

Turning Murder Into Manslaughter:

The Six Pillars of the Manslaughter Defense and Other Rousing Stories

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INTRODUCTION

The idea for this article and seminar presentation was to set forth some basic principles and hot legal issues concerning voluntary manslaughter, considered in its most common guise, as a defense to murder based on provocation/heat of passion and, to a lesser extent, imperfect self-defense.

To get myself started, I did a bit of research into the history of the unusual crime of manslaughter. A review of two landmark cases, the U.S. Supreme Court's decision in *Mullaney v. Wilbur* (1975) 421 U.S. 684 and the California Supreme Court's opinion in *People v. Valentine* (1946) 28 Cal.2d 121, gave me a good entree into the history and evolution of heat of passion manslaughter in the common law, the United States, and California. What I learned from this history led me to reexamine many of the current issues and controversies surrounding the law of manslaughter, opening up a framework for talking about manslaughter which I hadn't known about, and leading me to put forth a thesis – or, more accurately, a set of related and tentative theses – about the evolution and devolution of manslaughter in defense of murder charges.

Encapsulated in shorthand, the thesis sounds a familiar refrain. The law of manslaughter has evolved over the centuries, and over the past couple generations, to provide greater rights to criminal defendants, making it easier, in a formal sense, to defend against a murder charge as manslaughter and eliminating obstacles to such a defense. Yet, at the same time, the old ways that disfavor defendants persist, with constant retrenchment which makes it ever more difficult to obtain a manslaughter verdict in a murder case.

Under present California law, the stakes of this contest on the individual level of our clients have become staggeringly important. Murder, even in the second degree, carries a

mandatory 15 to life term; if a gun is used, it's 40 to life. (Pen. Code §§ 189 & 12022.53)¹ And these days, any term with “life” in it promises to be something very close to a virtual sentence of life-without-meaningful-chance-of-parole [LWMCP]. Voluntary manslaughter, by contrast, carries a determinate term range of 3, 6, or 11 years (§ 193, subd. (a)), and personal use of a firearm, which is not subject to the enhanced life term under section 12022.53, carries an additional determinate term of 3, 4, or 10 years. Although the maximum 21 year term for manslaughter with a gun is nothing to sneeze about, a first-time offender would only need to serve 18 years², which is light years better than the LWMCP term of any murder conviction.

The stakes are nearly the same for the crime of attempted murder, for which attempted voluntary manslaughter is a lesser included offense where there is evidence of provocation and heat of passion or imperfect self-defense. Premeditated attempted murder carries a life term, with the chance of parole not much better once the minimum term is served; and while non-premeditated attempted murder carries a determinate term of 5, 7, or 9 years, if a firearm is used for either variant of attempted murder, the punishment expands dramatically under section 12022.53, up to 25 to life if the firearm is discharged and causes great bodily injury.

This brief foray into sentencing law – the only one you will see in this article – is done to remind the reader just how important the often pitched-battle fight is over manslaughter instructions, supporting evidence, arguments of counsel, and verdicts. At every step of the way, in both the trial court and on appeal, the powerful forces arrayed against our clients will make every effort to undermine the six pillars of the manslaughter defense which will be discussed below. Our job is to fight to uphold the procedural and substantive rules which make a manslaughter verdict something more than an abstract possibility.

¹Statutory references are to the Penal Code unless otherwise specified.

² Voluntary manslaughter is, alas, a violent felony, subject to 15 percent credit limits. (§§ 667.5, subd. (c)(1) & 2933.1.)

The discussion which follows is not in the format of a traditional outline-type analysis of the crime of manslaughter, or even voluntary manslaughter as a defense to murder. Indeed, the slippery and contested terrain that is the voluntary manslaughter defense seems to limit the usefulness of this kind of analysis. Instead, what follows, if you will, is a series of talking points intended to fire-up you, the reader and practitioner, about battling for our clients to obtain manslaughter verdicts in murder cases, or get reversals of murder convictions based on manslaughter-related theories.

Most of the discussion will focus and spin off from what I will be labeling the “Six Pillars” of the heat of passion-based voluntary manslaughter defense to murder, i.e., six significant sites of contestation within manslaughter law which have, and will continue, to form focal points of legal controversies and appellate issues concerning the manslaughter defense based on heat of passion. Put in their most succinct form, here are the Six Pillars:

Pillar One: It’s *Their* Burden, Not Ours. Although it is commonly said that proof of provocation and heat of passion negates malice and reduces murder to manslaughter, this phrasing is misleading because the burden is on the prosecution to prove, beyond a reasonable doubt, that a defendant did not kill as a result of provocation and heat of passion. (*Mullaney v. Wilbur* (1975) 421 U.S. 684; *People v. Rios* (2000) 23 Cal.4th 450, 462.)

Pillar Two: Favorably Low Quantum of Evidence Required to Instruct on Heat of Passion Manslaughter Although trial and appellate courts frequently conclude there is insufficient evidence to justify instruction on provocation/heat of passion manslaughter, the test for sufficiency of proof is a favorable one, requiring such instructions where there is any evidence deserving of consideration which supports such a defense, irrespective of any credibility findings. (*People v. Breverman* (1998) 19 Cal.4th 142, 162-163.)

Pillar Three: *Any* Type of Conduct Can Provoke. While the common-sense understanding of heat of passion manslaughter, which has its antecedents in older formulations of the law, limits provocation to acts, not words or gestures, with the quintessential such act involving the defendant seeing another man committing adultery with

his wife, provocation giving rise to heat of passion can be from *any* conduct, including words and gestures, that would be “sufficient to excite an *irresistible passion* in a reasonable person” and lead that person to “act rashly or without due deliberation and reflection.” (*People v. Valentine*, 28 Cal.2d 121, 138-139.)

Pillar Four. How “Objective” is the Objective Test? Provocation/heat of passion manslaughter is based on an *objective* standard, on the jury’s consideration of how a “person of average disposition” would react, with the understanding that a man of “violent” or “cowardly” nature cannot set up his own standard of conduct. (*People v. Logan* (1917) 175 Cal. 45, 48-49; see CALCRIM No. 570.) However, California law recognizes that a proper “objective” assessment of whether there was provocation leading to acts based on passion rather than judgment requires consideration of important *subjective* factors, namely the specific circumstances surrounding the situation giving rise to the killing and the facts known to the defendant, allowing considerable room to argue that the unique circumstances present would have led a reasonable person *in your client’s situation and knowing what he/she knew*, to act rashly out of passion

Pillar Five: “Would a Reasonable Person Kill in this Situation?” Hey! That’s Not the Standard! Despite recent CALCRIM instructions and efforts by prosecutors to argue otherwise, California law makes it clear that, the factfinder should not be directed to consider *what sort of action* a person of average disposition would have taken in the same situation, and knowing the same facts, but is limited to determining the more limited question whether such a reasonable person would have acted rashly and out of passion.

Pillar Six: Voluntary Manslaughter Requires an Intent to Kill; Wait, No, It Doesn’t Really; It Only Requires Proof of Malice, Express or Implied, Even Though It’s Based on the Negation of Malice. Huh? After decades of case law and jury instructions telling us that “intent to kill” was a necessary element of voluntary manslaughter, a decade ago the California Supreme Court said it is not, and that voluntary manslaughter is available as a defense and lesser included offense in any case where malice,

express or implied, is negated by heat of passion or imperfect self-defense. (*People v. Lasko* (2000) 23 Cal.4th 101 [heat of passion] and *People v. Blakeley* (2000) 23 Cal.4th 82.) As it turns out, this is a good thing.

The Rest of the Story. After exploring the six pillars of heat of passion voluntary manslaughter, I will turn briefly to the “new kid on block,” the other form of voluntary manslaughter, based on an imperfect self-defense, discussing a couple of important concerns about instructions and evidentiary issues relating to this defense. I will then close with a brief look at a pair of “crossover” issues concerning the two manslaughter defenses and other aspects of homicide law.

I. **A Little Manslaughter History, From the Middle Ages to Last Year.**

It all started with murder, kings, and the church. In early common law times, all homicides were subject to punishment of death unless committed in the enforcement of justice. At the same time, capital punishment was only actually applied in limited situations because of the intervention of ecclesiastical courts and the “benefit of clergy,” for which almost anyone who applied was eligible. This reduced punishment from death to one year’s imprisonment, forfeiting of goods (to the church of course) and, presaging contemporary gang practices, branding of the thumb. (*Mullaney v. Wilbur*, 421 U.S. at p. 692.) As the Crown grew stronger, new statutes eliminated the benefit of clergy in “all cases of ‘murder premeditated.’” (*Id.*, at 692-693, quoting 12 Hen. 7, c. 7 (1496).) “Other forms of homicide committed without malice were designated ‘manslaughter,’ and their perpetrators remained eligible for benefit of clergy.” (*Ibid.*)

Fast forward to Henry VIII, the demise of the ecclesiastical courts, and common law recognition of the difference between murder and manslaughter. By the 16th century, the categories of justifiable homicide expanded to include those committed by accident or in self-defense. A couple centuries later, Blackstone described voluntary manslaughter – the only type we are concerned with in this review – as “aris[ing] from the sudden heat of the passions, murder from the wickedness of the heart.” (4 W. Blackstone, Commentaries *190,

quoted in *Mullaney*, at p. 693.) In its original formulations, manslaughter arose from specified categories of provocation: (1) grossly insulting assault; (2) seeing a friend or relative being attacked; (3) seeing a citizen being unlawfully deprived of his liberty; and (4) seeing a man committing adultery.³

At common law, there was a presumption in favor of malice, implied or express. Once the crown had demonstrated an unlawful killing, it was incumbent upon the prisoner to prove “justification, excuse, or alleviation . . .”, meaning that the burden of proving provocation rested with the accused. (*Mullaney*, at 693-694, quoting 4 W. Blackstone, Commentaries *201.)

The common law as transplanted to the American colonies and our new republic reflected the same pattern, with a developing division between the prevailing view, early on, which implied malice for an unlawful killing, requiring the defendant to “negate malice by proving, by a preponderance of evidence that he acted in the heat of passion . . .”, and a minority view, which had evolved into a majority position by the time *Mullaney* was decided, requiring the prosecution to prove the absence of heat of passion beyond a reasonable doubt. (*Mullaney*, at 694-696.) California law, prior to *Mullaney*, followed a hybrid rule, requiring the defense to come forward with evidence of heat of passion to give rise to reasonable doubt as to malice. (See *People v. Williams* (1969) 71 Cal.2d 614, 624.)

Justice Powell’s unanimous opinion in *Mullaney* represents a watershed moment in the criminal law where the old rules requiring defendants to put forward evidence of provocation which negated malice gave way to newly recognized due process principles, epitomized by the court’s then-recent decision, *In re Winship* (1970) 397 U.S. 358, requiring proof beyond a reasonable doubt of each element of a criminal offense. After *Mullaney*, it became incumbent on the “prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.” (*Mullaney*, at 704.)

³Michael Allen, “Provocation’s Reasonable Man: A Plea for Self Control,” 2000 JoCL 64(216), citing Lord Holt’s opinion in *Mawgridge’s Case*, Kelyng’s Rep 128.

Meanwhile, homicide law in California and elsewhere had evolved such that three of the four circumstances which had, at early common law, only reduced murder to manslaughter became a complete defense, e.g., defense of others (§ 197, subd. 1), a killing in response to a “forcible and atrocious crime” such as rape or sodomy (*People v. Ceballos* (1974) 12 Cal.3d 470, 478), and a killing in response to the use of deadly force for the unlawful arrest of oneself or another (see, e.g., *People v. Dallen* (1913) 21 Cal.App. 770, 775). This left, of the original manslaughter categories, only the prototypical case of sudden adultery discovery.

By that time, though, limitations on the *type* of provocation had altered from specific conduct to categorical descriptions. In this vein, though, California law for many decades expressed a divided view as to what conduct could constitute provocation. One line of cases held that “No words of reproach, however grievous, are sufficient provocation to reduce the offense of an intentional homicide from murder to manslaughter.” (*Valentine*, 28 Cal.2d at 138, citing, e.g., *People v. Butler* (1857) 8 Cal. 435, 441.) A second line of cases, which followed enactment of the Penal Code in 1872 repealing limiting language of a previous penal statute, held that “an intentional killing is manslaughter ‘when it is committed under the influence of passion caused by an *insult or provocation* sufficient to excite an *irresistible passion* in a reasonable person.’” (*Valentine* at 138, quoting *People v. Hurtado* (1883) 63 Cal. 288, 292, emphasis added in *Valentine*.) *Valentine* resolved this ambiguity, holding, in part under the rule of lenity, that *Hurtado* correctly stated California law, and that *any* provocation, including words and insulting, non-assaultive actions, could be considered in determining whether a reasonable person would be provoked. (*Valentine* at 143-144.)

The next step in the evolution of manslaughter in California was the gradual adoption of two additional defenses to murder which were said to negate malice and reduce the crime to voluntary manslaughter. The “diminished capacity” defense arose to provide a partial defense to murder for persons who, because of mental disease or defect, intoxication or drug use, were incapable, at the time the killing occurred, of forming an intent to kill. (*People v. Gorshen* (1959) 51 Cal.2d 716.) A second new form of manslaughter was later recognized

for what came to be called “imperfect self-defense,” i.e., the situation where the evidence showed that the killer had an actual belief in the need to defend against imminent peril, but that belief was not found to be reasonable. (*People v. Flannel* (1979) 25 Cal.3d 668.) Of course, diminished capacity met an untimely death when Proposition 8 (the 1982 version) eliminated this defense by initiative fiat. Imperfect self-defense miraculously survived Prop. 8 (*In re Christian S.* (1994) 7 Cal.4th 768), and is recognized as having many of the same features as heat of passion manslaughter, including the requirement that the prosecution prove beyond a reasonable doubt the absence of an actual (but unreasonable) belief in the need to defend against imminent peril.

Manslaughter has always been a funny sort of crime. Not really a crime at all, but a “partial defense” to murder with reduced culpability, a remnant, if you will, of the “benefit of clergy” exception at early common law. Trying to specify the “elements” of the crime of manslaughter under California law has always been a daunting task, and became more and more difficult as case law developed. Basically, manslaughter is an “unlawful killing” which is *not* murder. Prior to *Mullaney*, heat of passion was considered an element of manslaughter, and the defense bore the burden of producing evidence giving rise to reasonable doubt that the killing was committed in the heat of passion based on provocation which would make a reasonable person act rashly. *Mullaney* altered this, putting the burden on the prosecution to prove the “[a]bsence of a sudden quarrel or heat of passion” beyond a reasonable doubt “when murder and voluntary manslaughter [were] under joint consideration.” (*People v. Rios* (2000) 23 Cal.4th at 454, 462.) As the Supreme Court recognized in *Mullaney*, manslaughter thus became a crime proven through a negative. (*Mullaney*, at 701-702.)

Until a decade ago, there was general agreement that one element of voluntary manslaughter was a specific intent to kill. (See *People v. Brubaker* (1959) 53 Cal.2d 37, 44, *People v. Hawkins* (1995) 10 Cal.4th 920, 958.) In light of this, it was generally assumed that proof of manslaughter mitigating factors such as heat of passion for a crime which lacked evidence of this very particular mens rea meant that the crime was either involuntary

manslaughter or no crime at all. However, in a pair of decisions in 2000, the California Supreme Court completely altered this framework, holding that voluntary manslaughter based on heat of passion and imperfect defense was a lesser crime of murder whether the mens rea element of the greater crime was *either* express malice *or* implied malice. (*People v. Lasko*, 23 Cal.4th 101 [heat of passion] and *People v. Blakeley* 23 Cal.4th 82 [imperfect self-defense]). However, California law has consistently refused to recognize any form of manslaughter as available as a defense to felony murder in either of its incarnations, based on the notion that proof of malice is not necessary for felony murder, and thus evidence of provocation or imperfect self-defense which negates malice is besides the point. (See case law cited at *People v. Robertson* (2004) 34 Cal.4th 156, 165, overruled on other grounds in *People v. Chun* (2009) 45 Cal. 4th 1172.)

By contrast, there is little disagreement of late as to the test for determining whether the evidence presented in a case is sufficient to require instruction on voluntary manslaughter on either a heat of passion or imperfect self-defense theory (or both). Such instructions are required whenever there is “substantial evidence,” i.e., “evidence from which a jury composed of reasonable [persons] could . . . conclude[] that the lesser offense, but not the greater, was committed.” A determination whether there is “evidence that a reasonable jury could find persuasive” in this regard does not call for the court to determine the credibility of witnesses, a task that belongs exclusively to the jury. Furthermore, the duty to instruct sua sponte “arises even against the defendant’s wishes. . .” and “may exist even in the face of inconsistencies presented by the defense itself.” (*People v. Breverman*, 19 Cal.4th at 162-163, citations and internal quotations omitted; see *People v. Flannel*, 25 Cal.3d 668, 684.)

Disagreements frequently arise as to the *application* of this test to particular circumstances, with trial courts routinely refusing to instruct on manslaughter, and appellate courts routinely sanctioning such refusals, based on the corollary that instruction is not required when there is “insubstantial” evidence, i.e., some evidence bearing on the issue, but not adjudged by the trial court or reviewing court to be “substantial” under the above test.

(See, e.g., *People v. Moye* (2009) 47 Cal.4th 537 [majority opinion finding insubstantial evidence where defendant testifies that he acted in self-defense, with dissent by Justice Kennard finding circumstantial evidence, if jury disbelieved defendant’s “self-serving protestation of innocence,” supporting heat of passion manslaughter instruction].)

The objective, “reasonable person” test for the heat of passion defense in California has a long history, with very early recognition that a killing done in a state of passion is not enough to reduce the crime to manslaughter, absent a showing that a reasonable, non-hot-tempered fellow would have had his passions aroused. (*People v. Hurtado*, 63 Cal. 288 at 292.) Of course, the test is not purely objective because it requires inserting the hypothetical “reasonable person” into the circumstances presented to the defendant, with the assumption that the reasonable person has the same knowledge as the defendant. (*People v. Logan*, 175 Cal. 45, 48-49.) Up for grabs, though, is the line between the impact of “facts and circumstances” and the reasonable person, objective test. When does the knowledge and experiences of a given defendant come into play in this?

The state Supreme Court’s recent majority opinion in *Moye* will serve to remind us of another subjective gloss on the objective test, i.e., a requirement that there be evidence “that the defendant subjectively killed under the heat of passion . . .”, even in a case where there is evidence of sufficient provocation to arouse the passions of a reasonable person. (*People v. Moye*, 47 Cal.4th at p. 541.)

Finally, a recently deleted provision of CALCRIM No. 570 indicates a further controversy about the objective test, namely the degree to which the jury is required, or even permitted, to consider *what sort of actions* a reasonable person would take under the influence of provocation. The now-omitted provision told the jury, “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.” (CALCRIM No. 570 (Thompson-West, Jan. 2006 ed.), p. 273.) Although it is clearly improper for a prosecutor to argue, along the lines suggested by this instruction, that the current crime isn’t manslaughter “because a reasonable person wouldn’t kill in this situation

...” (*People v. Najera* (2006) 138 Cal.App.4th 212, 223), it is less than clear whether the jury is precluded from considering how a reasonable person would react under the same circumstances and knowing the same facts.

II. **The Six Pillars of the Heat of Passion Voluntary Manslaughter Defense.**

Here, in their splendor, are the six fundamental principles of the voluntary manslaughter defense based on provocation and heat of passion. I present the six pillars with the proviso that the specified categories, though all based in actual legal rules and controversies, are of my own invention, and that I therefore deserve both blame and credit for anything omitted, wrongly included, or elided.

A. **First Pillar: The Requirement that the Prosecution Prove the Absence of Heat of Passion Beyond a Reasonable Doubt to Secure a Murder Conviction.**

In 1975, the Supreme Court in *Mullaney* addressed the due process implications of a jury instruction, which, following settled Maine law, required the defendant to prove, by a preponderance of evidence, that he acted in the heat of passion on sudden provocation in order to negate malice. The Court held that such an instruction deprived criminal defendant Wilbur of his right, under the Due Process Clause as construed by the Court in *Winship*, 397 U.S. 358, to hold the prosecution to proof beyond a reasonable doubt as to the “malice aforethought” element of murder. (*Mullaney v. Wilbur*, 421 U.S. 684.)

After a review of the historical roots of heat of passion manslaughter as a defense to murder, which is summarized above, Justice Powell, writing for the unanimous Court, noted first that the “presence or absence of the heat of passion on sudden provocation . . . has been, almost from the inception of the common law, the single most important fact in determining the degree of culpability attaching to an unlawful homicide.” (*Mullaney* at 696.) Presaging the holding of the Court a generation later in *Apprendi v. New Jersey* (2000) 530 U.S. 466, *Mullaney* held that the requirement of *Winship* of proof beyond a reasonable doubt by the prosecution as to every element of a criminal charge applies with equal force to facts which, if proven, increase the “degree of culpability,” and hence the range of punishments, for an offense. (*Id.*, at 697-701.)

Although recognizing the difficulties inherent in requiring the prosecution to “prove a negative,” the Court noted that “proving that the defendant did not act in the heat of passion on sudden provocation is similar to proving any other element of intent . . .”, which can be established by circumstantial evidence surrounding the crime, and noted that Maine, like other states, already required proof of the absence of self-defense beyond a reasonable doubt. (*Id.*, at 701-702.) The Court then squarely held “that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case.” (*Id.*, at p. 704.)

Although jury instructions in California and elsewhere were altered to comply, at least on the surface, with *Mullaney*, my thesis is that this bedrock principle from *Mullaney* has yet to be properly carried through under California law. Its implications, especially when considered together with the subsequent landmark holding in *Apprendi*, require fundamental challenges and changes in several areas, some obvious, others perhaps not so apparent. Here are a few of them.

- 1. The Failure of Jury Instructions in California to Properly Carry Out the Mandate of *Mullaney*.**

Under California law, prior to *Mullaney*, sudden quarrel or heat of passion was considered an element of voluntary manslaughter. (See *Najera*, 138 Cal.App.4th at p. 227.) After *Mullaney*, CALJIC altered its jury instructions on heat of passion manslaughter to conform with *Mullaney* (*ibid.*), adding this final sentence: “To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel.” (CALJIC 8.50.) CALCRIM 570 contains a similar passage: “The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder.”

In my view, the inclusion of this language is problematical because virtually everything else about the CALCRIM instruction – and, to a slightly lesser extent, CALJIC

– suggests to the jury that it is up to the defense to put forward evidence which “reduces” murder to voluntary manslaughter.⁴ Nothing about the instruction, aside from the final sentence, is framed in terms of the prosecution having any burden to prove the absence of provocation on heat of passion. In fact, the entire instruction – except the last sentence – is written as if the requirement that the defense establish heat of passion by preponderance of evidence was still in effect; each step of the instruction amounts to a hurdle the defense must

⁴Here is the text of CALCRIM 570:

A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The defendant killed someone because of a sudden quarrel or in the heat of passion if:

1. The defendant was provoked;
2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment;

AND

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

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

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

It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/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.

[If enough time passed between the provocation and the killing for a person of average disposition to “cool off” and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.]

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

overcome, absent which the defense has failed to show that it was manslaughter, not murder.

For example, the instruction provides, in mandatory terms, that “[i]n order for heat of passion to reduce murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation, as I have defined it.” (CALCRIM 570.) Clearly, to properly carry out the holding in *Mullaney*, this portion of the instruction should be rewritten to state that “[i]n order for the prosecution to prove, based on the absence of heat of passion, that the crime is murder, and not voluntary manslaughter, the prosecution must prove beyond a reasonable doubt that the defendant did not act under the direct and immediate influence of provocation as I have defined it.”

FORECITE has suggested a revision of the instruction, which I include in the margin.⁵ While perhaps less than elegant in its phraseology, it at least has the virtue of

⁵To prove the malice element of the murder charge the prosecution must prove beyond a reasonable doubt that the defendant did not kill because of a sudden quarrel in the heat of passion.

To meet this burden the prosecution must prove at least one of the following beyond a reasonable doubt:

1. The defendant was not provoked;

OR

2. As a result of the provocation, the defendant did not act rashly and under the influence of intense emotion that obscured his/her reasoning or judgment

OR

The provocation to which defendant responded would not have caused a person of average disposition to act rashly 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 the prosecution to disprove the heat of passion and prove the defendant guilty of murder rather than voluntary manslaughter, the prosecution must prove beyond a reasonable doubt that the defendant did not act under the direct and immediate influence of provocation as I have defined it.

You must decide, if you can, whether the defendant was unprovoked or whether the provocation was insufficient. In attempting to decide whether the provocation was insufficient, consider whether the provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than

putting the right foot forward in terms of carrying out the mandate of *Mullaney*.

Thus, trial counsel seeking instructions on heat of passion manslaughter should strongly advocate for instructions, along the lines of those suggested by FORECITE, which properly reflect the shift of the burden from *Mullaney*.

2. **Notwithstanding *Breverman*, After *Mullaney*, Failure to Instruct on Heat of Passion Manslaughter, or Erroneous/Misleading Instructions, is Federal Constitutional Error Requiring Prejudice Assessment Under *Chapman*, Not *Watson*.**

As most of us will recall, in 1998 the California Supreme Court in *Breverman*, 19 Cal.4th 142, abolished the favorable *Sedeno* test for instructional error on lesser included offenses and held that the more forgiving *Watson* test applied to such errors.⁶ In so holding, the Court rejected several related claims that the failure to instruct on manslaughter as a lesser included offense was federal constitutional error. (*Id.*, at 164-172.) In a ringing dissent, Justice Kennard disagreed, explaining that, in light of *Mullaney* and the unique relationship between murder and manslaughter under California law, Due Process required instructions on the prosecution's burden to disprove heat of passion, making the failure to give such instructions subject to the more stringent *Chapman* test for constitutional error.⁷ (*Breverman*, 19 Cal.4th at 188-191, dis. opn. of Kennard, J.) The majority ducked the merits of this aspect of the assertion of federal constitutional error in *Breverman*, claiming it was not properly presented by the parties. (*Breverman*, at p. 170, fn. 19)⁸ As of yet, the Court has continued to avoid the issue and has proceeded since *Breverman* to address this species of instructional error under *Watson*. (See *People v. Lasko* (2000) 23 Cal.4th 101, 113

judgment.

(FORECITE 570.4 [with correction of obvious typographical errors].)

⁶*People v. Watson* (1956) 46 Cal.2d 818.

⁷*Chapman v. California* (1967) 386 U.S. 18.

⁸ In my view, this procedural claim was soundly refuted in Justice Kennard's dissent. (*Id.*, at 191-194.)

[explaining that *Breverman* did not decide the question], and *Moye*, 47 Cal.4th at 555-558 [applying *Watson* test]; but see *Moye*, at 563-565 [dis. opin. of Kennard, J., applying *Chapman* for reasons explained in *Breverman* dissent].)

Justice Kennard's argument in her *Breverman* dissent must be the starting point of any meaningful contention that failure to instruct, or misinstruction, on the requirement of proof of the absence of heat of passion in a murder case with provocation evidence is federal constitutional error. Beginning with the unassailable premise that "[t]he presence of heat of passion is consistent with the mental state and other facts that would support a murder verdict, but nonetheless heat of passion precludes a murder verdict . . ." (*Breverman*, at 191), Justice Kennard contends that after *Mullaney*, "the absence of heat of passion must be treated as part of the definition of murder for jury instruction purposes." (*Id.*, at 190.)

"[T]he state cannot omit an instruction on voluntary manslaughter and thereby prevent the jury from determining the additional circumstance of heat of passion that would make the defendant factually innocent of murder [because] the defendant has a right to have the jury decide whether that additional circumstance, which is entirely consistent with the facts necessary to convict the defendant of murder, is present. [¶] To omit the instruction creates the very real possibility that the defendant will be convicted of an offense of which, in the jury's view, he is factually innocent under the evidence presented at trial, and it is hard to imagine anything more fundamentally unfair than that. It is manifestly unjust to permit the state to use the jury's ignorance of the elements of voluntary manslaughter to convict a defendant of murder when the jury, had it known of voluntary manslaughter, could have found the additional circumstance of heat of passion that would have instead made the defendant liable only for that lesser crime. Such a procedure fails to ensure fundamental fairness in the determination of guilt at trial. The crucial consideration is that the presence of heat of passion is an additional circumstance, consistent with the elemental facts required to support a murder verdict, that not only establishes liability for voluntary manslaughter but precludes liability for murder.

(*Breverman*, 19 Cal.4th at 190-191, dis. opin. of Kennard, J.).

In my view, Justice Kennard's analysis in *Breverman* is unassailable. Thus the contention that instructional error on manslaughter which impacts the prosecution's obligation to prove the absence of heat of passion (and/or imperfect self-defense) beyond a

reasonable doubt is federal constitutional error subject to *Chapman* must be advanced in every appellate case involving such error.

A second consideration provides a further argument as to why a failure to instruct, or misinstruction on manslaughter, is federal constitutional error. Under the landmark ruling in *Apprendi v. New Jersey*, 530 U.S. 466, every fact which increases the maximum punishment for an offense must be proven to a jury beyond a reasonable doubt. (*Id.*, at p. 490.) In *People v. Sengpadychith* (2001) 26 Cal.4th 316, the California Supreme Court recognized that insofar as an enhancement allegation increases the “prescribed statutory maximum” punishment for a crime, a failure to instruct on such a sentence enhancement is federal constitutional error subject to the *Chapman* standard. (*Id.*, at 326-327.) It is indisputable that under both *Mullaney* and *Apprendi*, the prosecution in a murder case must prove the absence of heat of passion from provocation beyond a reasonable doubt, and that proof of this fact dramatically increases the “prescribed statutory maximum.” Thus, by parity of reasoning, *Apprendi* and *Sengpadychith* vindicate Justice Kennard’s view in *Breverman*, and the *Chapman* standard must apply to heat of passion, murder-manslaughter instructional error.

It is an open question whether a lower appellate court could, on its own, apply *Chapman* under the reasoning of Justice Kennard’s dissent. On the one hand, *Breverman* rejects the notion that failure to instruct on a lesser included offense is federal constitutional error and that such an error is only under state law, subject to the *Watson* test. Of course, lower appellate courts are bound by this holding. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) At the same time, the Supreme Court made it clear in both *Breverman* and *Lasko* that it has not addressed the specific-to-manslaughter contention of Justice Kennard’s dissent. In my view, this leaves lower appellate courts free to address the reasoning of Kennard’s dissent and apply it in the first instance. (See, e.g., *Roberts v. City of Palmdale* (1993) 5 Cal. 4th 363, 372 [cases are not authority for matters not considered therein].) So, you should endeavor in every case involving manslaughter instructional error to argue that it violated the federal constitution in the manner described in Justice Kennard’s

Brevereman dissent, and based on *Apprendi* and *Sengpadychith*.

But here's a caveat. While this type of argument could succeed in state court and, if unsuccessful, could set up a Cert petition in the Supreme Court, it may not work for your client on federal court habeas review. This is so because, arguably, there is no *settled* rule from the U.S. Supreme Court recognizing that misinstruction on the lesser offense of manslaughter is federal constitutional error. Under AEDPA, a federal habeas litigant must show that the state court decision was contrary to, or involved an unreasonable application of, clearly established federal law as determined by the Supreme Court. (28 U.S.C. § 2254(d)(1); see *Williams v. Taylor* (2000) 529 U.S. 362, 412-13.) I am aware of at least one district court order holding that *Mullaney* does not stand for an established rule that failure to instruct on voluntary manslaughter is federal constitutional error. (See *Nguyen v. Adams*, 2008 U.S. Dist. LEXIS 111043, at *11 - *14 [order of Judge Patel denying habeas petition].)

Thus, in all cases involving instructional error concerning manslaughter, counsel is urged to advance, as an alternative theory of federal constitutional error where applicable, the concept of failure to instruct on the defense theory of the case, a principle recognized, at least by the Ninth Circuit and its district courts, as a proper basis for federal habeas corpus relief. (See, e.g., *Conde v. Henry* (9th Cir. 2000) 198 F.3d 734, 739: "It is well established that a criminal defendant is entitled to adequate instructions on the defense theory of the case.") This won't win in state court, but it will get your client federal habeas review.

3. **After *Mullaney* and *Apprendi*, the Absence of Heat of Passion is an Element of the Crime Murder Which Must Be Proven Beyond a Reasonable Doubt and Included In Instructions Defining Murder.**

If, as *Mullaney* squarely holds, the prosecution must prove the absence of heat of passion beyond a reasonable doubt in order to prove a defendant guilty of murder, it follows, as a matter of Due Process under the logic of *Apprendi* and its progeny, that this aspect of required proof constitutes an element of the crime of murder. Although *Apprendi* does not specifically hold that all facts required to be proven to a jury beyond a reasonable doubt are elements of the offense, the reasoning of the opinion, from beginning to end, is based on the *equation* of the terms "elements of an offense" with the concept of the sum of facts which

the prosecution must prove beyond a reasonable doubt to secure a greater punishment. For example, in an oft-quoted passage, the majority opinion, after referencing and detailing the “constitutional protections of surpassing importance” at stake in the case, holds that “[t]aken together, these rights indisputably entitle a criminal defendant to ‘a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt . . .’ *United States v. Gaudin*, 515 U.S. 506, 510 . . .”, and then quotes *Winship*, 397 U.S. at 364, for the proposition that “The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” (*Apprendi*, 530 U.S. at 438.)

Justice Thomas’s concurrence makes this explicit.

[A] “crime” includes every fact that is by law a basis for imposing or increasing punishment (in contrast with a fact that mitigates punishment). Thus, if the legislature defines some core crime and then provides for increasing the punishment of that crime upon a finding of some aggravating fact – of whatever sort, including the fact of a prior conviction – the core crime and the aggravating fact together constitute an aggravated crime, just as much as grand larceny is an aggravated form of petit larceny. The aggravating fact is an element of the aggravated crime.

(*Apprendi*, conc. opn. of Thomas, J., at 501.)

Under this reasoning, and under the logic of *Mullaney* and *Apprendi*, the fact which *Mullaney* and the Due Process Clause requires the prosecution to prove beyond a reasonable doubt in order to secure a conviction for murder in a case, namely the “absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case . . .” (*Mullaney*, at 704), is an element of the crime of murder.

Notably, one appellate court has concluded the absence of heat of passion is an element of murder when both murder and heat of passion manslaughter are before a jury.

When a jury must consider both murder and voluntary manslaughter, heat of passion is not an element of voluntary manslaughter; rather, the absence of heat of passion is an element of murder the prosecution must prove beyond a reasonable doubt.

(*People v. Najera*, 138 Cal.App.4th at 227, citing *People v. Rios*, 23 Cal.4th at 454, 462.)

As such, when a case goes to the jury on facts which support a heat of passion defense, the jury must be so instructed. FORECITE suggests the following language:

The absence of heat of passion and provocation, as I will instruct you, is an essential element of murder which the prosecution must prove beyond a reasonable doubt. If the prosecution has failed to meet this burden, the defendant is not guilty of murder.

(FORECITE 522.2 Inst. 4.)

B. Pillar Two: Favorably Low Quantum of Evidence Required to Instruct on Heat of Passion Manslaughter

1. The Favorable Standard.

Breverman lays out the standard for assessing whether instructions on heat of passion manslaughter are warranted in a case, phrasing it in terms of the rules generally applicable for instruction on lesser included offenses.

[T]he existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [citations] “Substantial evidence” in this context is “evidence from which a jury composed of reasonable [persons] could . . . conclude[]” that the lesser offense, but not the greater, was committed. [citations]; accord, [*People v. Barton* (1995) 12 Cal.4th 186], 201, fn. 8 [“evidence that a reasonable jury could find persuasive”].)

In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury. [citations] Moreover, as we have noted, the sua sponte duty to instruct on lesser included offenses, unlike the duty to instruct on mere defenses, arises even against the defendant’s wishes, and regardless of the trial theories or tactics the defendant has actually pursued. Hence, substantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself.

(*Breverman*, 19 Cal.4th at 162-163, citations and some internal quotations omitted.)

On its face, this standard is one which is highly favorable to the defense. In fact, it is the very converse of the uphill battle we face on appeal in challenging the sufficiency of evidence to support a conviction. If there is evidence which any reasonable juror could find persuasive which supports a finding that defendant committed manslaughter, but not murder, instructions must be given, even when there is inconsistent evidence, or the credibility of

evidence supporting the instruction is challenged by other testimony. (*Ibid.*)

2. The Standard as (Mis)applied.

The problem arises in the carrying out of the test. As with sufficiency claims, if there is a failure to prove *one* required element of the complicated, layered manslaughter defense, the evidence is deemed insufficient, and a trial court's refusal to instruct will be upheld. This is shown dramatically by the recent decision in *Moye*, 47 Cal.4th 537. Defendant's testimony in *Moye* showed that, on the day prior to the killing, defendant had been in a fight in which the victim had attacked him with a baseball bat; on the day of the killing, the victim kicked at defendant's car; then, just prior to the fatal attack, the victim attacked and struck defendant with a baseball bat; defendant grabbed the bat from the victim, who then rushed at defendant, prompting defendant to strike the fatal blows with the bat. (*Id.*, at 545-547.) The trial court instructed on both perfect self-defense and manslaughter based on imperfect self-defense, but refused to instruct on heat of passion manslaughter. (*Id.*, at 550.) The Supreme Court upheld the trial court's refusal to instruct on heat of passion manslaughter based on what it characterized as an absence of evidence to prove the subjective element that the defendant was actually acting based on passion, not reason.

[T]he thrust of defendant's testimony below was self-defense – both reasonable self-defense (a complete defense to the criminal charges), and unreasonable or imperfect self-defense (a partial defense that reduces murder to manslaughter). There was insubstantial evidence at the close of the evidentiary phase to establish that defendant “actually, subjectively, kill[ed] under the heat of passion.”

(*Moye*, at p. 554.)

Once again dissenting from the majority, Justice Kennard argued that this evidence was sufficient to require heat of passion instructions, relying on the settled rule that instruction is required even when the defense is inconsistent with defense testimony where there is circumstantial evidence to support a finding that defendant acted in the heat of passion. Her analysis is, yet again, a paradigm of proper application of the sufficiency test of *Breverman* and *Flannel* to the determination whether instruction is required for voluntary manslaughter based on heat of passion.

The jury should not have to choose between believing defendant’s self-serving testimony that he acted in self-defense – and therefore should not be found guilty – and accepting the prosecution’s argument that the killing was murder. “Our courts are not gambling halls but forums for the discovery of truth.’ [Citation.] Truth may lie neither with the defendant’s protestations of innocence nor with the prosecution’s assertion that the defendant is guilty of the offense charged, but at a point between these two extremes: the evidence may show that the defendant is guilty of some intermediate offense included within, but lesser than, the crime charged. A trial court’s failure to inform the jury of its option to find the defendant guilty of the lesser offense would impair the jury’s truth-ascertainment function.” (*Barton, supra*, 12 Cal.4th at p. 196.)

Here, there was substantial circumstantial evidence from which the jury could have reasonably concluded that defendant killed Mark in a sudden quarrel or in the heat of passion. There was evidence that when Mark hit defendant with a baseball bat the night before the killing, defendant became so angry that he chased Mark’s brother Ronnie – who had been in a fight with defendant when Mark hit defendant with the bat – with a kitchen knife. There was also evidence that defendant again became upset when Mark, according to defendant, kicked defendant’s car shortly before the killing. From this evidence the jury could have reasonably inferred that just before the killing defendant again became enraged when, according to defendant, Mark – as he had done the night before – hit defendant with a baseball bat. Therefore, the trial court erred when it refused to instruct the jury on voluntary manslaughter arising from a sudden quarrel or heat of passion.

(*Moye*, at 563, Kennard, J. dissenting.)⁹

Cases finding insufficient evidence for heat of passion instructions are too many and diverse for me to attempt to catalogue here. One familiar pattern, which will be discussed in more detail in the next section, is where the trial and/or reviewing court adjudges the provocation to be too slight to lead to a rash response in the heat of passion. “A provocation of slight and trifling character, such as words of reproach, however grievous they may be, or gestures, or an assault, or even a blow, is not recognized as sufficient to arouse, in a

⁹Although ignored by the majority, Justice Kennard’s point recognizing that a factfinder could reasonably disregard certain “self-serving” aspects of the defendant’s testimony to reach heat of passion is consonant with the majority opinion of the same Court in *People v. Barton*, 12 Cal.4th at 202-203, which holds that a jury could arrive at a manslaughter verdict based on imperfect self-defense by “reasonably discounting [the] self-serving testimony” of the defendant that the fatal shots were fired by accident.

reasonable man, such passion as reduces an unlawful killing with a deadly weapon to manslaughter.” (*People v. Najera*, 138 Cal.App.4th at 226, quoting *People v. Wells* (1938) 10 Cal.2d 610, 623.)

It thus appears that persuading trial courts and appellate courts that there was sufficient evidence to instruct on heat of passion (or imperfect self-defense) manslaughter as a lesser offense to murder is something of an uphill battle, despite the favorable standard.

3. **The Standard Reconsidered in Light of *Mullaney*.**

In my view, part of problem with the restrictive application of the test for instruction on heat of passion manslaughter harkens back to the first pillar, the requirement that the prosecution has the burden to prove, beyond a reasonable doubt, the absence of heat of passion from provocation, and the failure of the courts to properly carry out the implications of the polar change in the law after *Mullaney*. If that is the standard of proof the jury is required to apply, the test for requiring instruction on the prosecution’s burden to prove the absence of heat of passion has to match this standard. In my view, the test should be *the existence of any evidence deserving of consideration which could give rise to a reasonable doubt for any reasonable juror as to the prosecution’s proof negating heat of passion*.

Instead, the courts have erected substantial barriers to instructions on heat of passion which have the effect of requiring the defense to produce, or at least point to, evidence which is *greater* than that which is required for an acquittal of murder and conviction of the lesser offense on proper instructions. This is an untenable situation. The test for sufficiency of evidence to instruct on heat of passion manslaughter should be, not the converse of the sufficiency of evidence rule under *Jackson v. Virginia* (1979) 443 U.S. 307, but the converse of the *Chapman* test to determine whether instructional error is harmless beyond a reasonable doubt. That is, instructions should be given if the evidence gives rise to a reasonable possibility that any reasonable juror could entertain reasonable doubt as to whether the prosecution has proven the absence of heat of passion based on provocation. (See *Chapman v. California*, 386 U.S. at 24 [reversal required if there is “a reasonable possibility” that the evidence complained of might have contributed to the judgment];

Sullivan v. Louisiana (1993) 508 U.S. 275, 279 [explaining *Chapman* test for instructional error as asking “whether the guilty verdict actually rendered in this trial was surely unattributable to the error”].)

Notably, cases frequently discuss insubstantial evidence in terms that don’t meaningfully give the benefit of doubt and credibility determinations to the defense. The holding in *Najera*, which discusses an analogous holding by the Supreme Court, provides a good example of this.

In *People v. Manriquez* (2005) 37 Cal.4th 547, 586, the victim called the defendant a “mother fucker” and taunted him by repeatedly asserting that if the defendant had a weapon, he “should take it out and use it.” The California Supreme Court stated such declarations “plainly were insufficient to cause an average person to become so inflamed as to lose reason and judgment” and held “[t]he trial court properly denied defendant’s request for an instruction on voluntary manslaughter based upon the theory of a sudden quarrel or heat of passion.” (*Ibid.*) Calling *Najera* a “faggot” was equally insufficient to cause an ordinary person to lose reason and judgment under an objective standard. *Najera* was not entitled to a voluntary manslaughter instruction.

(*People v. Najera*, 138 Cal. App. 4th at 226, fn. omitted.)

The subtext of the holdings in *Najera* and *Manriquez* seems clearly to be a reimposition of the discredited requirement that the defendant produce proof of heat of passion based on provocation by a preponderance of evidence. By requiring, in effect, evidence that the provocative acts were “[s]ufficient to cause an average person to become so inflamed as to lose reason and judgment . . .” (*ibid.*), *Najera* and *Manriquez* hold the defense to a higher standard than required under *Mullaney*. The question really ought to be whether any reasonable juror, based on these facts, could have entertained reasonable doubt that the prosecution had proven the absence of heat of passion. On the facts in each case, a strong case could be made that the answer would have to be yes, and that the trial court was required to instruct on heat of passion manslaughter.

It is fair to assume that it will not be a simple matter to reformulate the substantial evidence test of *Breverman* and *Flannel* in the manner suggested herein, despite the correctness of the position I am advancing. However, that should not deter either trial or

appellate counsel from articulating the test based on a fair application of the *Mullaney* standard in the manner suggested herein. Counsel should insist that any evidence which arguably could give rise to reasonable doubt as to the quantum of *prosecution* proof of the absence of heat of passion is sufficient to require instructions on heat of passion manslaughter.

C. Pillar Three: Any Type of Conduct Can Provoke.

1. The Rule of *Valentine*.

As discussed above, for many decades there was a conflict under California law as to what type of conduct could constitute provocation, with one line of cases limiting provocation to insulting and threatening actions, as opposed to “mere words or gestures,” and the other line recognizing that any conduct, including words and gestures, could constitute provocation provided it would excite the passions of a reasonable man. More than 60 years ago, the Supreme Court in *Valentine* resolved this conflict, holding that provocation giving rise to heat of passion can be *any* conduct which would be “sufficient to excite an *irresistible passion* in a reasonable person” and lead that person to “act rashly or without due deliberation and reflection.” (*Valentine*, 28 Cal.2d at 138, 143-144.)

2. *Valentine* Disregarded.

However, cases like *Najera* and *Manriquez* demonstrate that the discredited line of cases, which limited provocation to specific types of actions, and excluded “mere words and gestures,” lives on in many forms. CALCRIM still cites as authority a case from 1961, which holds, directly contrary to *Valentine*, that “insulting words or gestures” are insufficient to constitute adequate provocation. (CALCRIM 570 (West, Fall 2009 Ed.) “Related Issues,” “Heat of Passion: Sufficiency of Provocation – Examples,” p. 305, citing *People v. Dixon* (1961) 192 Cal.App.2d 88, 91.) *Dixon* holds that “Words or gestures, no matter how grievous or insulting, are not sufficient provocation to reduce an intentional homicide with a deadly weapon to manslaughter.” (*Ibid.*) Notably, *Dixon*, which was decided 15 years after *Valentine*, cites, as authority for this proposition, *People v. French* (1939) 12 Cal.2d 720,

744, a case *expressly* overruled by the Supreme Court in *Valentine*, 28 Cal.2d at 144.

Other cases collected at CALCRIM 570 under the aegis of holdings where “provocation has been found inadequate as a matter of law” include: *People v. Lucas* (1997) 55 Cal.App.4th 721, 739 [evidence of name calling, smirking, or staring and looking stone-faced]; *People v. Dixon* (1995) 32 Cal.App.4th 1547, 1555-1556 [refusing to have sex in exchange for drugs]; *People v. Kanawyer* (2003) 113 Cal.App.4th 1233, 1246-1247 [long history of criticism, reproach and ridicule where the defendant had not seen the victims for over two weeks prior to the killings]; and *In re Christian S.*, 7 Cal.4th 768, 779 [mere vandalism of an automobile]. (CALCRIM 570, *supra*, at p. 305.)

As suggested in the previous section, the problem here seems to be the overzealous nature of the “gatekeeping” function of trial and reviewing courts, which have erected substantial barriers to heat of passion manslaughter instructions on facts which, without much of a stretch of the imagination, could have led at least one reasonable juror to harbor reasonable doubt whether the prosecution had met its burden to disprove heat of passion from provocation. In each of the above cases, *categorical* exclusion of the type of provocation is expressly precluded under *Valentine*, since that case recognizes that “an intentional killing is manslaughter ‘when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person.’” When the evidence shows the existence of some “insult or provocation,” the question whether it was sufficient to give rise to such a passion – or, as properly rephrased after *Mullaney*, whether the prosecution had proven beyond a reasonable doubt that it *wasn't* sufficient – should be for the jury, not for a trial or reviewing court.

The moral of the story, trial and appellate counsel readers, is that when advancing the need for heat of passion manslaughter instructions in the trial court, or arguing for error in refusing to give such instructions in a reviewing court, you must emphatically stress the well-settled rule of *Valentine* that *any* type of conduct can be provocation provided that it could give rise to passion in a reasonable person, or, better said, it is sufficient to give rise to reasonable doubt whether the prosecution has disproved a killing on heat of passion from

provocation. The fact that a particular case has similar provocation facts to a prior case where the court found insufficient provocation should not deter you because each case is fact-specific and because, as will be discussed under Pillar Four below, the precise interplay between the objective test and the pertinent subjective factors – what your client knew and understood at the time of the incident – is different in every case.

3. Be Sure to Give “*Valentines*” When Arguing Heat of Passion Manslaughter to a Jury or in a Prejudice Argument.

In those situations in the trial court where the court *does* give heat of passion manslaughter instructions, trial counsel should be prepared for anti-*Valentine* salvos from the prosecutor. I have reviewed numerous cross-examinations of defendants and, more particularly, arguments to the jury, in which the prosecutor stressed the the victim used only words, gestures, or insults, and that this was not adequate provocation. You must emphasize that *any* insult or provocation can give rise to heat of passion, and implore the jury to properly apply the *Mullaney* reasonable doubt standard to determine whether the prosecution has demonstrated the absence of heat of passion on provocation.

One prosecutor in a Santa Clara County case argued to the jury that a loud argument about money between the defendant and the decedent which immediately preceded the shooting was insufficient to give rise to a killing in the heat of passion.

It’s just a verbal argument. . . . The question is is this the kind of thing that would make an ordinary person shoot somebody else?^[10] Is this like walking in and seeing your spouse with somebody else? Is this like . . . the teacher molesting your son or something like . . . that?

This type of argument is commonplace, and legally erroneous, calling for misconduct objections or, at a minimum, a pointed response. Even if it’s “just a verbal argument,” it could, given the right background, circumstances, gestures, knowledge, and history between the players, be the type of conduct that could leave a jury with reasonable doubt a to whether the prosecution had disproven the possibility that it could give rise to heat of passion in a

¹⁰ More on this under Pillar Five and *Najera*.

person of ordinary disposition. You will note that the subtext of “it’s just a verbal argument” seems to be the very holding repudiated in *Valentine*, i.e., that “Words or gestures, no matter how grievous or insulting, are not sufficient provocation to reduce an intentional homicide with a deadly weapon to manslaughter.”

Appellate practitioners face the same type of challenge when arguing prejudice from the failure to instruct on heat of passion, or improper instructions on this defense. Despite my bold pronouncements that *Chapman* will apply in such situations, for the foreseeable future, prejudice arguments will only be won under the framework of the *Watson* test as laid out by the majority in *Breverman*. And there is at least a cogent warning in the puzzling comments of Justice Mosk’s concurrence in *Breverman* suggesting that error in failure to instruct on manslaughter will always be harmless where there is sufficient evidence to support a verdict for second degree murder. (*Breverman*, 19 Cal.4th at 185-186, Mosk, J., conc.) Notably, the majority opinion’s response to Justice Mosk explains the narrow “wiggle room” for prejudice arguments under the *Watson* test.

[T]he very purpose of the rule [requiring instruction on necessarily included offenses] is to allow the juror to convict of *either* the greater or the lesser where the evidence might support either. That the jury chose the greater over acquittal, and that the evidence technically permits conviction of the greater, does not resolve the question whether, “after an examination of the entire cause, including the evidence” (Cal. Const., art. VI, § 13), it appears reasonably probable the jury would nonetheless have elected the lesser if given that choice. Depending on the circumstances of an individual case, such an examination may reveal a reasonable probability that the error affected the outcome in this way.

(*Breverman*, at 178, fn. 25, emphasis in original.)

Persuading an appellate court that a verdict on the lesser crime was a reasonably probable outcome is never easy. If the provocative conduct by the decedent is verbal, bring out the full *Valentine*, and point out that case law holding that mere words, insults, argument, etc., is insufficient, is contrary to *Valentine* and California law, and cannot be applied categorically across the board, but should instead be viewed in a case-specific manner. Point out to the court, using the record in your case, how a person in the defendant’s situation,

knowing what he knew, and experiencing what he experienced, could have been provoked into passionate rash action, making it reasonably probable that a jury properly instructed could have harbored reasonable doubt that the prosecution had proven the absence of heat of passion. If first degree murder was charged and rejected by the jury, use that fact to show that the jury had doubts about his mental state based on the provocative conduct (especially if they were instructed that provocation can negate premeditation).

In sum, we must insist that under *Valentine*, any type of provocative conduct, given the right circumstances, can lead a reasonable person to act rashly, and fight off all attempts to de facto overrule *Valentine* and reinstate the “mere words” exception.

D. Pillar Four. The Subjective Elements of the Objective Test.

How “objective” is the objective test for heat of passion manslaughter, and what subjective factors can or must be considered? Case law recognizes that the “objective, “reasonable person” test is applied by inserting the hypothetical average fellow into the particular circumstances of case based on what the actual defendant knew and experienced at the time of the killing. Thus, subjective elements can be crucial. And while you can’t base an objective determination on the unusual “passionate nature” of a particular individual, it is proper to consider what that person has known and experienced in determining whether a reasonable person, in his or her situation would act rashly out of passion, rather than reason. But what and how much can be properly considered? Does it matter that your client has a history of being hurt, threatened or harassed by the victim or persons like him? Does it matter that your client is from a culture where certain behavior has a particular meaning that might not be apparent or meaningful to the Average White Man?

1. The Objective/Subjective Test

It’s all a bit odd, really. The objective, “reasonable man” is a concept borrowed from tort law which seems out of place in the annals of criminal law, where both culpability and punishment are typically based on the acts, mental state, and characteristics of the offender. But its pedigree is rather old, and the rationale for it was best explained well over a century

ago in *People v. Hurtado*, 63 Cal. 288 at 292:

If defendant was so far in possession of his mental faculties as to be capable of knowing that the act of killing was wrong, any partial defect of understanding which might cause him more readily to give way to passion than a man ordinarily reasonable, cannot be considered for any purpose. To reduce the offense to manslaughter the provocation must at least be such as would stir the resentment of a reasonable man. [¶] It cannot be urged that the homicide is manslaughter because it was committed in an unreasonable fit of passion. In an abstract sense anger is never reasonable, but the law, in consideration of human weakness, makes the offense manslaughter when it is committed under the influence of passion caused by an insult or provocation sufficient to excite an irresistible passion in a reasonable person; one of ordinary self-control.

The subjective element is of near-equal vintage. The clearest statement of the interplay between the objective and subjective elements of the heat of passion rule can be found in the 1917 state Supreme Court opinion in *People v. Logan*, a case frequently cited by later courts as properly explicating the objective standard for the heat of passion manslaughter defense.¹¹

In the present condition of our law it is left to the jurors to say whether or not the facts and circumstances in evidence are sufficient to lead them to believe that the defendant did, or to create a reasonable doubt in their minds as to whether or not he did, commit his offense under a heat of passion. The jury is further to be admonished and advised by the court that this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person *under the given facts and circumstances*, and that, consequently, no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man. Thus, no man of extremely violent passion could so justify or excuse himself if the exciting cause be not adequate, nor could an excessively cowardly man justify himself unless the circumstances were such as to arouse the fears of the ordinarily courageous man. Still further, while the conduct of the defendant is to be measured by that of the ordinarily reasonable man *placed in identical circumstances*, the jury is properly to be told that the exciting cause must be such as 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

¹¹See, e.g., *Valentine*, 28 Cal.2d at 128, *Manriquez*, 37 Cal. 4th 547, 584, and *People v. Steele* (2002) 27 Cal.4th 1230, 1253.

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.

(*People v. Logan*, 175 Cal. 45, 49, emphasis added.)

I have highlighted the subjective aspects of the *Logan* objective test to make it plain that the rule requires the jury (or the judge assessing whether to instruct or find error in the failure to instruct) to place the “ordinary reasonable person” into the shoes of the defendant, determining whether there was sufficient provocation “under the given facts and circumstances”; the test requires that the “ordinary reasonable man” be “placed in identical circumstances” as the defendant. (*Ibid.*)

But what does this mean? Does the ever-present proviso that the reasonable man is not one with a violent or fearful temperament mean that you can't really consider the defendant's specific experiences, background, and fears in assessing whether a reasonable person would be provoked? The answer appears to be that the factfinder can and must consider such factors in a variety of contexts.

2. Experiences of Past Victimization.

In the closely related context of applying the “reasonable person” test for perfect self-defense, the Supreme Court in *People v. Humphrey* (1996) 13 Cal. 4th 1073 held that “the jury, in determining objective reasonableness, must view the situation from the defendant's perspective . . .”, and that therefore evidence of battered women's syndrome was relevant to this defense because, according to the expert on the subject, “a battered woman can become increasingly sensitive to the abuser's behavior, [which is] relevant to determining whether defendant reasonably believed when she fired the gun that this time the threat to her life was imminent.” (*Id.*, at p. 1086) Recognizing the relevance of this evidence to the determination of the reasonableness of a defendant's belief in the need to defend against imminent peril does not alter the nature of the test.

[W]e are not changing the standard from objective to subjective, or replacing the

reasonable “person” standard with a reasonable “battered woman” standard. Our decision would not, in another context, compel adoption of a “reasonable gang member’ standard.” * * * The jury must consider defendant’s situation and knowledge, which makes the evidence relevant, but the ultimate question is whether a reasonable person, not a reasonable battered woman, would believe in the need to kill to prevent imminent harm. Moreover, it is the jury, not the expert, that determines whether defendant’s belief and, ultimately, her actions, were objectively reasonable.

(*Humphrey*, at 1087.)

While I can find no cases applying the holding of *Humphrey* to the related-but-different objective standard for heat of passion manslaughter, the reasoning of *Humphrey* carries over. If, in the context of self-defense, the “defendant’s perspective,” which includes the effect of the systematic brutalization explained by battered women’s syndrome, is a factor which informs the jury’s determination of the reasonableness of the battered woman defendant’s belief in the need to defend against peril, it follows that similar evidence of brutalization and victimization is relevant to determining, in addition to perfect-self-defense, the related question whether a battered woman defendant killed while under the heat of passion. For example, conduct, such as egregious taunting, which might not provoke a person without the experiences of a battered woman, could very well provoke a rash response from a person who had experiencing repeated humiliation and brutalization in the past from the person doing the taunting.

While the principle is not recognized in this specific form, it is still the case that the fact finder is required, under the *Logan* test, to determin[e] objective reasonableness [by] view[ing] the situation from the defendant’s perspective. . . .” (*Humphrey*, at 1026.)

3. **Gang Bangers and Other Cultural Differences**

What if your client is a gang-banger, instead of a battered woman? Obviously, under *Humphrey* and the traditional articulation of the reasonable person test, the standard is not the “reasonable gang-banger.” Yet, under the reasoning of *Humphrey* and the test for heat of passion described in *Logan* and its progeny, it *does* matter that your client, for example, has experienced violence at the hands of an enemy faction, such that taunts, gestures, and nonviolent actions from a “gang enemy” would be likely to provoke a reasonable person

with the same life experiences and history. Unfortunately, the only case law I could find on a related issue is unfavorable. In *People v. Romero* (1999) 69 Cal.App.4th 846, the reviewing court upheld a trial court's refusal to allow an expert to testify on the cultural of Hispanic gangs and street fighting for the purpose of establishing, a la *Humphrey*, the background to the defendant gangbanger's belief in the need to defend against imminent peril. Basically, the court in *Romero* repeated the line in *Humphrey* about not setting up a "reasonable gang-member" standard, and rejected as irrelevant several subjects proffered by the expert as to the effect of gang and street-fighting culture.

Still, in any case in which the defendant's background and experiences would alter the question of the reasonableness of his or her impassioned response to provocation, including gang-related conduct, it should be argued that the fact finder is required, under the *Logan* test, to "determin[e] objective reasonableness [by] view[ing] the situation from the defendant's perspective. . . ." (*Humphrey*, at 1026.)

Leaving aside the gang subculture, where favorable case law may be hard to come by, a more promising issue arises with respect to the question whether more traditional "cultural differences" are something which should be properly considered in determining the objective reasonableness of a rash, passionate response to provocation. Does it matter, in determining whether provocative words or actions reasonably caused your client to act rashly from passion, that your client's cultural background is different from that of the majority culture, such that a particular insult or gesture which might provoke a mere smirk from the average American Joe could be reasonably perceived as highly provocative conduct?

Appellate attorney David Carico had a case some years back which perfectly illustrates the issue. David's client, Mr. W, an Ethiopian immigrant, killed his wife after a quarrel in which the wife, among other things, spat on him. The cultural issue in this case was whether spitting was sufficient provocation such that a reasonable person, in Mr. W's situation, would act rashly and not out of judgment. In American culture, the answer is pretty obviously "No." However, in the case, a cultural expert testified that one's identity in Ethiopia is based in family, not in the individual, and a demonstrative insult like spitting

is a declaration of war on the entire family unit, and ancestors. Hence, such an act, to a person with Mr. W's experiences and background, arguably amounts to provocation which would make a reasonable person with the same experiences act rashly.

During argument to the jury, the prosecutor castigated the importance of the cultural evidence, characterizing the heat of passion test as a "Joe and Betty" standard, not a reasonable Ethiopian immigrant standard. Following conviction for murder and appeal, David argued as part of his habeas claim that counsel was ineffective in not seeking a pinpoint instruction which would have clarified the significance of the cultural expert's testimony to the jury's determination of the heat of passion on provocation defense. The instruction, which can now be found as a suggested pinpoint in FORECITE, reads as follows:

The defendant] [and] [or] [the prosecution] has introduced evidence that the defendant has a cultural background that may be unique to you. Such cultural evidence may be relevant to your evaluation of whether the provocation in this case was of such a character and degree as to cause a reasonable person in the position of the defendant to have lost self-control and to have acted upon impulse rather than deliberation and reflection. You should give this evidence whatever weight you think it deserves. However, you may not reject this evidence out of caprice or prejudice because the defendant has cultural beliefs or practices different from your own.

(FORECITE 8.42e.) The pinpoint was necessary, David argued, because the pattern manslaughter and heat of passion instructions are phrased such that the prosecutor's "Joe and Betty" standard appears to be the correct one.

Unfortunately, there was no *citable* authority for the giving of this instruction, and the habeas, despite David's fine efforts, was not successful. Worse still, an excellent case from 1991, which found error in the failure to give such an instruction. was depublished. (*People v. Wu* (1991) 235 Cal.App.3d 614, ordered depublished, not citable.) In that case, the court held that a similar pinpoint instruction should have been given based on evidence at trial concerning the defendant's cultural background which was relevant to explain and understand her level of stress and understand how the victim's statements could have reasonably provoked her. (*Id.*, at 641-642.) The court noted in its discussion that a pinpoint instruction which directs the jury to consider whether cultural background had any relevance

towards their determination of the presence or absence of relevant mental states is proper under California law, and that “pre-existing stress” which has developed over time can be relevant to a determination of provocation and heat of passion. (*Wu*, at 637-640, citing *People v. Sears* (1970) 2 Cal.3d 180, 190 and *People v. Pacheco* (1991) 116 Cal.App.3d 617, 627.)¹²

The best case I could find which recognizes the viability of “cultural defense” factors is from another jurisdiction, and relates to an entirely different sort of defense. In *State v. Kargar* (Me. 1996) 679 A.2d 81, the Maine Supreme Judicial Court reversed the conviction of an Afghani refugee for gross sexual assault. In that case, the defendant had been observed kissing the penis of an infant boy, but presented evidence that in his country, such an act was an accepted, nonsexual cultural practice, a factor which negated the required sexual intent for the crime. The appellate court found that the court below had concluded erroneously that the defendant’s cultural background was irrelevant in determining whether the prosecution should have been dismissed under Maine’s de minimis statute. (*Id.*, at 83; see Wanderer and Connors, “Culture and Crime: Kargar and the Existing Framework for a Cultural Defense,” 47 Buffalo L. Rev. 829, 833-836.)

Kargar very strongly stands for the proposition that evidence of a defendant’s cultural background can be very relevant to a determination of his or her mental state. As such, it provides the basis, along with the other authorities noted herein, including *Humphrey*, for seeking a pinpoint instruction on cultural factors in a case with a heat of passion defense, and for arguing the relevancy of such factors both to a jury during a murder trial and in appellate briefing.

E. Pillar Five: Taking the Objective Test Too Far: The Jury Must Decide Whether A Reasonable Person Would Act Rashly Out of Passion, But Should *Not* Consider “How a Reasonable Person Would React in the Same Situation Knowing the Same Facts.”

¹²Again, bear in mind that *Wu* is a depublished case and, as such, is uncitable as authority. It is noted here for the soundness of its reasoning, and because the authority which it cites is, in turn, citable when a similar issue arises in your own cases.

Closely related is another key point, and a recent area of controversy: the question whether the objective test requires, or even permits, the factfinder to consider *what* a reasonable person would do in the defendant's situation. As laid out many times in this article, the proper and traditional articulation of this part of the test calls upon the factfinder to evaluate whether the provocation "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." (*Logan*, 175 Cal. at 49; *Breverman*, 19 Cal.4th at 163; *Moye*, 47 Cal.4th at 553.) CALJIC's standard instruction nicely parrots this well-settled language.

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 8.42.)

For reasons unknown, the drafters of CALCRIM inserted a new phrase into this settled formula, which led to all sorts of trouble.

In deciding whether the provocation was sufficient [to cause a person to act without due deliberation and reflection], 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.

(CALCRIM 570 (Thompson-West, Jan. 2006 ed.), p. 273, emphasis added.) The highlighted phrase was included with no statement by the drafters of the basis for its inclusion.

The mischief inherent in this inserted phrase began to surface very quickly. While I was reviewing murder records in several cases for the Greening Training Program, I began to notice that in one murder case after another in Santa Clara County, prosecutors were making similar types of arguments to undermine a heat of passion manslaughter defense. In Mr. N's case, the prosecutor asked the jury, rhetorically,

[I]s this the kind of thing that would make an ordinary person shoot somebody else?" . . . [I]s the fact that the victim owed the defendant and others money and had some kind of argument or loud voices . . . , is that enough to say, "Yeah, that's what I think an ordinary person would do. . . . They unload an entire clip of 9mm hollow point

bullets into somebody.” No, no, no, no. You’re not going to find that here. . . . It’s an ordinary person test. You decide whether the provocation is such that that’s the way you believe an ordinary person would have reacted like the defendant did.

In Mr. A’s case, with a much stronger heat of passion defense, the prosecutor took the same tack, arguing that the fact that defendant and his brother, while seatbelted in their car, had been attacked by four guys, with defendant struck with a full bottle, wasn’t sufficient provocation.

Would a reasonable person react the same way [defendant] did even if he was mad? Was it reasonable to shoot someone in the back because he was mad? And that’s what you have to decide and it’s really a simple decision.

* * *

That provocation does not have a response of shooting him in the back. [¶] For voluntary manslaughter you have to prove that a person of average disposition would have been enraged the same way and would have acted in the same way and here for the facts as detailed, you might have been mad if you were hit in the arm. You wouldn’t have shot [the victim] in the back. . . .

Analytically, there is something dramatically wrong with both the new phrase inserted into the CALCRIM instruction and the prosecutor’s arguments in the N and A cases. Of course the prosecutor’s comments in these two cases are legally erroneous and misconduct. “Reasonable persons” don’t kill other people. The law recognizes a killing as a “reasonable response” only in self-defense or defense of others, accident, and other very delimited situations. Heat of passion manslaughter has never been based on a societal belief that it is reasonable to kill based on provocation, however strong, but on the judgment that a person is less culpable for acts based on passion when a reasonable person would also act rashly in response to the same provocation. (See *People v. Hurtado*, 63 Cal. 288 at 292.)

Fortunately, one published case has squarely condemned this type of argument by a prosecutor. In *People v. Najera*, 138 Cal.App.4th 212 – a case discussed above for its unfavorable ruling that the facts did not really support a manslaughter instruction – the prosecutor focused on the manner in which defendant responded to provocation and argued that it would not cause an average person to kill, which the reviewing court found to be misconduct. “The focus [of a heat of passion defense] is on the provocation – the

surrounding circumstances – and whether it was sufficient to cause a reasonable person to act rashly. How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion.”(*Id.* at 223.)¹³

In Mr. A’s case, discussed above, panel attorney Danalynn Pritz was able to persuade the court both that the language of former CALCRIM 570 was an erroneous statement of the law and that the prosecutor had committed misconduct. Unfortunately, the panel who issued the reversal, authored by Justice Rushing, decided not to publish the opinion. However, the analysis is so sound and wise that I quote it here, with the usual proviso that it is included not as “authority” but for its helpfulness to our proper understanding of the issues.

Najera’s analysis of the prosecutor’s argument is sound. It simply reinforces the long-standing, qualitative standard for provocation – i.e., that it be sufficient to cause an ordinarily reasonable person to act from passion rather than judgment. [citations to *Hurtado*, *Logan*, and *Manriquez*] [¶] More importantly, the *Najera* analysis prevents this qualitative standard from being distorted by the quantitative notion that to reduce murder to voluntary manslaughter, provocation must reasonably trigger a certain heightened level of reactive conduct – i.e., lethal force. Such a notion is erroneous. What negates malice and thus reduces an unlawful killing in the heat of passion from murder to voluntary manslaughter is simply a state of mind obscured by passion. [citations] That passionate state of mind can be any violent, intense, high-wrought, or enthusiastic emotion, except revenge, including anger, rage, and fear of death or bodily harm. [citations] Thus, for the purpose of negating malice, 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.

(*People v. Alcaraz*, 2010 Cal. App. Unpub. LEXIS 272, *20-*21, citations omitted.)

Notably, the attorney general has filed a petition for review in *Alcaraz*, pointing to conflicting language in appellate opinions which seems to suggest that it is proper for a jury to consider whether lethal force is a reasonable response. In particular, the Government

¹³Fortunately, in the wake of *Najera*, CALCRIM deleted the offending phrase from its instruction, which now provides: “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 570 (2009).)

points to language in *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705, where the court concluded that there was “no evidence . . . from which the jury could have found provocation so serious that it would produce a lethal response in a reasonable person . . .”, and *People v. Superior Court (Henderson)* (1986) 178 Cal.App.3d 516, 524, fn. 4), where the court stated that heat of passion allows reduction of murder to manslaughter “only in those situations where the provocation would trigger a homicidal reaction in the mind of an ordinary person under the given facts and circumstances.” The simple response is that this is nothing but legally erroneous dicta in each opinion. *Henderson* involved a reversal of a magistrate’s determination that there was insufficient evidence to hold a defendant to answer for murder, and depended simply on a conclusion that there was substantial evidence to support the murder charge; and in *Fenenbock*, the court, in its other articulation of the heat of passion defense, properly explain that the question is “whether the circumstances were sufficient to arouse the passions of the ordinarily reasonable person.” (*Fenenbock*, at 1705.)

The kicker, of course, is that the jury must, to some extent, consider what a reasonable person in the defendant’s circumstances would do in order to determine whether they would act rashly. For example, if somebody, in the course of an argument called me a “dickhead,” I would probably be upset, but if I were a reasonable person, I would probably respond by ignoring the comment, asking the speaker not to address me with such an epithet, or, if I was ticked off enough, responding verbally in like manner. This would not be enough to cause a reasonable person to “act rashly and without deliberation and reflection, and from passion rather than from judgment.” As Justice Rushing explains in his unpublished opinion in *Alcaraz*, the required assessment of what a reasonable person would do in the same facts and circumstances is *qualitative*, not *quantitative*. The factfinder needs to decide whether the provocation would cause a reasonable person to cross the line from reasonable actions, even with emotion in the response, to unreasonable, rash, passionate responses.

Fortunately, CALCRIM 570 no longer has the offending language, so the instructional error issue won’t come up in cases tried after the revision. However, I have every reason to believe that prosecutors will continue to make the same type of arguments

as those made in *Najera* and the two cases discussed above. If *Najera* did not deter them, the revision to CALCRIM 570 won't either. The only thing that will stop them is prompt objections to such argument, with a request for the jury to be admonished that the argument is contrary to the law as laid out in the court's instructions.

Trial counsel handling a case with a heat of passion manslaughter defense, especially in Santa Clara County, would be well advised to seek an in limine order precluding the prosecutor from making this sort of argument to the jury. And appellate counsel reviewing records with this type of misconduct, whether objected to or not, should challenge it as misconduct and/or, where necessary, as ineffective assistance of counsel for failure to object to this misconduct.

F. Pillar Six: Heat of Passion Voluntary Manslaughter Applies to “Negate” Any form of Malice, Express or Implied.

We know all about the heat of passion defense to murder which results in “reduction” of the crime to voluntary manslaughter. Despite the fact that this does make it sound like a cooking recipe, it is virtually impossible to describe the “ingredients” of the crime of voluntary manslaughter. We know, by definition, that manslaughter is the “unlawful killing of a human being without malice aforethought . . .” (§ 192), and that voluntary manslaughter is such a killing “upon a sudden quarrel or heat of passion.” (§ 192, subd. (a).) Prior to *Mullaney*, proof of this crime required evidence from the defense proving a heat of passion on provocation, but that burden has since been shifted to the prosecution to prove the negative in order to obtain a murder conviction.

It used to be settled that voluntary manslaughter required, as an element, a specific intent to kill. (See *People v. Brubaker* (1959) 53 Cal.2d 37, 44.) In light of this requirement, it was frequently argued, if not recognized in case law, that an implied malice killing in the heat of passion had to be *involuntary* manslaughter. But in 1998 the Supreme Court granted review *expressly* to decide “whether the trial court had a sua sponte duty to instruct the jury that imperfect self-defense or provocation/heat of passion may reduce an implied malice murder to involuntary manslaughter . . .” (*People v. Lasko*, 98 Cal. Daily Op. Service 4452),

then concluded after review that voluntary manslaughter did not really include or require an intent to kill. In a pair of decisions, the Court held that voluntary manslaughter was a lesser included crime of murder regardless of whether the mental state element of the murder was express or implied malice. (*People v. Lasko*, 23 Cal.4th 101 [heat of passion] and *People v. Blakeley*, 23 Cal.4th 82 [imperfect self-defense].)

This did seem like bad news at the time, as involuntary manslaughter is a much less serious crime than voluntary manslaughter, as it is not a serious or violent felony, and carries a much lower range of punishments.

However, this should be seen that as good news in terms of making things clearer for juries in cases involving heat of passion and/or imperfect self-defense facts. It is common in murder prosecutions for the prosecutor to proceed on an either/or theory of implied or express malice. The task of instructing a jury on manslaughter as a lesser offense became much simpler in this situation after *Lasko* and *Blakely*.

The rump question, then, is what is voluntary manslaughter? The short answer, confusingly enough, is that it is an unlawful killing of a human being *with* malice aforethought, but where malice is “negated” by the prosecution’s failure to prove, beyond a reasonable doubt, the absence of heat of passion and/or imperfect self-defense.

So, when, in those rare circumstances, voluntary manslaughter is charged *on its own* after *Lasko* and *Blakely*, the jury is essentially given instructions that look exactly like murder instructions, i.e., requiring proof of a killing without lawful excuse or justification with either express or implied malice. (See CALCRIM 572 (Fall 2009 ed.)) Nothing is said about provocation, heat of passion, or imperfect self-defense, because there is no burden on the prosecution to prove this and because, by nature of the prosecutor’s charging decision, the inability to prove these facts are effectively assumed into the case. (See *People v. Rios* (2000) 23 Cal.4th 450, rejecting a defense contention that when voluntary manslaughter is charged on its own, the prosecution bears the burden of proving heat of passion or imperfect self-defense.)

III. The New Kid on the Block, Imperfect Self-Defense

I will not say much about the more recent, judge-made incarnation of voluntary manslaughter, imperfect self-defense. This variant is closely related to its better sibling, “perfect self-defense,” which is the subject of article and presentation by my colleagues Lori Quick and Vicki Firstman. I do want to make a couple of points.¹⁴

First, I want to briefly tie this form of manslaughter in with some of my comments under Pillar One regarding the impact of *Mullaney* on the law of murder and manslaughter. And second, I will briefly contrast the different sorts of evidence which come into play for imperfect self-defense which are anathema to heat of passion manslaughter.

A. ***Mullaney* and Imperfect Self-Defense**

Voluntary manslaughter based on imperfect self-defense was first given formal recognition in 1979, in *Flannel*, 25 Cal.3d 668. As this was eight years after *Mullaney* was decided, instructions on this variant always included language, mirroring both perfect self-defense and heat of passion manslaughter, that the prosecution bore the burden of proving the absence of imperfect self-defense beyond a reasonable doubt. (See CALJIC 8.50; CALCRIM 571.)

Because the burden is on the prosecution to prove this fact in order to obtain a conviction for murder, counsel should take the positions advanced herein with respect to heat of passion manslaughter, i.e., (1) seek to rewrite the controlling instruction so that it reflects that the burden is on the prosecution; (2) argue that error in failing to instruct on imperfect self-defense, or misinstruction on it, is federal constitutional error with respect to an element of murder, along the lines explained in Justice Kennard’s dissent in *Breverman*, requiring *Chapman* prejudice analysis; and (3) advance the proposition that the absence of imperfect self-defense is an element of murder which must be included in murder instructions when

¹⁴Preliminarily, I take for granted a point not settled until recently, that imperfect self-defense is not an “affirmative defense,” but is rather “a shorthand description of one form of voluntary manslaughter . . .”, and thus is subject to the rules for instruction on lesser included offenses in the same manner as heat of passion. (*People v. Barton*, 12 Cal.4th 186, 200-201, overruling *People v. Wickersham* (1982) 32 Cal. 3d 307, 329.)

there are facts supporting such an instruction. It is notable with respect to the final point that CALCRIM, at least, includes, as a third element within the definition of murder, that the defendant “killed without lawful excuse or justification.” (CALCRIM 520.) Thus the jury is told that the prosecution must prove the absence of *perfect* self-defense as an element of murder, but receives no such instruction as to the absence of *imperfect* self-defense, even though the government bears the same burden to disprove both in order to obtain a murder conviction.

B. The Two Forms of Voluntary Manslaughter Contrasted.

With the demise of diminished capacity, the defense lost the ability to include sympathetic evidence about a defendant’s intoxication, mental defects, or other impairments into manslaughter defenses with facts related to heat of passion. However, those factors arguably remain both admissible and significant in the realm of imperfect self-defense. For example, in *People v. Barton*, 12 Cal.4th at 202, the court recognized that imperfect self-defense could be predicated upon the mental state of a defendant whose judgment was “clouded by anger.” One appellate court has held that imperfect self-defense cannot be grounded on “delusion” caused by mental illness, while at the same time suggesting that evidence of mental illness may be relevant to imperfect self-defense insofar as it informs the defendant’s actual perceptions and beliefs about the need to defend against imminent peril. (*People v. Mejia-Lenares* (2006) 135 Cal.App.4th 1437, 1454-1455.)

A quick survey of case law has not led me to any authority which indicates evidence of intoxication or drug use is relevant to imperfect self-defense. However, it seems self-evident that if a defendant’s impairment from drug or alcohol use cause him to actually, but unreasonably, believe that his life is in danger, it would have to be considered as evidence negating malice under the doctrine of imperfect self-defense. In this regard, the jury is instructed in murder cases involving intoxication that they can consider evidence of the defendant’s voluntary intoxication in deciding whether the defendant had an intent to kill. (CALCRIM 625; see *People v. Saille* (1991) 54 Cal.3d 1103.)

If I am correct that intoxication is relevant and admissible with respect to imperfect

self-defense, a new problem arises from the Supreme Court's expansion of that defense in *People v. Blakeley*, 23 Cal.4th 82, to include crimes where murder culpability is based on implied malice. Following the Supreme Court's decision in *People v. Whitfield* (1994) 7 Cal.4th 437, 442–444 that intoxication evidence was admissible to negate the mental state of implied malice, the Legislature amended section 22, subdivision (b) to make it clear that evidence of voluntary intoxication is not admissible with respect to proof of the mental state required for implied malice. (See *People v. Wright* (2005) 35 Cal.4th 964, 985.) This creates the untenable situation that intoxication would be admissible to negate malice based on imperfect self-defense only if the prosecution's theory of the killing is express malice, but would be inadmissible as to implied malice. If such a rule is applied, it should be challenged under federal constitutional grounds as denying the defendant the right to present admissible and relevant evidence to negate proof of a required element of the prosecution's case. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 687, *Washington v. Texas* (1967) 388 U.S. 14.)

Finally, as the touchstone of imperfect self-defense is the actual but *unreasonable* belief in the need to defend against imminent peril, unique factors about the defendant's background and experiences which make him or her markedly different than the "ordinary men of average disposition" (*People v. Logan*, 175 Cal. at 49) – i.e., cultural background, gang affiliations, or a "cowardly temperament" – could very well be relevant with respect to proof of his *actual* belief in the need to defend.

IV. A Couple of Parting Crossover Salvoes.

I will close this too-lengthy discussion with a couple of short comments about closely-related non-manslaughter issues.

A. Is There Anything Left of Diminished Mental State Manslaughter? No.

Nearly three decades have passed since nonstatutory voluntary manslaughter based on diminished capacity was abolished by Proposition 8. What was left was a kind of phantom defense, known as "diminished actuality," which permits the defense to show that

because of intoxication and/or mental defects of the defendant, he did not (as opposed to “could not”) form an intent to kill. (*People v. Steele*, 27 Cal. 4th 1230, 1253.)

Unfortunately, the rump “diminished actuality” defense – a term which the Supreme Court has characterized as a “nonsensical phrase being judicial shorthand for the actual lack of a requisite mental state, due to an abnormal mental condition . . .” (*People v. Wright*, 35 Cal.4th at 978), allows only for an “all-or-nothing” choice of acquittal of murder, with no intermediate option of voluntary manslaughter. (*People v. Saille*, 54 Cal.3d 1103, 1113–1117; see CALCRIM 625.)

B. Is There a Defense of Imperfect Heat of Passion From Provocation Applicable to Premeditated Attempted Murder?

We all know by now that a killing in the heat of passion based on provocation that would *not* lead a reasonable person to act rashly does not negate malice and reduce the crime to voluntary manslaughter. But what is the effect of such a mental state on the greater crime of first degree murder based on premeditation and deliberation?

On request, juries are instructed that provocation is relevant to the question whether the crime is first degree or second degree murder. (CALCRIM 522; CALJIC 8.75.) The CALCRIM variant has the virtue of linking the instruction to those concerning provocation which reduce the crime to manslaughter, where the CALJIC form assumes that the jury has already rejected this part of the equation.

But neither instruction discusses a salient point, namely that the existence of heat of passion, even if unreasonably induced, is plainly inconsistent with the requirements for premeditated first degree murder. In this regard, the jury is expressly told that “[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated.” (CALCRIM 521) I am therefore tentatively putting forward the thesis that when first degree murder is charged on a theory of premeditation and deliberation, California law should recognize, akin to imperfect self-defense, a doctrine of “imperfect heat of passion from provocation,” as a complete defense to premeditated first degree murder.

This is not simply a matter of allowing the jury to consider evidence of provocation.

If, following the instructions on provocation, the jury concludes that the facts establish, or that the prosecution has failed to disprove, a killing from a rash impulse from provocation which would not cause a reasonable person to act rashly, they should be instructed that such a killing can only be second degree murder. Although this is a novel legal principle, it seems to flow directly from the combined authority of the doctrines of heat of passion and imperfect self-defense.

So, trial counsel and appellate counsel should go out there and turn my newly minted doctrine of imperfect heat of passion from provocation into a novel defense to premeditated first degree murder.

CONCLUSION

Although I have expended considerable ink (or toner, actually) on this topic, I fear I have only touched the surface of a subject of ancient lineage and ever-changing dimensions. My goal, as stated in the Introduction, was to both inform and rouse you, the trial and appellate defense practitioner, into the historic and evolving fields of contestation concerning the heat of passion manslaughter defense to murder, the success or failure of which has such enormous consequences for our clients. If I have succeeded in doing so in any small part, I will consider my labor as having been worthwhile.