard. (ABM 29.) Appellant's argument ignores the historical and contextual meaning of the language at the time it was employed and the later cases analyzing and interpreting that language. His literal understanding of that phrase also conflicts with the principles that underlie the heat of passion concept.

Basic to the *Maher* decision was a foundational understanding that an ordinary person is susceptible in response to adequate provocation not merely to "acting out," but rather to lethal reaction. *Maher* did not attempt to fundamentally alter the legal landscape with respect to what constituted adequate provocation. Rather, it shifted the locus of evaluation from the judge to the jury. Moreover, *Maher* did not create the objective standard from whole cloth, it refined the standard that had already been woven into the common law of provocation and heat of passion manslaughter.

Well before the *Maher* decision in 1862, the common law had incorporated an objective component into the categorical standard. This objective component took the form of a proportionality requirement for

evaluating the defendant's response. Under this requirement, even when the provocation fell within one of the recognized categories of valid provocation, such as an assault on the defendant, the defendant's response still had to be objectively proportionate to that provocation to qualify the resulting homicide for voluntary manslaughter. The proportionality requirement was described by Edward Hyde East in 1806:

> It must not however be understood that any trivial provocation, which in point of law amounts to an assault, or even a blow, will of course reduce the crime of the party killing to manslaughter. This I know has been supposed by some, but there is no authority for it in the law. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or the continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty: it is one of the true symptoms of what the law denominates malice; and therefore the crime will amount to murder, notwithstanding such provocation.

(1 East, A Treatise of the Pleas of the Crown (1806) Homicide From Transport of Passion, or Heat of Blood, p. 234; see also 1 Foster, A Report of Some Proceedings on the Commission for the Trial of the Rebels in the Year 1746 in the County of Surrey and of Other Crown Cases To Which are Added Discourses upon a Few Branches of the Crown Law (3d ed. 1792) of Homicide, Discourse II, pp. 291-293 [same]; cf. *State v. Norris* (1796) 2 N.C. 429.)[1]

Although the principle was not stated in terms of an objective standard predicated on the reactions of an ordinary person, this proportionality requirement employed a de facto objective standard that

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[1] 1 East, A Treatise of the Pleas of the Crown (1806), and the other historical legal treatises cited in this brief were obtained by respondent through the digital legal library database "Heinonline," located at <http://heinonline.org> (as of February 22, 2012).

measured the actual response of the defendant against the likely response to such provocation.

The fourth edition of Wharton's treatise on criminal law, which is cited in *Maher*, similarly recounted the objective component of provocation.

> The line which distinguishes between those provocations which will and will not extenuate the offence, cannot be certainly defined. Such provocations as are in themselves calculated to provoke a high degree of resentment, and ordinarily induce a great degree of violence when compared with those which are slight and trivial, and from which a great degree of violence does not usually follow, may serve to mark the distinction.

(Wharton, Treatise on the Criminal Law (4th ed. 1857) Homicide, § 983, p. 509.)[2]

It was against this backdrop that *Maher* articulated the objective component of manslaughter by reference to the effect on the ordinary person. *Maher*'s use of the phrase "act rashly" in articulating the objective component, when properly viewed in context, refers not to just any possible rash act but rather to the defendant's own lethal actions in committing the homicide. Indeed, *Maher* preceded its use of the phrase "act rashly" with a discussion of provocation with respect to the homicidal act.

Maher first contrasted malice murder with heat of passion manslaughter by observing that for murder the homicidal *act* must arise from a depraved and malignant heart, and not from provocation that would cause even an ordinary person to lose control.

> It is sufficient to say that, within the principle of all the recognized definitions, the homicide must, in all ordinary cases, have been committed with some degree of coolness and deliberation, or, at least, under circumstances in which ordinary

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[2] See footnote 1.

> men, or the average of men recognized as peaceable citizens, would not be liable to have their reason clouded or obscured by passion; *and the act* must be prompted by, or the circumstances indicate that it sprung from, a wicked, depraved or malignant mind—a mind which, even in its habitual condition, and when excited by no provocation which would be liable to give undue control to passion in ordinary men, is cruel, wanton or malignant, reckless of human life, or regardless of social duty.

(*Maher*, *supra*, 10 Mich. at p. 219, italics added.)

Maher observed that if the "act of killing" was committed under the influence of passion resulting from reasonable provocation sufficient to overcome the ordinary control of reason, "then the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." (*Maher*, *supra*, 10 Mich. at p. 219.)

Appellant points to a later passage in *Maher*, adopted in *Logan*, in which the court used the term "act rashly" as resolving the issue of the proper standard:

> 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*, *supra*, at p. 220, italics in original; ABM 29.)

However, the terms specifically emphasized by the court in its opinion undermine appellant's interpretation that the standard refers to a mere rash act. The court italicized the terms in this passage to show that the response it described for the objective component would not always occur as a

matter of course; rather, the provocation *might* render an ordinary person *liable* to respond in such a manner.

Given these qualifiers, the response contemplated by *Maher* was necessarily something more than mere rashness. No case prior to *Maher* suggested that provocation was sufficient if it *might* induce an ordinary person merely to exhibit any rash response. *Maher* did not contemplate the standard allowing for a reduction to manslaughter if the provocation allowed for the mere chance that an ordinary person might act imprudently or hastily. The fact that *Maher*'s standard focused on the *possibility* of a sufficient response reflects that it considered the response to be more serious than mere rashness—sufficient provocation that *might* render an ordinary person *liable* to commit the act of slaying the provoker. Thus, *Maher* concluded, "[i]n determining whether the provocation is sufficient or reasonable, *ordinary human nature*, or the average of men recognized as men of fair average mind and disposition, should be taken as the standard . . . ." (10 Mich. at p. 221, italics in original.)

Other courts embracing *Maher*'s formulation recognized that the rash act referenced in *Maher* was the defendant's lethal act. The Tennessee Supreme Court expressly adopted *Maher*'s formulation in *Seals v. State* (1874) 62 Tenn. 459, 464-465. And in applying that standard, *Seals* explained that the question for the jury was whether the provocation "was calculated to produce such excitement and passion, as would obscure the reason of an ordinary man, and induce him, under the excitement and passion so produced, *to strike the blow* . . . ." (*Id.* at p. 466, italics added; accord, *State v. Watkins* (Iowa 1910) 126 N.W. 691, 692 [noting equivalence between a standard requiring provocation "that might render ordinary men, of fair, average disposition, liable to act rashly and without reflection, and from passion rather than judgment" and one requiring "that

the provocation shall be such as might naturally induce such a man, in the anger of the moment, to commit the deed"].)

Indeed, the Michigan Supreme Court itself subsequently made this point clear:

> Murder and manslaughter have been distinguished frequently in our reports. Murder in the first degree requires proof of premeditation, deliberation and malice. Manslaughter, on the other hand, is a homicide which is not the result of premeditation, deliberation and malice but, rather, which is the result of such provocation *that an ordinary man would kill* in the heat of passion before a reasonable time had elapsed for the passions to subside and reason to resume its control.

(*People v. Younger* (Mich. 1968) 158 N.W.2d 493, 495, italics added.)

In sum, the phrase "act rashly" used in *Maher*'s articulation of the objective ordinary person component of provocation for voluntary manslaughter must be viewed and interpreted in the context of the common law, which looked to not just any rash action by an ordinary person, but rather an understandably lethal action by an ordinary person. As the United States Supreme Court observed, in describing the common law of voluntary manslaughter:

> "An unlawful killing in the sudden heat of passion—whether produced by rage, resentment, anger, terror or fear—is reduced from murder to manslaughter only if there was adequate provocation, such as might naturally induce a reasonable man in the passion of the moment to lose self-control *and commit the act* on impulse and without reflection." [Citations.]

(*United States v. Frady* (1982) 456 U.S. 152, 170, fn. 18, italics added; see also *id.* at p. 174.)

Likewise, when this Court adopted the *Maher* formulation in *Logan*, it did not intend to deviate from the longstanding common law approach to this aspect of voluntary manslaughter. (See OBM 23-27.) As the Court of Appeal explained:

> An historical exposition of the meaning and application of the terms "upon a sudden quarrel or heat of passion" as used to describe voluntary manslaughter (§ 192) is contained in *People v. Valentine* (1946) 28 Cal.2d 121, 138-144 [169 P.2d 1]. The requirement that a provocation must be sufficient to excite the passions of a reasonable person to kill, was taken from the common law and first enacted in this state in the Crimes and Punishment Act of 1850 (§ 23). Later, it was enacted in section 192 in 1872 in the manner in which it still appears. A code section is presumed to be a continuation of common law only when it and the common law are substantially the same. (*People v. Valentine*, *supra*, 28 Cal.2d 121, 142.) Although the discussion in *Valentine* emphasizes the common law as enacted in the Crimes and Punishment Act of 1850 is substantially different in certain respects from that contained in section 192, it is substantially the same on the point in question. The Legislature is deemed to have understood the terms as used by the common law and as construed continuously by our Supreme Court throughout the years, to allow a defendant to reduce a killing from murder to manslaughter only in those situations where the provocation would trigger a homicidal reaction in a reasonable person.

(*People v. Ogen* (1985) 168 Cal.App.3d 611, 621-622.)

Appellant's interpretation of the phrase "act rashly" as permitting something less than a potentially lethal response ignores this legal foundation that informs the very doctrine the phrase is meant to define.

The foundational principles of voluntary manslaughter based on heat of passion also compel the conclusion that the phrase "act rashly" refers to lethal action. As *Logan* noted, under the doctrine of heat of passion manslaughter, "no defendant may set up his own standard of conduct" to mitigate his actions. (*Logan*, *supra*, 175 Cal. at p. 49.) *Logan* explained "the conduct of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances." (*Ibid.*)

Appellant's interpretation of the standard as merely requiring rash action short of a lethal response wholly undermines this principle. It allows a defendant to downgrade homicidal conduct from murder to voluntary

manslaughter even when an ordinary person would never respond to the same provocation with lethal violence. This view not only allows a defendant to set up "his own standard of conduct," it rewards his own standard of conduct by reducing culpability for a killing even if the ordinary person would only react with a thoughtless expression or gesture. It renders meaningless the requirement that "the *conduct* of the defendant is to be measured by that of the ordinarily reasonable man placed in identical circumstances." (*Logan*, *supra*, 175 Cal. at p. 49, italics added.) Appellant's view should be rejected. (See *People v. Ogen*, *supra*, 168 Cal.App.3d at p. 622 [observing that "there are substantial policy reasons to restrict the application of the heat of passion defense to cases where the circumstances are sufficiently provocative to trigger violent reactions in a reasonable person," and noting that "society has a strong interest in deterring violent and homicidal conduct by not allowing individuals to justify their acts by their own standard of conduct"].)

The requirement that the defendant's conduct be measured against that of an ordinary person flows directly from the principle that an intentional killing, or one done with conscious disregard for life, is reduced from murder to manslaughter in recognition of the inherent flaws in human nature to which even the ordinary man of average disposition may succumb. (OBM 32-37.) As *Maher* explained, when one kills in the throes of overwhelming heat of passion based on adequate provocation, "the law, out of indulgence to the frailty of human nature, or rather, in recognition of the laws upon which human nature is constituted, very properly regards the offense as of a less heinous character than murder, and gives it the designation of manslaughter." (*Maher*, *supra*, 10 Mich. at p. 219; see also *People v. Freel* (1874) 48 Cal. 436, 437.) Appellant's interpretation of the voluntary manslaughter standard as requiring mere rashness on the part of an ordinary person untethers the doctrine from its moorings founded in

human weakness and allows it to float aimlessly along the vicissitudes of each defendant's individual unreasonable reactions. Contrary to the approach advocated by appellant and the Court of Appeal below, the standard should be interpreted in light of the longstanding law as well as the policy underlying the doctrine.

B. This Court Has Recognized the "Act Rashly" Standard Looks to Whether an Ordinary Person Could Respond with Lethal Violence

This Court has repeatedly described the "act rashly" requirement in terms of homicidal rage and deadly passion. (OBM 14.) Appellant contends these cases are inapplicable because they address situations where the provocation was insufficient as a matter of law. Appellant therefore dismisses the relevant portions of these cases as dicta. (ABM 35-38.) We disagree. The cases reflect that when this Court *applied* the "act rashly" standard to review whether substantial evidence showed the provocation was objectively sufficient to warrant instruction, the Court assessed whether an ordinary person would react homicidally.

For example, in *People v. Koontz* (2002) 27 Cal.4th 1041, 1086, this Court confronted a claim that the trial court erred in not instructing on manslaughter based on provocation and heat of passion. *Koontz* applied the general standard for voluntary manslaughter using the "act rashly" language from *Logan* to reject the claim, explaining, "Any provocation arising out of defendant's prior arguments with the victim was no longer immediately present by the time of the shooting, such that a reasonable person in defendant's position would have reacted with homicidal rage. Hence, we cannot say the trial court erred in failing to instruct the jury on voluntary manslaughter based on heat of passion." (*Ibid.*)

Similarly, *People v. Waidla* (2000) 22 Cal.4th 690, 740, footnote 17, rejected the claim that a confession provided substantial evidence to support a voluntary manslaughter instruction.

> He invites our attention to the fact that voluntary manslaughter is committed "upon a sudden quarrel or heat of passion" (Pen. Code, § 192, subd. (a)). We invite his to the fact that "sudden quarrel or heat of passion" requires provocation that is adequate to arouse a reasonable person [citation]. There was no evidence whatsoever that Viivi so provoked Waidla as adequately to arouse a reasonable person to make the kind of sudden and devastating attack that he participated in making.

(*Ibid.*)

In *People v. Avila* (2009) 46 Cal.4th 680, 704-706, the Court rejected the defendant's claim of entitlement to a voluntary manslaughter instruction in part because "there is no substantial evidence of provocation." The Court described the circumstances leading up to the fatal stabbings and explained, "None of these events was sufficient 'to arouse feelings of homicidal rage or passion in an ordinarily reasonable person.'" (*Id.* at p. 706; see also *ibid.* ["Reasonable people do not become homicidally enraged when hearing the term 'Carmelos,' even if it is understood as a fleeting gang reference or challenge"].)

People v. Pride (1992) 3 Cal.4th 195, 250, likewise rejected a claim of instructional error for failing to instruct on voluntary manslaughter, explaining, "To the extent defendant relies solely on criticism he received about his work performance *three days* before the crimes, such evidence is insufficient as a matter of law to arouse feelings of homicidal rage or passion in an ordinarily reasonable person." (See also *People v. Carasi* (2008) 44 Cal.4th 1263, 1307 [finding no substantial evidence of adequate provocation because "none of these events were sufficient 'to arouse feelings of homicidal rage or passion in an ordinarily reasonable person'"].)

In *People v. Lee* (1999) 20 Cal.4th 47, the plurality opinion, the concurring opinion of Justice Brown, and the dissenting opinion of Justice Mosk, joined by Justice Werdegar, all described the absence of adequate provocation in terms of the lethal response of an ordinary person. (*Id.* at p. 59 (plur. opn.) ["There was no direct evidence that Mee Nor did or said anything sufficiently provocative that her conduct would cause an average person to react with deadly passion"]; *id.* at p. 68 (conc. opn. of Brown, J.) ["Here, as the Court of Appeal observed, '[w]hile defendant was clearly provoked, there is no evidence in this record upon which the trier of fact could rationally assess whether the provocation was sufficient to cause the average person to have acted similarly'"]; *id.* at p. 74 (dis. opn. of Mosk, J.) ["There was simply no direct or even circumstantial evidence that showed or even suggested that defendant had been confronted with any word or deed, on the part of his wife or anyone else, that would have been adequate to arouse a reasonable person to do what he did"]; see also *People v. Moye* (2009) 47 Cal.4th 537, 551 ["We further agree with the People that the victim's asserted act of kicking defendant's car on Sunday morning just before defendant and his codefendants gave chase likewise did not itself constitute legally sufficient provocation to cause an ordinarily reasonable person to act out of a heat of passion and kill Mark in response].)

Thus, rather than amounting to loose language as intimated by appellant, the homicidal rage standard was in fact used to evaluate the presence or absence of the objective component of heat of passion manslaughter.

Appellant's suggestion that this Court used the phrase "homicidal rage" or "lethal passion" as an incorrect shorthand when it actually meant much less (i.e. mere rash action not amounting to homicidal rage) is logically unsupportable. Under appellant's thesis, a defendant is entitled to an instruction on voluntary manslaughter whenever an ordinary person

would merely "act rashly" (under a dictionary definition of those words), even if an ordinary person would never be moved to kill, i.e., would never experience "homicidal rage" or "lethal passion." Under that standard, this Court's explanation that the provocation would not arouse feelings of homicidal rage in an ordinary person would not resolve the central legal question in these cases, namely whether the trial court erred in failing to instruct on voluntary manslaughter. Appellant's view that this Court merely used loose language in those cases is, in reality, an assertion that this Court repeatedly uses the wrong legal standard in finding insufficient evidence to warrant instruction on voluntary manslaughter. We disagree with him.

But we concur in appellant's assessment that this Court's use of an objective standard based on "deadly passion" and "homicidal" conduct was "never meant to change precedent." (ABM 37.) The Court's practice shows the phrase "act rashly" in *Logan* always has required an assessment of whether the provocation was likely to induce lethal action by an ordinary person. Precisely because the proper legal understanding of the phrase "act rashly" is undermined by *Najera* and the decision below, the CALCRIM instruction should be modified to restore the objective test to one predicated on the potential for a lethal response by an ordinary person of average disposition. (Cf. *Victor v. Nebraska* (1994) 511 U.S. 1, 13 ["[W]ords and phrases can change meaning over time: A passage generally understood in 1850 may be incomprehensible or confusing to a modern juror"]; *People v. Freeman* (1994) 8 Cal.4th 450, 501-504 [modification of CALJIC No. 2.90 to ensure antiquated language does not diverge from intended meaning]; *People v. Phillips* (1966) 64 Cal.2d 574, 586-589 [eliminating "abandoned and malignant heart" from instructions because modern juries may fail to perceive the term's original meaning], overruled on another ground in *People v. Flood* (1998) 18 Cal.4th 470, 490, fn. 12.)

Appellant's reliance on *People v. Lasko* (2000) 23 Cal.4th 101 is also unavailing. The central issue in *Lasko* was the subjective mental state necessary for voluntary manslaughter, not the objective standard for provocation. (*Id.* at pp. 108-111.) Accordingly, *Lasko* did not purport to address, let alone resolve, the issue in this case.

More importantly, contrary to appellant's suggestion, *Lasko* did not "redefine" voluntary manslaughter in explaining the mens rea requirement. (ABM 29.) Rather, *Lasko* looked back to first principles to properly interpret the law of manslaughter. *Lasko* rejected any interpretation that was inconsistent with the principles and policy that underlie the doctrine. (*Id.* at pp. 108-109.) *Lasko* rebuffed the argument that voluntary manslaughter based on heat of passion required an intent to kill, explaining that finding someone who acted in conscious disregard for human life in the heat of passion more culpable than someone who intended to kill under the same circumstances was absurd and inconsistent with the very policy reasons for heat of passion manslaughter. (*Ibid.*) In reaching this conclusion, *Lasko* pointed out that the doctrine was predicated on acknowledging the inherent weakness of human nature, i.e. the *objective* weakness inherent in ordinary individuals. (*Id.* at p. 109.) For this same reason, it is absurd and inconsistent with this doctrine to mitigate murder to manslaughter when a defendant kills under a perceived provocation not likely to induce an ordinary person to succumb to that inherent human weakness and commit a similar lethal act.

Lasko also looked to the common law of manslaughter as interpreted and applied in other jurisdictions to ensure consistency with the doctrine. (23 Cal.4th at pp. 110-111.) Other jurisdictions following the common law approach to voluntary manslaughter, with similar manslaughter statutes, have interpreted the objective component as requiring a potential lethal response by the ordinary person facing the same provocation. (See, e.g.,

United States v. Frady, *supra*, 456 U.S. at p. 170, fn. 18; *United States v. Wagner* (9th Cir. 1987) 834 F.2d 1474, 1487 ["While the crime of manslaughter is in some sense 'irrational' by definition, in that it arises out of a person's passions, the provocation must be such as would arouse a reasonable and ordinary person to kill someone"]; see also OBM 28-30; see generally Dressler, Understanding Criminal Law (1987) § 31.08, pp. 474-475.) Accordingly, appellant's assertion that *Lasko* redefined voluntary manslaughter and dictated a standard of mere rashness for the objective component is unavailing.

Finally, appellant asserts that any modification of the CALCRIM instruction to reflect the correct understanding of the term "act rashly" cannot be applied in this case because so doing would constitute a retroactive imposition of a new legal standard. (ABM 54-55.) Appellant's claim is unavailing because the lethal action requirement does not state a new legal standard.

Due process governs whether a judicial decision is to be only applied prospectively.

> If a judicial construction of a criminal statute is "unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue," it must not be given retroactive effect. [Citation.]' [Citations.]" (*In re Baert* (1988) 205 Cal.App.3d 514, 518; see *Bouie v. City of Columbia* (1964) 378 U.S. 347, 353-354; cf. *People v. Guerra* (1984) 37 Cal.3d 385, 400-402 [retroactivity analysis not implicating ex post facto and due process focuses on reliance and policy considerations].)
>
> Accordingly, retroactive application turns on whether the change effects "an unforeseeable judicial enlargement of a criminal statute" (*Bouie v. City of Columbia*, *supra*, 378 U.S. at p. 353) and whether defendant had "fair warning that . . . contemplated conduct constitutes a crime." (*Id.* at p. 355.)

(*People v. Martinez* (1999) 20 Cal.4th 225, 238-239.)

Stating that the objective component for voluntary manslaughter that an ordinary person "act rashly" requires a likelihood of lethal action is neither unexpected nor indefensible by reference to preexisting law. Rather, it is a reiteration of the standard as understood at its adoption and as repeatedly employed by this Court. Reaffirming that standard is not an unforeseeable judicial narrowing of the provocation standard for voluntary manslaughter.

II. THERE WAS NO INSTRUCTIONAL ERROR EVEN UNDER APPELLANT'S VIEW OF HEAT OF PASSION MANSLAUGHTER

A. The CALCRIM Instruction Did Not Misstate the Law as Advanced by Appellant and the Court of Appeal

Notwithstanding our position that the current instruction undervalues the objective component of voluntary manslaughter based on heat of passion, the 2006 version of CALCRIM No. 570 given in this case fully informed the jury on appellant's and the Court of Appeal's view regarding the objective standard for provocation.[3] There is no reasonable likelihood that the jury misunderstood the instructions viewed as a whole. (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 & fn. 4; *People v. Kelly* (1992) 1 Cal.4th 495, 526-527.)

The 2006 version of CALCRIM No. 570 informed the jury the objective component of manslaughter required that "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." (5 CT 1455.) The instruction also provided: "In deciding whether the provocation was sufficient, consider whether a person of average disposition would

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[3] The trial court modified the instruction slightly on a different point at appellant's request. (13 RT 1608-1612; 14 RT 1768; 5 CT 1455.) That modification is not at issue here.

have been provoked and how such a person would react in the same situation and knowing the same facts." (5 CT 1455.) The instructions viewed as a whole set out the objective standard advanced by appellant and the Court of Appeal.

Appellant contends that the latter portion of the instruction "misdefined the provocation sufficient to reduce a homicide 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." (ABM 41-42.) Appellant views the challenged clause as somehow directing the jury to decide whether an ordinary person would have killed. Appellant's argument lacks any textual support.

The entire instruction sets out a single standard for the objective prong, the precise standard which appellant advocates—that a person of average disposition would act rashly. The challenged sentence does not redefine or contradict the earlier-stated "act rashly" standard. It properly invites the jury to consider how an ordinary person would have reacted under the provocation, i.e., would he or she have acted rashly. Respondent submits that the only rational method for answering the central question—whether "the provocation would have caused a person of average disposition to act rashly"—is for the jury to consider how the person of average disposition would have reacted under the circumstances of the provocation. That is precisely what the instruction did, nothing more.

Appellant appears to suggest that the challenged clause should have also contained a reference to the "act rashly" language to constrain the jury's inquiry. Such language would have been redundant of the earlier part of the instruction and unnecessary.

Directing the jury to consider how an average person would respond under the circumstances did not contradict the previously stated definition

that requires an assessment of whether an average person would have acted rashly. The instruction did not invite the jury to evaluate whether the average person would likely kill. There is simply nothing in the challenged clause that would have led the jury to disregard the express command identifying the legal standard for the objective prong as requiring "rash" action and substitute in its place homicidal action.

Appellant argues that the propriety of such an instruction was considered in *People v. Najera* (2006) 138 Cal.App.4th 212, in the context of a claim of prosecutorial misconduct. (ABM 43.) Appellant is incorrect. *Najera* expressly declined to consider the defendant's challenge to the CALJIC manslaughter instructional given in that case. (*Najera*, *supra*, at p. 226.) Rather, *Najera* consider six separate claims of prosecutorial misconduct based on asserted misstatements of law regarding voluntary manslaughter. (*Id.* at pp. 220-225.) *Najera* found some of the challenged statements to be legally incorrect, but held that the defendant had forfeited the claims by not objecting. *Najera* rejected the claim of ineffective assistance of counsel based on the failure to object because the defendant was not legally entitled to a voluntary manslaughter instruction. (*Id.* at pp. 224-226.) Consequently, *Najera* did not reach the instructional challenge. (*Id.* at p. 226.)

Appellant attempts to use *Najera*'s evaluation of the prosecutor's statements to attack the instructions given in the current case. However, the challenged portion of the instruction is not comparable to the statements made by the prosecutor in *Najera*. The prosecutor argued in *Najera* that the objective standard required the jury to find that a reasonable person would have killed. (*Najera*, *supra*, 138 Cal.App.4th at p. 223.) The instruction here did not direct the jurors to find that an ordinary person would have killed in response to the provocation. Thus, *Najera*'s discussion is inapplicable to the claim of instructional error.

Finally, the prosecutor's closing arguments in this case did not detract from the legal standard advanced by appellant. The prosecutor reiterated the "act rashly" language from the instruction. (14 RT 1698-1699.) When the prosecutor briefly referred to murder being unreasonable, defense counsel objected and the court referred the jury to the instructions. (14 RT 1699.) Defense counsel's closing argument explained in detail that the provocation standard required that an ordinary person would act rashly, not that an ordinary person would kill. (14 RT 1712-1713.) The arguments reinforced the instructions, rather than detracted from them. Appellant's argument for instructional error is unavailing.

B. Any Ambiguity Was Cured by the Court's Response to the Jury's Question

To the extent the challenged portion of the instruction was unclear or ambiguous with respect to the objective standard because it did not repeat the "act rashly" language of the earlier part of the instruction, the trial court's response to the jury's question necessarily resolved any ambiguity.[4] During deliberations, the jury sent a note to the court asking:

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

(5 CT 1502.)

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[4] Although appellant addresses the court's response to the jury question in a separate argument heading, that response is properly evaluated within the context of the broader claim of instructional error. (ABM 68-69; see generally *Weeks v. Angelone* (2000) 528 U.S. 225, 231-237 [evaluating court's response to jury question to determine if instructions were ambiguous].)

The court responded with the following clarification:

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

(5 CT 1503.)

The court's response removed any ambiguity by directing the jury back to the act rashly language of the first part of CALCRIM No. 570 and away from any requirement that an ordinary person would kill. Appellant, however, faults the court for using the phrase "do an act rashly" rather than just "act rashly." (ABM 69.) Respondent is unable to perceive any legal or semantic distinction between these two phrases. The former, "do an act," merely uses an equivalent nominalization of the verb form "act."[5] Though prolix, this nominalization does not impart a different meaning. More importantly, appellant has not shown a reasonable likelihood that the jury would have parsed the phrase "doing an act rashly" to connote any meaning other than "acting rashly."

Appellant suggests that the instruction did "not clear up the problem found in *Najera* . . . that an average person need not have been provoked to kill, but only to 'act rashly.'" (ABM 69.) We disagree. The jury question indicated two possible interpretations for evaluating "how such a person would react," either by committing the same crime (a homicide), or by possibly committing other less severe rash acts. The court's response that the standard was causing an ordinary person "to do an act rashly" directed the jury to the latter interpretation, as opposed to the former. Moreover, it

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[5] "Nominalization is the process, often unintentional, of turning verbs into nouns; though grammatically correct, it can import a host of needless words into a sentence." (Cal. Style Manual (4th ed. 2000) §5.2[C], pp. 175-176 [offering tips for reducing wordiness].)

paralleled the "act rashly" portion of the original instruction as to which appellant makes no complaint and the Court of Appeal found no error. The court's response did precisely what appellant argues it should have done. (*Waddington v. Sarausad* (2009) 555 U.S. 179, 196 ["Where a judge 'respond[s] to the jury's question by directing its attention to the precise paragraph of the constitutionally adequate instruction that answers its inquiry,' and the jury asks no followup question, this Court has presumed that the jury fully understood the judge's answer and appropriately applied the jury instructions"].) There is no reasonable likelihood the jury would have understood the court's answer to require that an average person would commit a homicide in response to the provocation.

III. APPELLANT'S CLAIM OF PROSECUTORIAL MISCONDUCT WHEN DISCUSSING HEAT OF PASSION IN CLOSING ARGUMENT IS UNAVAILING

Respondent's opening brief explained, in reference to the appellate court's finding of instructional error, that the prosecutor's arguments did not misstate the law or exacerbate any ambiguity in the jury instructions. (OBM 45-50.) Appellant responds by raising as a separate claim of error that the prosecutor's argument amounted to prejudicial prosecutorial misconduct. (ABM 56-67.) We disagree.[6] The prosecutor did not misstate the law, and appellant did not suffer any prejudice.

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[6] We submit that this new issue is outside the scope of review. The Court of Appeal did not reach the issue of prosecutorial misconduct, and our petition for review did not raise that issue, nor did appellant's answer to the review petition. Although this Court's order granting review directed the parties to address "whether the prosecutor misstated the law in argument," that inquiry is properly viewed in the context of the instructional error claim. (*People v. Kelly*, *supra*, 1 Cal.4th 495, 526-527 [considering explanatory closing arguments in determining whether jury correctly understood the law as presented by the instructions as a whole];

(continued...)

A. Applicable Standard of Review

"A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." (*People v. Ochoa* (1998) 19 Cal.4th 353, 427, citations and internal quotations marks omitted.) When the claim of misconduct "focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion." (*Ibid.*) Any alleged misconduct must be examined in context to determine its propriety and effect. (*People v. Frye* (1998) 18 Cal.4th 894, 977.) Moreover, the court should not lightly infer the jury drew the most damaging, rather than the least damaging, meaning from the prosecutor's statements. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153.)

B. The Prosecutor Did Not Misstate the Law

Appellant asserts the following passage from the prosecutor's closing argument misstated the law on provocation:

> 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 agree that this is what happened. It's an illogical interpretation

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(...continued)
cf. *Middleton v. McNeil* (2004) 541 U.S. 433, 438.) Accordingly, this Court should not consider this independent claim of error on review. (Cal. Rules of Court, rules 8.500, 8.516; *Scottsdale Ins. Co. v. MV Transportation* (2005) 36 Cal.4th 643, 654, fn. 2.)

of the facts. You stub your toe. You're angry, might cuss a few words. You don't go out and kill someone.

We've all gotten cut off in traffic. We say a 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 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 – buy his own account he's 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 here –

[Defense counsel]: Judge, I'm going to object to that as a misstatement of the law, Your Honor, that last part.

[¶] . . . [¶]

The Court: The jury will get the jury instructions. Go ahead.

(14 RT 1698-1699.)

1. Appellant's claim is legally incorrect because voluntary manslaughter requires homicidal passion

Appellant's misconduct claim is predicated on his view that the proper objective standard for provocation is that an ordinary person would merely act rashly rather than respond with lethal violence. For the reasons set out above and in our opening brief, the objective standard requires lethal violence, and thus a prosecutor does not misstate the law by arguing that an average person would not kill under the circumstances.

2. The prosecutor did not commit misconduct in argument even under a mere rashness standard

Appellant's claim of misconduct also fails under the more lenient legal standard for voluntary manslaughter advocated by appellant—merely requiring an ordinary person to act rashly—because there is no reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. (*People v. Ochoa, supra*, 19 Cal.4th at p. 427.)

The prosecutor began the discussion with a legally accurate paraphrasing of the jury instruction for voluntary manslaughter, explaining that "the provocation has to be such that a person of average disposition to [*sic*] act with passion rather than judgment." (14 RT 1698; compare 14 RT 1669 [instructing that "the provocation would have caused a person of average disposition to act rashly and without due deliberation. That is, from passion rather than judgment"].) The prosecutor followed this statement of the law with a generalized discussion, not tied to the particular facts of this case. After a slightly meandering discussion of whether the evidence supported appellant's account, the prosecutor made the general statement that "murder is unreasonable." (14 RT 1699.) The defense made a specific objection to this final clause. (14 RT 1699.)

Appellant contends that the prosecutor's argument that "murder is unreasonable" was a misstatement of the law, because the passion need not invoke a murderous response in an ordinary person. The flaw in appellant's argument is that the prosecutor was not arguing to the jury that it had to find that a reasonable person would kill to satisfy the provocation requirement for manslaughter. Rather, the prosecutor made an uncontroversial statement about the wrongful nature of murder. There is little likelihood that the jury would have understood the statement as somehow applying to the definition of manslaughter because the prosecutor

specifically referred to the greater offense of "murder." Appellant's claim that the jury would have understood the general statement "murder is unreasonable" as actually instructing on the degree of rashness necessary to justify voluntary manslaughter depends upon the jury having read far more into the straightforward statement of the prosecutor than is reasonable in light of the entire argument.

Moreover, to the extent the jury could have construed the challenged clause as an incorrect statement of law, the court essentially sustained the defense objection by referring the jury to the instructions for the law. (14 RT 1699.) The instructions set out the standard for voluntary manslaughter in conformity with appellant's view of the law. Accordingly, appellant's claim of misconduct is unavailing. (See *People v. Hinton* (2005) 37 Cal.4th 839, 864 [rejecting claim of prejudicial prosecutorial misconduct over questions and arguments for which the trial court sustained defense objections]; *People v. Price* (1991) 1 Cal.4th 324, 482 [rejecting prosecutorial misconduct claim where court sustained defense objection].)

On a more general level, even under the mere rashness standard advanced by appellant there is nothing legally incorrect about a prosecutor arguing that a reasonable person would not kill under the circumstances. (See OBM 48.) While a prosecutor cannot misinform the jury on the appropriate legal standard of what is required for voluntary manslaughter, a prosecutor is not precluded from offering examples or discussing the likelihood of different forms of rash responses up to and including a homicide.

Appellant counters that "society as a whole should not decide that killing another person is ever a reasonable response." (ABM 63.) Appellant's argument misses the point. That sufficient provocation could cause an ordinary person of average sensibilities to commit a homicide does not render that homicide a "reasonable" response; rather, it is an

understandable response. Consequently, such a homicide is still punished, but punished less severely. This reflects the foundational premise that voluntary manslaughter based on heat of passion is grounded in a concession to *human* weakness, not the defendant's own personal weakness. If an ordinary person would *never* kill under such provocation, then a defendant's act of killing does not reflect *human* weakness worthy of mitigation, but rather reflects his own personal weakness which cannot counterbalance or mitigate the heinous act of killing another.

Appellant adds that "[i]t 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." (ABM 64.) This argument is also off the mark. Such comparisons are not efforts to belittle the "doctrine," but rather to deride a defendant's claim of adequate provocation under the facts of the case by relating the claimed provocation to obviously insufficient types of provocation. Such argument is entirely proper.

> "'It is settled that a prosecutor is given wide latitude during argument. The argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom. [Citations.] It is also clear that counsel during summation may state matters not in evidence, but which are common knowledge or are illustrations drawn from common experience, history or literature.' [Citation] 'A prosecutor may "vigorously argue his case and is not limited to 'Chesterfieldian politeness'"

(*People v. Williams* (1997) 16 Cal.4th 153, 221; see also *People v. Thomas* (1992) 2 Cal.4th 489, 526 ["'[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. He has the right to fully state his views as to what the evidence shows and to urge whatever conclusions he deems proper. Opposing counsel may not complain on appeal if the

reasoning is faulty or the conclusions are illogical because these are matters for the jury to determine'"]; *People v. Huggins* (2006) 38 Cal.4th 175, 207-208 [same].)

Appellant's attempt to universalize the prosecutor's argument from one challenging the sufficiency of his claimed provocation to one directed at the doctrine itself is unavailing.

Ultimately, there is also no reasonable likelihood the jury would have understood the argument as requiring a legal standard for provocation different from that advocated by appellant. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 427.) As noted, the prosecutor's comments reiterated the instruction, and the court informed the jurors at that point in the argument that they would get the instructions from the court. (14 RT 1699.) The court also instructed the jury pursuant CALCRIM No. 200, "You must follow the law as I explain it to you, even if you disagree with it. If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions." (5 CT 1428; 14 RT 1655.) The jury would have looked to the court's instructions for the proper definition of provocation.

Finally, during deliberations the jury asked the court about this precise issue, and the court responded by instructing the jury in accordance with appellant's view of the law. (5 CT 1502-1503.) The jury was fully instructed on the objective standard for provocation in conformity with the defense view, notwithstanding the challenged comment by the prosecutor. The jury is presumed to follow the court's instructions. (See *People v. Hinton*, *supra*, 37 Cal.4th at p. 865.) Accordingly, there is no reasonable likelihood the jury was misled into applying an incorrect standard for voluntary manslaughter. The prosecutor's argument did not constitute misconduct. For this same reason, even if the prosecutor's argument rose to the level of misconduct, appellant suffered no prejudice as a result given

the court's subsequent clarifying response to the jury's question on this very issue.

IV. APPELLANT WAS NOT PREJUDICED BY ANY MISINSTRUCTION

A. *People v. Watson* States the Applicable Legal Standard for Prejudice

Appellant contends that the proper standard for assessing prejudice is the federal constitutional standard set out in *Chapman v. California* (1967) 386 U.S. 18, 24, rather than the state law test of *People v. Watson* (1956) 46 Cal.2d 818, 836. We disagree. This Court explained in *People v. Breverman* (1998) 19 Cal.4th 142, 169-179, that voluntary manslaughter is a lesser included offense of murder and there is no federal constitutional entitlement to instruction on that lesser offense. Misinstruction on this lesser included offense is properly reviewed under the state law standard for prejudice. (*Ibid.*)

Appellant points out that *Breverman* acknowledged the possible open question whether absence of provocation is itself an element of malice, thereby elevating misinstruction on provocation to error of federal constitutional dimension. (*Breverman*, *supra*, 19 Cal.4th at p. 170, fn. 19; *id.* at p. 187 (dis. opn. of Kennard, J.); see also *People v. Moye*, *supra*, 47 Cal.4th at p. 558, fn. 5; *id.* at p. 559 (dis. opn. of Kennard, J.).) Appellant embraces the dissent in *Breverman* and *Moye* to argue that the absence of heat of passion is an affirmative element of malice, and thus misinstruction on the definition of provocation and heat of passion is misinstruction of an element of the offense of murder. (ABM 49-52.) Appellant's arguments are unavailing. The absence of heat of passion is not an element of malice as defined by statute.

Penal Code section 188[7] defines malice as follows:

> Such malice may be express or implied. It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. It is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.
>
> When it is shown that the killing resulted from the intentional doing of an act with express or implied malice as defined above, no other mental state need be shown to establish the mental state of malice aforethought. Neither an awareness of the obligation to act within the general body of laws regulating society nor acting despite such awareness is included within the definition of malice.

The statutory definition of express malice is clearly stated and does not contain an "absence of provocation" component. All that is required is an intent to kill.

The statutory definition of implied malice is facially more complicated, but when analyzed, likewise contains no requirement of an absence of heat of passion. The statute gives two statements of implied malice, which are stated in the disjunctive: "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (§ 188.) The latter part, referring to "showing an abandoned and malignant heart," has been refined to state the familiar standard "that malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life." (*People v. Dellinger* (1989) 49 Cal.3d 1212, 1215,

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[7] All further statutory references are to the Penal Code unless otherwise noted.

1218-1221; *People v. Phillips* (1966) 64 Cal.2d 574, 587-588.) That definition does not contain an absence of heat of passion requirement.

The first part of the implied malice clause refers to malice being implied when no considerable provocation appears, but that reference does not incorporate an absence of provocation requirement into either express malice or "abandoned and malignant heart" implied malice. Rather, that language arose from the common law view that malice should be presumed from the mere fact a homicide was committed, which then shifted the burden to the defendant to demonstrate the homicide was not intentional or done with a malignant heart, i.e., that it was justified, excused, or mitigated. (See, e.g., *People v. Milgate* (1855) 5 Cal. 127, 129-130.) This presumption of implied malice in section 188 was a shorthand reference to the principle set out in more detail in former Penal Code section 1105, which provided:

> Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable.[8]

Sections 188 and 1105 were originally viewed as setting out a presumption of malice aforethought arising from the mere fact of the killing itself and placing on the defendant a burden of proving justification,

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[8] Former section 1105 was repealed and reenacted in 1989 as section 189.5, which provides: "(a) Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon the defendant, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable. [¶] (b) Nothing in this section shall apply to or affect any proceeding under Section 190.3 or 190.4." (Stats. 1989, ch. 897, §16.)

excuse, or mitigation. (*People v. Jones* (1911) 160 Cal. 358, 369-372; *People v. Knapp* (1886) 71 Cal. 1, 2-11; *People v. Hong Ah Duck* (1882) 61 Cal. 387, 396.) However, that interpretation of placing a burden of persuasion on the defendant has since been repudiated. This Court subsequently explained these provisions reflect the recognition that implied malice can be inferred from the circumstances of the offense, and that upon proof of express or implied malice, instructions on justification, excuse, or mitigation are only warranted if supported by evidence. (*People v. Cornett* (1948) 33 Cal.2d 33, 42-43.) In other words, once malice has been established by the prosecution evidence, it devolves upon the defendant to offer some evidence sufficient to raise a reasonable doubt that the homicide was justified, excused, or mitigated, which in turn allows that claim to go to the jury with the prosecution retaining the burden of persuasion—proof beyond a reasonable doubt—as to the absence of justification, excuse, or mitigation. (*People v. Rios* (2000) 23 Cal.4th 450, 461-462.) As *Cornett* explained with respect to former section 1105, "This section does not set forth a rule relating to the burden of proof, but merely declares a rule of procedure that imposes on the defendant only a duty of going forward with the evidence of mitigating circumstances." (33 Cal.2d at p. 42; see also *People v. Albertson* (1944) 23 Cal.2d 550, 587-589 (conc. opn. of Traynor, J.) [explaining that former section 1105 is only a procedural requirement that "has the effect merely of freeing the prosecution of the risk of a directed verdict in favor of the defendant"].)

Accordingly, the statement in section 188 that malice is implied "when no considerable provocation appears" does not reflect a legislative decision to delineate absence of provocation as an element of either express or implied malice. Indeed, the fact that this reference is made in the disjunctive of both the statutory definition of express malice (intent to kill) and implied malice (an abandoned and malignant heart), precludes an

interpretation that absence of provocation is an elemental component of either mental state.

Moreover, the view that absence of provocation is an element of malice misconstrues how heat of passion operates in mitigation. As noted, express malice is defined as an intent to kill, and implied malice is defined as conscious disregard for human life. (See generally *People v. Cravens* (2012) 53 Cal.4th 500.) While adequate provocation is properly described as "negating malice" (*People v. Rios*, *supra*, 23 Cal.4th at p. 467), it does not *factually* negate malice. A defendant eligible to have a murder charge mitigated to voluntary manslaughter based on heat of passion still harbors an intent to kill or conscious disregard for life. (*Ibid.* [explaining heat of passion "thus reduces the offense to the '[v]oluntary' form of manslaughter [citation], *even though* the lethal act was committed with a mental state, such as intent to kill, which would otherwise justify a finding of malice"]; see also *People v. Lasko*, *supra*, 23 Cal.4th at p. 109; *People v. Blakeley* (2000) 23 Cal.4th 82, 87-91.) Malice is negated by heat of passion based on adequate provocation *as a matter of law* in recognition of inherent human weakness.

"'Of course, from a strictly realistic point of view, such a killing [intentional homicide under adequate provocation] is likewise malicious; but, according to common law tradition, the malice is presumed to be wanting in such a situation, the act 'being rather imputed to the infirmity of human nature.'" (*People v. Holt* (1944) 25 Cal.2d 59, 85, quoting 1 Mitchie, Homicide (1914) § 21, p. 130; see also *People v. Freel*, *supra*, 48 Cal. at p. 437 [explaining "the law, out of forbearance for the weakness of human nature, will disregard the actual intent and will reduce the offense to manslaughter"].)

In sum, the absence of adequate provocation is not a legal component of malice, express or implied, nor an element of second degree murder.

Likewise, "'[n]either heat of passion nor imperfect self-defense is an element of voluntary manslaughter' that must be affirmatively proven. [Citation.] Rather, they are 'theories of partial exculpation' that reduce murder to manslaughter by negating the element of malice. [Citation.]" (*People v. Moye*, *supra*, 47 Cal.4th at p. 549; *People v. Rios*, *supra*, 23 Cal.4th at p. 454.)

The presence of adequate provocation and heat of passion is a mitigating circumstance that serves as the gateway for this partial exculpation to a lesser offense by negating malice as a matter of law and placing the burden on the prosecution to disprove heat of passion beyond a reasonable doubt. *People v. Martinez* (2003) 31 Cal.4th 673 explained, in the context of voluntary manslaughter based on imperfect self-defense or intoxication, that such "mitigating factors are not elements of the offense of murder but are defensive matters, which may reduce murder to manslaughter by negating malice." (*Id.* at p. 685.) "Thus, the absence of imperfect self-defense or voluntary intoxication is not an *element* of the offense of murder to be proved by the People. Instead, these doctrines are 'mitigating circumstances,' which may reduce murder to manslaughter by negating malice." (*Ibid.*)

An instructional error regarding the proper definition of the objective component of voluntary manslaughter does not constitute misinstruction on an element of the greater offense of murder, but merely misinstruction on a mitigating circumstance allowing for a lesser included offense. It constitutes only state law error and implicates only the state test for prejudice. (Cf. *Gilmore v. Taylor* (1993) 508 U.S. 333, 341-345 [characterizing instructions which allowed jury to find second degree murder without considering valid claim of voluntary manslaughter as state law error, and questioning circuit court's finding of due process violation, noting that such a conclusion was not dictated by precedent nor does it

implicate the fundamental fairness and accuracy of the criminal proceeding as required by *Teague v. Lane* (1989) 489 U.S. 288, and thus could not be basis for granting federal habeas relief]; see also *id.* at p. 351 (conc. opn. of O'Connor, J.) ["[O]ur cases do not resolve conclusively the question whether it violates due process to give an instruction that is reasonably likely to prevent the jury from considering an affirmative defense, or a hybrid defense such as [here]"].)

Appellant's fallback assertion that any error was of federal constitutional dimension because he was denied the right to present a defense (ABM 52-54) is also unavailing. It is well settled that a claim of adequate provocation and heat of passion is not a defense to second degree murder, but rather the mechanism for reducing the crime to the lesser included offense of voluntary manslaughter. (*People v. Barton* (1995) 12 Cal.4th 186, 200-201 ["[V]oluntary manslaughter, whether it arises from unreasonable self-defense or from a killing during a sudden quarrel or heat of passion, is not a defense but a crime; more precisely, it is a lesser offense included in the crime of murder"].)

Any instructional error affected only the lesser included offense of voluntary manslaughter and is properly analyzed under the state law test for prejudice. (*People v. Breverman*, *supra*, 19 Cal.4th at pp. 169-179; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

B. The Asserted Instructional Error Is Harmless Under Either Standard

As explained in our opening brief, the error was harmless under *Watson*. For the same reasons, the claimed instructional error is harmless even if the federal *Chapman* standard applies, as claimed by appellant. (See generally *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

CONCLUSION

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

Dated: March 21, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached REPLY BRIEF uses a 13 point Times New Roman font and contains 10,462 words.

Dated: March 21, 2012

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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S192644**

I declare:

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

On March 21, 2012, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 21, 2012, at San Francisco, California.

J. Wong
Declarant

J Wong
Signature