FIRST DISTRICT APPELLATE PROJECT

APPELLATE REPRESENTATION TRAINING SEMINAR

APRIL 26, 2024

TURNING MURDER INTO MANSLAUGHTER THE SIX PILLARS OF THE HEAT OF PASSION MANSLAUGHTER DEFENSE AND OTHER ROUSING STORIES

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Turning Murder Into Manslaughter:

The Six Pillars of the Manslaughter Defense and Other Rousing Stories[1]

by William M. Robinson

Introduction

The goal of this article, as originally written, 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 review 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 as a defense to murder charges.

Encapsulated in shorthand, the thesis sounds a familiar refrain. The law of manslaughter has evolved over the centuries, and in 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

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[1] This article was originally written for SDAP's 2010 annual seminar. The previous revision, in 2013, included some much-needed editing, and updated the text based on two then-recent California Supreme Court decisions regarding manslaughter, *Bryant* and *Beltran*. In 2016, I did a separate "update" of both this article and my other homicide article, "Murder and Madness", for a CADC presentation about both articles.

The goal of this 2024 revision is to both to integrate the updates to the "Murder Manslaughter" article (and some of the Murder Madness materials) into this article, and do some catching up based on case law developments from the past eight years.

constant retrenchment that 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)[2] And until about a dozen or so years ago, with repeated denials of parole as an almost-given, any term with "life" in it promised 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)); personal use of a firearm – which for manslaughter, unlike murder, 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 years[3], which is light years better than the LWMCP term of any murder conviction, not to mention LWOP or the death penalty.

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. (See, e.g., *People v. Montes* (2003) 112 Cal.App.4th 1543, 1545.) 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

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[2]Statutory references are to the Penal Code unless otherwise specified.

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

made to remind the reader of the stakes involved in the often pitched-battle fight over manslaughter instructions, supporting evidence, arguments of counsel, and verdicts. At each 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.

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 getting reversals of murder convictions on appeal 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 formed, and will continue to form, focal points for legal controversies and appellate issues concerning the manslaughter defense based on heat of passion. Put into succinct form, here are the Six Pillars:

Pillar One: It's *Their* Burden, Not Ours. It is commonly said that "proof of provocation and heat of passion negates malice and reduces murder to manslaughter." But 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*, 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.) In fact, as I argue below, even this test may be too severe under *Mullaney*.

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 a male 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 person of "violent" or "cowardly" nature cannot set up their 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 efforts by prosecutors to argue otherwise, California law makes it clear that the factfinder should not be directed to consider *what type 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. (*People v. Beltran* (2013) 56 Cal.4th 935, 949-954.)

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. Wait, I get it – It Requires Malice, Express or Implied, But Missing an Element Negating Heat of Passion or Imperfect Self-Defense. Right? After decades of case law and jury instructions telling us that "intent to kill" was a necessary element of voluntary manslaughter, 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 [imperfect self-defense]; see also *People v. Bryant* (2013) 56 Cal.4th 959, 968-969.) 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 imperfect self-defense, discussing a couple of important concerns about instructions and evidentiary issues relating to this defense. I will then address a somewhat familiar form of *in*voluntary manslaughter, which very briefly appeared to morph into a previously unrecognized form of voluntary manslaughter (see *People v. Garcia* (2008) 162 Cal.App.4th 18, disapproved in *Bryant*, *supra*, 56 Cal.4th at 970), which was then re-recognized as involuntary manslaughter per Justice Kennard's concurrence in *Bryant*, *supra*, at 971-974, and cases following it, which looks very much like a form of involuntary manslaughter we thought we knew back when we all believed that voluntary manslaughter required an intent to kill.

I will then take a quick look at a pair of "crossover" issues concerning the two manslaughter defenses, followed by a somewhat extended discussion of the "diminished actuality defense," borrowed and updated from a different article I wrote and revised in light of *Bryant*. I will then close with a final comment on a hitherto unheralded defense

to first degree murder based on "imperfect heat of passion."

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

Like much of English history, the story here begins with Murder, Kings, and the Church.[4] 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, which 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 prepensed.'" (*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 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.[5]

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[4]I wrote this before I had read Hillary Mandel's remarkable *Wolf Hall* trilogy, which is all about the Crown, the Church, and various kinds of state-sanctioned murder, and which I highly recommend for some light reading.

[5]Michael 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.

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 division developing 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.)

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, had 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 of forming an intent to kill at the time the killing occurred. (*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 in 1982 when Proposition 8 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. (*Ibid*.)

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*, 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 two decades 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 altered this framework, holding that voluntary manslaughter based on heat of passion and imperfect defense was a lesser crime of murder if 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]. More recently, in *Bryant*, the Supreme Court

expressly recognized that voluntary manslaughter is not available as a defense where the theory of the case advanced by defendant is based directly on evidence directed at negating the element of malice, i.e., express malice intent to kill or the implied malice mental state of actual knowledge that his/her conduct endangered the life of the decedent combined with wanton disregard of the consequences of one's actions, rather than on the traditional manslaughter negation of malice via evidence of (or, more properly, prosecution failure to prove the absence of), heat of passion on provocation or imperfect self-defense. (*Bryant*, 56 Cal.4th at 964-970.)[6]

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) is well settled. 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.)

However, 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 commonly sanctioning such refusals, based on the corollary that instruction is not required when there is "insubstantial" evidence, i.e., some evidence

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[6] California law has consistently refused to recognize manslaughter in either of its incarnations as an available defense to felony murder, 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.)

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 Supreme Court's 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 now-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. As previously phrased, the instruction 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. Beltran*, 56 Cal.4th at 949-954, *People v. Najera* (2006) 138 Cal.App.4th 212, 223), *Beltran* rather strongly suggests that the jury is not 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.

After that rather lengthy introduction, I will now turn to the "Six Pillars," the 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 on actual legal rules and controversies, are of my own invention, such that I deserve blame 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 United States 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*, 421 U.S. 684.)

After a review of the historical roots of heat of passion manslaughter as a defense to murder (which I have 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*.) by 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 obviously correct 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.[7] Nothing about the instruction, aside from the final sentence, is framed in terms of the prosecution having

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[7]Here 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.

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 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."

Working together with some colleagues, I have come up with a proposed modified instruction which makes the prosecution's burden both central to the instruction and clear to the jury, and which also includes corrections of the current instruction with respect to a number of the other "Pillars" of voluntary manslaughter discussed in this article. Here it is:

CALCRIM 570, (Proposed Revision) :Voluntary Manslaughter: Heat of Passion—Lesser Included Offense (Pen. Code, § 192(a))

An unlawful killing is not murder, but is instead voluntary manslaughter, if the defendant killed someone because of a sudden quarrel or in the heat of passion.

The People have the burden of proving beyond a reasonable doubt that the defendant did not kill as a 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 and guilty of voluntary manslaughter.

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 their 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.

In order for the People to prove that the defendant committed murder instead of voluntary manslaughter, the People must prove that the defendant did not act because of a sudden quarrel or in the heat of passion by proving that they did not act under the direct and immediate influence of provocation as I will define it. While no specific type of provocation is required, slight or remote provocation might not negate malice. Sufficient provocation may occur over a short or a long period of time.

The provocation leading a person to act because of a sudden quarrel or in the heat of passion may be physical or verbal. Words alone may be sufficiently provocative to cause an ordinary person to act rashly or without due deliberation and reflection.

In deciding whether the People have proved beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion, you should not ask whether an ordinary person would have killed in the same situation. Instead, the question is whether an ordinary person would have acted rashly or without due deliberation. In other words, provocation is sufficient if it would cause a person of average disposition in the same situation, knowing the same facts, to react from passion rather than judgment.

If the People have not proven beyond a reasonable doubt that the defendant was not actually provoked, the People may still meet their burden by proving beyond a reasonable doubt that the provocation was insufficient. Before finding the defendant guilty of murder, you must decide whether the People have proved that the provocation was only slight or remote. In making this decision, consider whether a person of average disposition, in the same situation, and knowing the same facts as the defendant, would have reacted from passion rather than from judgment.

If the People have proven beyond a reasonable doubt that enough time has passed between the provocation and killing for a person of average disposition to "cool off" and regain their clear reasoning and judgment, then the killing was not the

result of heat of passion and is murder, not manslaughter.

However, it is the People's burden to prove beyond a reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If you have reasonable doubt whether the People have met this burden, you must find the defendant not guilty of murder and guilty of voluntary manslaughter.

This proposed amendment to CALCRIM 570 is admittedly a work in progress. However, in light of the recent decision in *Schuller* – discussed below – which makes it clear beyond dispute that it is the prosecution's burden to prove the absence of heat of passion from provocation, which concerns proof of the malice element of the crime of murder, this proposal can hopefully be a starting point for a long-overdue revision of this critically important CALCRIM instruction.

Unless and until CALCRIM revises the pattern instruction, it will remain an uphill battle for appellate counsel to challenge the current instruction as contrary to *Mullaney*, trial counsel seeking instructions on heat of passion manslaughter should strongly advocate for instructions, along the lines of the one suggested above, as properly reflecting a proper allocation of the burden under *Mullaney*, as well as the other important legal principles discussed in this article. In this regard, it is well settled that a trial court is not limited to pattern instructions, but must instruct, on request, on principles of law which are correct but not included in pattern instructions. (See *People v. Vargas* (1988) 204 Cal.App.3d 1455, 1464: "Although the CALJIC pattern instructions perform an invaluable service to the bench and bar, that those instructions are not sacrosanct is apparent from their treatment by the appellate courts.") When such requests are made but denied – which is the likely result – appellate counsel is in a much better position to argue error in failing to give the requested instruction than he or she would be if the claim was a failure to give such an instruction sua sponte. (See, e.g., *People v. Hughes* (2002) 27 Cal.4th 287, 361 [defendant is entitled upon request to an instruction that accurately states the law and pinpoints the theory of defense].)

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

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.[8] 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.[9] (*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)[10]

That sad story was the original framing piece of this portion of the article, with a stirring call to battle to get our Supreme Court to hold that the *Chapman* standard applies. Although it took 23 years, that goal has now been accomplished. In *People v. Schuller* (2023) 15 Cal.5th 237, the Supreme Court squarely held that the failure to instruct on imperfect self-defense voluntary manslaughter is federal constitutional error because it "precludes the jury from making a finding on a factual issue that is necessary to establish the element of malice . . .," which is triggered in this situation because "[w]hen imperfect self-defense is at issue, the malice element of murder requires the People to show the absence of that circumstance beyond a reasonable doubt." (*Id*., at pp. 243-244.)

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[8] *People v. Watson* (1956) 46 Cal.2d 818.

[9] *Chapman v. California* (1967) 386 U.S. 18.

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

A careful review of the opinion in *Schuller* indicates that it does not quite hold that "absence of imperfect self-defense" is an element of murder, but relies on the thesis that an instruction which has "an incomplete or misleading description of what is necessary to establish an element of an offense . . ." is also subject to *Chapman* review. (*Schuller*, *supra*, at p. 921-922, citing *People v. Hendrix* (2022) 13 Cal.5th 933, 942.) *Schuller* holds that *Chapman* review applies on a failure to instruct on imperfect self-defense because

> when imperfect self-defense is at issue, the prosecution cannot establish malice without proving the absence of that circumstance beyond a reasonable doubt. Because of that requirement, without an instruction on imperfect self-defense, the jury is left unable to properly evaluate whether the prosecution has sustained its burden to prove malice. More specifically, the jury is left unaware that even if the prosecution has proven that the defendant intended to kill — a circumstance that generally demonstrates express malice — the jury cannot find malice if it has a reasonable doubt whether the defendant killed in imperfect self-defense. Thus, the failure to instruct on that issue rendered the description of malice —which is unquestionably an element of murder — incomplete.

(*Schuller*, *supra*, at p. 921.)

This new development was long overdue, as evidenced, as recently as 10 years ago, when the Court in *Beltran* applied *Watson* without a peep of protest from Justice Kennard. (See *Beltran*, 56 Cal.4th at 955-956.) The issue had been kept alive by a favorable opinion from Division Three of the First District in *People v. Thomas* (2013) 218 Cal.App.4th 630, which squarely held that the failure to instruct on heat of passion manslaughter was federal constitutional error, following the identical reasoning eventually adopted by the Supreme Court in *Schuller.*

I note that while *Schuller* involved the manslaughter defense based on imperfect self-defense, its reasoning applies with equal force to heat of passion manslaughter. (See, e.g., *Thomas*, *supra.*)

I hasten to add that there is a while *Schuler* resolves this question in state 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 a failure to instruct, or 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 arguably recognized by the U.S. Supreme Court and certainly recognized by the Ninth Circuit and its district courts, as a proper basis for federal habeas corpus relief. (See *Mathews v. United States* (1988) 485 U.S. 58, 63-64 [recognizing due process right to instruction on inconsistent defenses shown by the evidence]; *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 may not win for you in state court, but it will raise and preserve a federal constitutional claim which could get your client federal habeas relief.

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* [(2005)] 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.)

I would be remiss in not indicating that efforts to raise this point have so far met with unfavorable results in unpublished opinions. We have lost when arguing that such a modification is required sua sponte, with courts holding that the concept is covered by current instructions. Here too, a request by trial counsel that proof of absence of heat of passion be included as an element of the murder charge, even where denied, would put appellate counsel in a better position to argue error in the failure to give correct requested instructions.

However, *Schuller* now provides defense advocates with a golden opportunity to urge a reformulation of the manslaughter instruction to emphasize that the absence of heat of passion based on provocation (or the absence of imperfect self-defense) is an element of murder, and to ask for amended instructions – like the one suggested above – which correctly set forth this principle.

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 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 in *Moye*, 47 Cal.4th 537, where defendant's testimony showed that, on the day prior to the killing, he 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.)[11]

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 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

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[11]Although 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.

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 hearkens 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 sea change in the law after *Mullaney* – and now *Schuller*. 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 as follows:

> **Instruction on heat of passion voluntary manslaughter is required if the record includes evidence deserving of consideration which could provide any juror with reasonable doubt 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 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 meaningful possibility that any 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 or 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 "[]sufficient 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 argument could be made that the answer should have been "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. Of course, this contention can and should be federalized by citation to *Mullaney* and the Due Process Clause of the Fourteenth Amendment.

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, including "mere words" 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. Up until recently, CALCRIM cited 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*, cited, 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. Fortunately, the reference to *Dixon* no longer appears in CALCRIM No. 570, having been replaced by the correct and more evenhanded note, citing *Valentine* and *People v. Lee* (1999) 20 Cal.4th 47, 59, that "[t]he provocative conduct by the victim may be physical or verbal, but the conduct must be sufficiently provocative that it would cause an ordinary person of average disposition to act rashly or without due deliberation and reflection." (CALCRIM No. 570, Nov. 2023 Update, "Related Issues.")

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 "gatekeeper" 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 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 an irresistible 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 that 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?[12] Is this like walking in

[12] More on this under Pillar Five, *Najera* and *Beltran*.

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," given the right background, circumstances, gestures, knowledge, and history between the players, it could be the type of conduct that would 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 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. Even with the Supreme Court now agreeing that *Chapman* applies in this situation. we still face an uphill battle to persuade an appellate court that the failure to give manslaughter instructions is not harmless. 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., are 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, and gave rise to a solid chance 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 defendant's 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? Under the current CALCRIM instruction, the jury must 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 from judgment." (CALCRIM 570.) But case law recognizes that the "objective, "reasonable person" test is applied by inserting the hypothetical average fellow into the particular circumstances of a 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 person" standard 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.[13]

> 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

[13]See, e.g., *Valentine*, 28 Cal.2d at 128, *Manriquez*, 37 Cal. 4th 547, 584, *People v. Steele* (2002) 27 Cal.4th 1230, 1253, and *Beltran*, 56 Cal.4th at 947-951.

> these proper admonitions from the court. For the fundamental of the inquiry is whether or not the defendant's reason was, at the time of his act, so disturbed or obscured by some passion – not necessarily fear and never, of course, the passion for revenge – to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.

(*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 the appellate court determining whether there was 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 person 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 fact finder 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* should carry 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 would be 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 experienced repeated humiliation and brutalization in the past from the person doing the taunting, and who had experienced taunting that was followed by violent behavior.

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.)

A recent case, though again focused on perfect self-defense, and not heat of passion manslaughter, illustrates how this should work. In *People v. Sotelo-Urena* (2016) 4 Cal.App.5th 732, the First District, relying on *Humphrey*, concluded that expert

testimony concerning the psychological trauma associated with chronic homelessness was relevant to the objective prong of a self-defense claim. "[E]xpert testimony explaining why a chronically homeless individual would experience a heightened fear of aggression would assist a jury in weighing the reasonableness of defendant's belief of imminent harm, as was central to defendant's self-defense claim." (*Id*., at p. 751.) In a case in which the defendant had been previously assaulted, and reasonably (though incorrectly) believed that the murder victim was his assailant, the "heightened sensitivity to violence experienced by the chronic homeless . . .", the court in *Sotelo-Urena* reasoned, could lead the jury to conclude "that defendant was 'justified in acting more quickly and taking harsher measures for [his] own protection in event of assault . . .' as compared to a person who did not experience chronic homelessness. (*Ibid*.) "Paraphrasing the *Humphrey* court, '"Evidence of [chronic homelessness] not only explains how a [chronically homeless individual] might think, react, or behave, it places the behavior in an understandable light."'" (*Sotelo-Urena*, at p. 751.)

Although there is not much, if any, favorable case law putting this case law from perfect self-defense into the context of heat of passion manslaughter, in one of my former staff cases, I was able to argue that my client's well-documented PTSD was a factor to consider with respect to determining whether the conduct of the murder victim would have been provocative to a reasonable person in my client's situation. It helped that this particular victim had previously stabbed my client's brother, an incident which was significant to the client's PTSD, allowing me to argue that "the evidence of [my client's] PTSD mental disorder was admissible at his trial as bearing on the jury's critical determination whether a reasonable person, in [the client's] shoes – i.e., with his history and life experiences of traumatic events, including prior encounters with [the victim] – could have, in the colloquial phrasing adopted by the prosecutor in his argument to the jury (22RT 6410), "lost it" when he surprisingly saw [the victim] that night, and acted rashly, out of passion, and not reason, when he angrily confronted, pursued, and stabbed

[the victim]."[14]

3. Gang Members and Other Cultural Differences.

a. Gangs? Maybe. . . .

What if your client is a long-time gang member, instead of a person with PTSD? Obviously, under *Humphrey* and the traditional articulation of the reasonable person test, the Supreme Court made it expressly clear that the standard is not the "reasonable gang-banger." (*Humphrey*, *supra*, 13 Cal.4th at p. 1087.) Yet, under the reasoning of *Humphrey* and the test for heat of passion described in *Logan* and its progeny, it *should* matter that your client, for example, has experienced violence at the hands of an enemy faction, such that taunts, gestures, and provocative 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 culture 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. (*Id*., at 854.)

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.)

b. Cultural Differences? More Promising. . . .

Leaving aside the gang subculture, where favorable case law may be hard to come

[14]My briefing from this case is available upon request.

by, a more hopeful set of 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, at W's trial, a cultural expert testified that one's identity in Ethiopia is based in family, not in the individual, and a demonstrative insult like spitting, when made by a family member, is the equivalent of a declaration of war on the entire family unit, including 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 set of life 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 a 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 manslaughter 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.)[15]

The best extant authority 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

[15]Again, bear in mind that *Wu* is a depublished case and, as such, is uncitable as authority. It is discussed 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.

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 minimus statute. (*Id*., at 83; see Wanderer and Connors, "Culture and Crime: Kargar and the Existing Framework for a Cultural Defense," (1999) 47 Buffalo L. Rev. 829, 833-836.)

Kargar very strongly stands for the proposition at issue here, 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."

Closely related is another key point, a former area of controversy which, despite favorable rulings, continues to recur: 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, in the early 2000s, 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 an appellate counsel training program on homicide law, I began to notice, in one murder case after another in Santa Clara County, that prosecutors were making similar insidious and improper 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 phrase inserted into the CALCRIM instruction and the prosecutor's arguments in the N and A cases. Put plainly, the prosecutor's comments in these two cases are legally erroneous and thus misconduct. A "reasonable person" does not kill another person. 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 act rashly in response to the same provocation. (See *People v. Hurtado*, 63 Cal. 288 at 292.)

Fortunately, an earlier Court of Appeal decision 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.)

Even more helpfully, in *Beltran*, *supra*, 56 Cal.4th 935, the Supreme Court joined the chorus condemning this type of argument as improper, although in not an entirely

helpful manner. Disagreeing with the contention that the prior version of CALCRIM 570 cited above was improper, the Court reaffirmed the core holding in *Najera* that the prosecution committed misconduct and misstated the law by arguing the jury should reject manslaughter because a reasonable person in defendant's situation would not kill, and expressly rejected the Attorney General's effort to endorse the principle that a heat of passion defense would only arise if a reasonable person would become homicidal, hearkening back to the formulation of the heat of passion test by the Supreme Court in *Logan*, 175 Cal. 45. (*Id*., at 946-954.)

> Adopting a standard requiring such provocation that the ordinary person of average disposition would be moved to kill focuses on the wrong thing. The proper focus is placed on the defendant's state of mind, not on his particular act. To be adequate, the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection. To satisfy *Logan*, the anger or other passion must be so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene. Framed another way, provocation is not evaluated by whether the average person would act in a certain way: to kill. Instead, the question is whether the average person would react in a certain way: with his reason and judgment obscured.

(*Beltran*, *supra*, at p. 949.)

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, a principal recognized in Justice Corrigan's opinion in *Beltran*. 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, by 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 *Beltran* explains, 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. (*Id*., at p. 949.) But it most certainly does not permit consideration of whether a reasonable person would kill, a question whose answer will invariably be "no" in the realm of provocation and heat of passion.

Fortunately, CALCRIM 570 no longer has the offending language, and it was not reinserted after being upheld by the Court in *Beltran*.[16] Thus, the instructional error issue is not likely to arise for cases tried after the revision. However, I can honestly report that even after *Najera*, *Beltran*, and the revision to CALCRIM 570, prosecutors continue to make the same type of arguments as those made in *Najera*, *Beltran*, and the two cases discussed above.

While the holding in *Beltran* will provide some help, the best way to stop them is by promptly objecting to such argument. Given the proclivity of prosecutors to continue to make this type of improper argument – a circumstance suggesting it is part of the curriculum in their training programs – I was heartened to see that some defense counsel handling a case with a heat of passion manslaughter defense sought a pretrial in limine order precluding the prosecutor from making this sort of argument to the jury, and urge all counsel to do so in a case involving a heat of passion defense. 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

[16]After *Najera* was decided, 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 (2023).)

"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. The homicide statutes make it clear 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 heat of passion from provocation, but that burden has since been shifted to the prosecution to prove the absence of this in order to obtain a murder conviction.

It was once seemingly 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 underlying 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 because it is not a serious or violent felony, and carries a much lower range of punishments. In the long run, though, this was probably good news because it made 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.[17] 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 2023 ed.).) Nothing is said about provocation, heat of passion, or imperfect self-defense, because there is no burden on the prosecution to prove their absence or upon the defense to prove their presence and because, by nature of the prosecutor's charging decision, the inability to negate these facts is effectively assumed into the case. (See *People v. Rios*, *supra*, 23 Cal.4th at 463-464, [rejecting 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 Kids on the Block: Imperfect Self-Defense and Involuntary Manslaughter Based on a Killing Committed Without Malice During the Course of an Inherently Dangerous Assaultive Felony.

We will now leave the ancient and evolving terrain of heat of passion manslaughter, and turn to two other forms of manslaughter: the more recent, judge-made incarnation of voluntary manslaughter, imperfect self-defense; and a variant of involuntary manslaughter we knew from cases like *People v. Cameron* (1994) 30 Cal.App.4th 591, which was briefly elevated to voluntary manslaughter in *Garcia*, 162 Cal.App.4th 18, but has now seemingly been demoted back to involuntary manslaughter

[17]I wrote the preceding sentence before the Supreme Court's holding in *Bryant* which, surprisingly enough, says virtually the same thing. "A defendant commits voluntary manslaughter when a homicide that is committed either with the intent to kill or with conscious disregard for life – and therefore would normally constitute murder – is nevertheless reduced or mitigated to manslaughter." (*Bryant*, 56 Cal.4th at 968.)

– and reasonably so – by the Supreme court in *Bryant* and subsequent cases following *Bryant*.

Looking first to imperfect self-defense, I will first tie this form of manslaughter defense into the discussion above under Pillar One regarding the impact of *Mullaney* on the law of murder and manslaughter. Second, I will briefly discuss the admissibility of two critical categories of evidence – intoxication, and mental disorders – and how they fit into for imperfect self-defense.

I will then describe the rise and fall of the short-lived *Garcia* variant of voluntary manslaughter, which we now know, after *Bryant*, was actually an under-recognized form of involuntary manslaughter discussed in cases like *Cameron*.

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*, instructions on this variant always included language, mirroring both perfect self-defense and heat of passion manslaughter, requiring the prosecutor to prove 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 absence-of-fact in order to obtain a conviction for murder, counsel can and should advance the contentions suggested in this article with respect to heat of passion manslaughter, i.e., (1) seek to rewrite the controlling instruction so that it reflects throughout – and not just in a single sentence buried at the end of the instruction – 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, as now mandated by the Supreme Court's holding in *Schuller*, 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 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. Given the close relationship between perfect and imperfect self-defense, and the likelihood that both defenses will be presented in the same case, a strong argument can be made the burden to prove absence of imperfect self-defense, like perfect self-defense, should be included as an element of a murder charge where there is evidence giving rise to such a defense.

B. Imperfect Self-Defense, Intoxication and Mental Disorder Evidence.

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 a manslaughter defense. While they plainly do not apply to heat of passion manslaughter – though perhaps with the PTSD examples suggested above as an exception – there remained a recently controversial question whether these factors are admissible and significant with respet to imperfect self-defense manslaughter. There is some admixture between these defenses. 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." However, as to intoxication and mental disorder evidence – both an area of contestation when I originally wrote this article – recent case law is largely unfavorable, albeit with one helpful exception.

1. Intoxication Evidence: the Unfavorable *Soto* Decision.

Our Supreme Court recently reversed a favorable ruling by the Sixth District as to this issue, concluding, in *People v. Soto* (2018) 4 Cal.5th 968, that evidence of voluntary intoxication cannot be used to support a claim of lack of express malice based on an unreasonable belief in the need to act in self defense. Respectfully, the opinion on this point, authored by Justice Chin, is not particularly well reasoned. Boiled down to its essence, it relies on the Legislature's amendment of former section 22 (now section 29.4),

to preclude admission of intoxication evidence to negate implied malice, which was passed in response to the majority opinion in *People v. Whitfield* (1994) 7 Cal.4th 437. *Whitfield* held that the pre-amendment version of former section 22 did not preclude admission of intoxication evidence to negate implied malice. Under the reasoning of *Whitfield*, the same rule should plainly apply to imperfect self-defense. If a defendant's impairment from drug or alcohol use caused him to actually, but unreasonably, believe that his life was in danger, intoxication evidence should be admissible to negate malice under the doctrine of imperfect self-defense.

However, basing its conclusion on the amendment to current section 29.4, which precluded admission of intoxication evidence as to implied malice, the majority in *Soto* concluded, the same rule carried over to imperfect self-defense. That law, as amended, only allows intoxication evidence to be admitted to prove a "specific intent." Accepting a very literal definition of "specific intent", the majority concluded that imperfect self-defense is akin to implied malice, in that neither mental state involves any "additional consequence" (e.g., intent to kill, or to steal) characteristic of a specific intent, for which intoxication evidence is admissible. (*Soto*, *supra*, at pp. 795-796.)

Justice Liu's concurrence and dissent, joined by one member of the court sitting pro tem., is a template for challenging this decision in *Soto*. Boiled down to its essence, the concurrence demonstrates that the text of section 29.4 makes evidence of voluntary intoxication admissible on the issue of whether a defendant charged with murder 'harbored express malice aforethought' and sets forth no exceptions . . ."; since imperfect self-defense involves a mental state – an actual but unreasonable belief in the need to defend against imminent peril – which negates express malice, the concurrence correctly argues that intoxication evidence must be admissible as to imperfect self-defense at least in those situations where the charge of murder is based on express malice. (*Soto*, *supra*, 4 Cal.5th at pp. 983-985, conc. opn. of Liu, J.) Thus, at least in cases where murder is premised upon express malice, we should be advancing the view that *Soto* was wrongly decided and should be reconsidered.

Of course, if this is correct, there will be a problem where murder culpability is based on implied malice where, following the post-*Whitfield* amendment, voluntary intoxication is not admissible. (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 in admissible as to implied malice. But we'll cross that bridge if we get to it. For now, *Soto* completely precludes admission of intoxication evidence as to imperfect self-defense.

2. Imperfect Self-Defense and Mental Disorders: a Split Decision.

Turning to the admissibility of mental disorder evidence in the context of a claim of imperfect self-defense, the news is somewhat better. In my original "Murder-Madness" article, I railed about the opinion in *People v. Mejia-Lenares* (2006) 135 Cal. App.4th 1437, which held that imperfect self-defense was not available as a defense where the actual-but-unreasonable belief in the need to defend against imminent peril was based on delusions of a mentally ill person. (See "Murder-Madness", pp. 25-28.) When review was granted to address this issue, I was hopeful, but my hopes were dashed by the opinion in *People v. Elmore* (2014) 59 Cal.4th 21.

Essentially, the holding in *Elmore* is that the only defense available based on delusion is an insanity defense, and that imperfect self-defense, which is, in essence, a "mistake of fact" defense, requires some plausible, non-delusional basis in reality for the actual-but-unreasonable belief.

> The question here is whether the doctrine of unreasonable self-defense is available when belief in the need to defend oneself is entirely delusional. We conclude it is not. No state, it appears, recognizes "delusional self-defense" as a theory of manslaughter. We have noted that unreasonable self-defense involves a mistake of fact. (*In re Christian S.* (1994) 7 Cal.4th 768, 779, fn. 3.) A purely delusional belief in the need to act in self-defense may be raised as a defense, but that defense is insanity. Under our statutory scheme, a claim of insanity is reserved for a separate phase of trial. At a trial on the question of guilt, the defendant may not claim unreasonable self-defense based on insane delusion.

(*Elmore*, *supra*, 59 Cal.4th at p. 130.)

The good news from *Elmore* is that it affirms a key point suggested in my earlier version of this article, namely that "[a]ll relevant evidence of mental states *short of insanity* is admissible at the guilt phase under section 28(a), including evidence bearing on unreasonable self-defense, as in *Mills* and *Wells*." (*Id.*, at p. 146, quoting *People v. Mills* (2012) 55 Cal.4th 663, 678, and *People v. Wells* (1949) 33 Cal.2d 330, 346.) Which takes us to some good news.

In *People v. Ocegueda* (2016) 247 Cal.App.4th 1393, a post-*Elmore* case, the Sixth District held squarely that mental disorder evidence is admissible as to imperfect self-defense. Plainly, as suggested by the Supreme Court in *Elmore*, the exclusion of "pure delusion" as a basis for imperfect self-defense does not preclude the application of this defense to situations where an unreasonable mistake of fact is based *in part* on a defendant's mental deficiencies, but has some discernible connection to reality. In *Ocegueda* the defendant saw the victim holding a metal stick which he believed to be gun. Evidence about his mental deficiencies was presented to the jury, and arguably was relevant to the jury deciding whether he had an actual, but unreasonable belief that he was in danger from the perceived gun. But "the trial court instructed the jury it could consider evidence of defendant's mental disabilities 'only for the limited purpose' of deciding whether defendant harbored the 'intent to kill.'" (*Id*., at p. 1407.) This was error, Justice Marquez's opinion held.

> [T]here is no reasonable likelihood the jury understood the given instructions to mean it could consider defendant's mental disabilities in assessing his belief in the need for self-defense. While the court instructed the jury to consider "circumstances as they were known and appeared" to the defendant, this did not allow the jury to consider whether his perceptual or sensory processing disabilities made it more likely that self-defense would appear to be necessary to him.
> By contrast, the erroneous instruction explicitly limited the jury's consideration of mental disabilities to the issue of whether he intended to kill. The court's instruction was therefore erroneous.

(*Ocegueda*., at 1408-1409.)

Although this error was found harmless under the *Watson* standard – a framework which, after *Schuller* was arguably incorrect – this is a highly favorable ruling that permits evidence of mental disorder, short of delusions, to be admitted as to a claim of imperfect self-defense. The holding in *Ocegueda* makes it clear that the bad news from *Elmore* applies only to a belief in the need to defend based on pure delusion, but not to an actual, but objectively reasonable belief that one is in danger based on some piece of reality colored by a mental disorder. Thus, the hypothetical advanced in my original article – a man who suffered from severe PTSD who sees another person holding a flashlight in a dimly lit place and jumps to the conclusion, in part based on his mental condition and/or intoxication, that it is a gun being pointed at him – would have available to him a manslaughter defense based on his actual but unreasonable belief in the need to defend against the perceived threat to his life.

C. Implied Malice Absent Proof of the Knowledge Element: the Short Life of *Garcia* Voluntary Manslaughter, Which Under *Bryant*, We Now Know (Again) Can Only Be Involuntary Manslaughter.

For a short time, which happened to coincide with the original version of this article, there was some hope that a new variety of voluntary manslaughter would be recognized in implied malice cases, based on the holding of the court in *People v. Garcia*, 162 Cal.App.4th 18. This new, nonstatutory variety of manslaughter was said to arise in the following situation: (1) a non-intentional killing during an inherently dangerous assaultive felony which merges under the *Ireland* rule (*People v. Ireland* (1969) 70 Cal.2d 522), and is thus not subject to the second degree felony murder rule, which is (2) committed without malice aforethought because of a failure to prove that defendant had the required mental state for implied malice, i.e., actual knowledge that his/her conduct endangered the life of the decedent. (See *Garcia*, *supra*, 162 Cal.App.4th at p. 30.)

This is not really a new variety of manslaughter. At least one earlier decision held that this had to be *involuntary* manslaughter, since the "intent to kill" required for voluntary manslaughter was demonstrably absent. (See *People v. Cameron*, 30 Cal.App.4th 591, 604; see also *People v. Burroughs* (1984) 33 Cal.3d 804, 833-836.)

However, as discussed in Pillar Six, after *Blakely* and *Lasko*, we supposedly now know this is no longer true, or was never true, so it can, and should be, according to the Court of Appeal in *Garcia*, voluntary manslaughter. Right?

Wrong, said the California Supreme Court in *People v. Bryant*, *supra*, 56 Cal.4th 959, reversing a Court of Appeal decision which, adopting the holding in *Garcia*, found reversible error in the failure to instruct on voluntary manslaughter in this situation. The core of the holding in *Bryant* is illustrative of a principle discussed below, namely, the notion that the peculiar crime of voluntary manslaughter actually has the *same elements* as murder, i.e., the killing of a human being with either express or implied malice, but is "reduced to manslaughter" as a result of the " circumstances" of heat of passion or imperfect self-defense. (*Bryant*, *supra*, at 968-970.) But in cases like *Bryant*, the defense is predicated upon negating, not the absence of heat of passion or the absence of imperfect self-defense, but of proof of intent to kill or conscious disregard for life. If the defense negates either of these required elements of *both* murder *and* voluntary manslaughter, the killing cannot be voluntary manslaughter. (*Id*., at 970.)

The majority in *Bryant* declined to address the defendant's "alternative contention that, because assault with a deadly weapon is not an inherently dangerous felony, the trial court erred in failing to instruct the jury on the theory of involuntary manslaughter recognized in [(*People v. Burroughs*, *supra*, 35 Cal.3d 824]", noting that it was not within the scope of the review grant, and sent the case back to the Court of Appeal to address this issue. (*Bryant*, *supra*, at 970-971.)

However, in yet another superb separate opinion, this time in the form of a concurrence, Justice Kennard addressed this issue, concluding that an unlawful killing during a merged felony offense, such as an assault with a deadly weapon, which is committed without express or implied malice, is necessarily involuntary manslaughter. Yet again, Justice Kennard's separate opinion is a recipe for our briefs on this subject.

To make a long and complex evaluation of statutory history and language short, Justice Kennard wisely concluded that the phrase "not amounting to a felony . . ." in the definition of involuntary manslaughter in section 192, subdivision (b) does not signify, as

has been previously assumed, that involuntary manslaughter is not available as a defense unless a killing occurs in the course of the commission of a misdemeanor. Rather, it is a somewhat inelegant way of distinguishing the situation from the typical *felony* murder, i.e., where a killing occurs during the course of *specified* felonies, which is murder, not manslaughter. (*Bryant*, *supra*, at 972-974.) Turning to the facts of *Bryant*, Justice Kennard concluded that because there was "evidence form which the jury could have reasonably concluded that that defendant lacked malice, but killed while committing an assault with a deadly weapon . . ." instruction on involuntary manslaughter would have been proper. (*Id*., at p. 975.)

In my view, Justice Kennard's opinion provides a template for arguing that instruction on involuntary manslaughter is compelled, at least on request, where there is a killing in the course of an assaultive crime – e.g., assault with a deadly weapon, shooting at an inhabited vehicle, discharge of a firearm with gross negligence, etc. – and there is evidence from which the jury could have reasonable doubt as to the proof of express or implied malice.

We need only note Justice Kennard's further caveat, that such an instruction was not required sua sponte in the *Bryant* case itself, as there was no request and the legal principle on which such instruction was based was "so obfuscated by infrequent reference and inadequate elucidation" that it could not be considered a general principle of law" which required sua sponte instruction. (*Id*., at p. 975, opin. of Kennard, J., conc., citing *People v. Flannel*, 25 Cal.3d at 681.) Since Justice Kennard has now, for our purposes, elucidated the basis for such an instruction in a crystal clear manner, it can now be argued that instruction is required sua sponte on the lesser included offense of involuntary manslaughter. Still, it behooves trial counsel to make the request for such an instruction in these circumstances, so as to avoid the unresolved question as to whether instruction is required sua sponte.

There was some mixed news which came in the wake of *Bryant*. The bad news is that on remand in the *Bryant* case, the Court of Appeal rejected the defendant's contention that there was a sua sponte duty to instruct on this theory of involuntary

manslaughter, following Justice Kennard's suggestion that the state of the law was too unsettled for the court to have been required to instruct on its own motion. (*People v. Bryant* (2013) 222 Cal.App.4th 1196, citing, e.g., *Flannel*, *supra*, 25 Cal.3d at p. 681.)

The good news is that, in light of the holding in *Bryant*, the court in *People v. Brothers* (2015) 236 Cal.App.4th 24 held that courts *now* have a sua sponte duty to instruct on this form of involuntary manslaughter, rejecting the AG's argument that this is not so because the majority in *Bryant* did not reach this issue and Justice Kennard's concurring opinion is not controlling.

> The Attorney General is technically correct on both counts. However, if an unlawful killing in the course of an inherently dangerous assaultive felony without malice must be manslaughter (*People v. Hansen* (1994) 9 Cal.4th 300, 312) and the offense is not voluntary manslaughter (*Bryant, supra*, 56 Cal.4th at p. 970), the necessary implication of the majority's decision in *Bryant* is that the offense is involuntary manslaughter. Accordingly, an instruction on involuntary manslaughter as a lesser included offense must be given when a rational jury could entertain a reasonable doubt that an unlawful killing was accomplished with implied malice during the course of an inherently dangerous assaultive felony.

(*Brothers*, *supra*, 236 Cal.App.4th at pp. 33-34.)

Brothers then repeats the old saw, which we must challenge – see Pillar No. Two above – that it is simply not good enough for there to be "any evidence, no matter how weak," in support of such an instruction, holding that there must be 'substantial evidence' from which a rational jury could conclude" the defendant committed the lesser, but not the greater, offense. (*Id*., at pp. 33-34, citing *People v. DePriest* (2007) 42 Cal.4th 1, 50.) The court then went on to hold there was no such duty on the facts of that case, as there was not substantial evidence to support such an instruction because the record overwhelmingly established implied malice, and holding that the involuntary manslaughter LIO instruction is not required "in every implied malice case regardless of the evidence." (*Id*. at 34.)

As emphasized in my argument under Pillar Two above, it is simply wrong, and contrary to the letter and spirit of *Mullaney*, for the court, as the "gatekeeper" of

manslaughter defenses, to have a higher standard of "substantial evidence", when the real standard in this situation, as with voluntary manslaughter instructions, is whether the evidence is sufficient to give rise to reasonable doubt that the prosecution has proven the required mens rea element(s).

Recap: The good news for us is that *Brothers* recognizes that there is a new/old form of involuntary manslaughter which can be raised as a lesser included offense of murder, and that there is a sua sponte duty to instruct on this theory where warranted by the evidence.

Let me reiterate when this applies. There must be:

(1) A killing without express malice intent to kill, committed in the course of an inherently dangerous assaultive felony which merges under the *Ireland* rule (and is thus not subject to the second degree felony murder rule), prosecuted under a theory of implied malice[18]; and

(2) a defense challenging proof of implied malice based on a failure to prove that defendant had required mental state for implied malice, i.e., actual knowledge that his/her conduct endangered the life of the decedent.

Importantly, keep in mind that this is an *actual subjective* knowledge element, and not a *objective*, constructive knowledge element. Thus, things like intoxication, mental defects, cultural differences, lack of maturity, etc., would be relevant to such a defense. (See "Murder-Madness" article, pp. 21-24, and below of diminished actuality defense.) Boiled down to its essence, based on Justice Kennard's concurrence, the holding in *Brothers*, and older cases like *Cameron* and *Burroughs*, "*Garcia* manslaughter" still

[18]Arguably, the demise of second degree felony murder after SB 1437 – see *People v. DeHuff* (2021) 63 Cal.App.5th 428, 443, and *In re White* (2019) 34 Cal.App.5th 933, 937, fn.2 [second degree felony murder implicitly repealed by SB 1437]) – means that the logic of this argument, and involuntary manslaughter as an LIO, applies to a broader category of killings committed in the course of an "inherently dangerous felony," and not just assaultive felonies covered by the merger doctrine, which had previously been not subject to the second degree felony murder, including for example, operation of a meth lab (see, e.g. *People v. James* (1998) 62 Cal.App.4th 244).

exists, but it is involuntary manslaughter, not voluntary manslaughter.

Following Brothers, CALCRIM 580 now includes this bench note: "The court has a sua sponte duty to instruct on involuntary manslaughter based on the commission of an inherently dangerous assaultive felony and to instruct on the elements of the predicate offense(s). (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33-34 [186 Cal.Rptr.3d 98]; see also *People v. Bryant* (2013) 56 Cal.4th 959, 964 [157 Cal.Rptr.3d 522, 301 P.3d 1136].)"

That's the good news. The bad news is that CALCRIM No. 580 still does not include an instruction on involuntary manslaughter based on the *Brothers-Bryant* variant. So, I have provided, below, a proposed sample instruction on this version of involuntary manslaughter, where the theory of murder culpability is implied malice.

> The defendant is guilty of involuntary manslaughter if s/he unintentionally killed the decedent during the commission of an assaultive felony that was inherently dangerous to human life, but without actually knowing that his/her conduct endangered the decedent's life. In order for the prosecution to prove that the crime is murder, and not involuntary manslaughter, the prosecution must prove beyond a reasonable doubt that defendant actually knew, in his/her own mind, that his/her conduct endangered the decedent's life. If you have a reasonable doubt whether defendant actually knew, in his/her own mind, that her conduct endangered the decedent's life, then you must find him/her not guilty of murder.[19]

IV. A Couple of Parting Crossover Salvoes.

I will close this already too-lengthy discussion with a prolonged tangent about the "diminished actuality" defense and a short comment about "imperfect heat of passion" as a defense to premeditated, deliberate murder of the first degree.

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[19] This proposed instruction was rewritten by me after *Bryant* was decided, based on a previous proposed instruction on the short-lived *Garcia* voluntary manslaughter instruction written by Yours Truly and Michael Ogul, formerly of the Santa Clara Public Defender's Office, in connection with our presentation to a CPDA homicide seminar in 2010.

A. Is There Anything Left of Diminished Mental State Manslaughter? Yes, Especially After *Bryant* and *Nelson*.

Nearly three decades have passed since nonstatutory voluntary manslaughter based on diminished capacity was abolished by Proposition 8. What remained 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 or she *did* not (as opposed to "could not") form an intent to kill. (*People v. Steele*, *supra*, 27 Cal.4th 1230, 1253.)

Unfortunately, the rump "diminished actuality" defense – a term which the Supreme Court has caustically 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), seemingly allows only for an "all-or-nothing" choice of acquittal of murder, with no intermediate option of voluntary manslaughter. (*People v. Saille* (1991) 54 Cal.3d 1103, 1113–1117; see CALCRIM 625.)

Of course, something is terribly wrong with this picture. In the original version of this article, I ended with the comment that it was out of the realm of this article for me to deal with this point." But a couple years later I wrote an article for another SDAP seminar, called "Murder and Madness: Snapshots of Mental Health Defenses in Homicide Cases." In that article, I took up my own challenge and tried to put together what was left of the "diminished actuality" defense, even theorizing the possibility of a new form of manslaughter which could be recognized from it. With some revisions in light of the decision in *Bryant* disapproving the voluntary manslaughter holding in *Garcia* and the further possibility, under Justice Kennard's concurrence in that case, that involuntary manslaughter could apply, here is that discussion.

1. The "Diminished Actuality" Defense to Murder.

After I wrote and disseminated the first version of the present manslaughter article back in 2010, Michael Ogul properly chastised me for my denigration of diminished actuality, reminding me of some favorable case law which provides considerable latitude to a defense expert in connection with this aspect of a mental state defense in a murder

case, and pointing out that the same issues and expert evidence which give rise to a diminished actuality defense will often spill over into factual issues related to imperfect self-defense, or defenses against deliberate, premeditated first degree murder, which can provide a jury with options besides acquittal or full conviction. In addition to these sage comments, it is also the case that the diminished actuality defense, unlike the related NGI defense, is not subject to the legislatively imposed restrictions of section 25.5, and thus can include evidence of personality and adjustment disorders, as well as intoxication-based mental disorders. Finally, although a pinpoint request is required to give rise to a duty to instruct – unless, at least arguably, the involuntary manslaughter defense a la *Bryant* applies – evidence that your client was intoxicated or out of his mind on drugs is admissible with respect to the diminished actuality defense, as, excepting the statutorily delineated exclusion of implied malice murder under section 22, subdivision (b) (see above), the defense involves a challenge to the prosecution's proof of a required specific mental state, to which evidence of intoxication is relevant. (See *People v. Saille*, 54 Cal.3d at 1117-1120.)

Here's some newer good news on this issue. Capital case opinions often contain hidden unfavorable holdings, which the Attorney General's office is skilled at locating and using to attack some of our arguments. However, now and again there is a hidden gem in there. My colleague Brad O'Connell found such a gem in *People v. Nelson* (2016) 1 Cal.5th 513, 555-556, where the Supreme Court, in passing, confirmed that diminished actuality may provide a basis for instructions on involuntary manslaughter (but not voluntary manslaughter) as a lesser included offense. The Court described former CALJIC 3.32 as a "full and correct statement of that doctrine . . .", concluding that where a defendant "did not actually have the mental state of malice and did not intend to kill," due to a mental illness or impairment, "then the defendant is not guilty of murder but is guilty of involuntary manslaughter."

The Court reiterated, however, that diminished actuality is not a distinct basis for voluntary manslaughter. "'[T]he elimination of the diminished capacity defense effectively eliminated the middle option of voluntary manslaughter in a diminished

actuality case.' [Citation.]" (*Nelson* at 556.) Thus, we can cite *Nelson* for the proposition that diminished actuality voluntary manslaughter is alive and well.[20]

a. *Cortes* and Improper Restrictions on the Expert.

Turning to the substance of the diminished actuality defense, there is a helpful Sixth District opinion in *People v. Cortes* (2010) 192 Cal.App.4th 873, which reversed a murder conviction because of improper restrictions on the expert's testimony. The opinion features an excellent explanation of the expansive scope of testimony an expert is allowed to give concerning a defendant's mental health, including, but not limited to, at the time of the alleged crime, and how it affected him at that time.

First, the court reiterated settled law permitting a mental health expert to opine that a defendant suffered from a mental illness at the time of the homicide, including a description of how that mental illness can affect a person, such as the fact that it "'can lead to impulsive behavior. . . .'" (*Id*., at p. 902, quoting *People v. Coddington* (2000) 23 Cal.4th 529, 582-583.)

Second, *Cortes* provided a detailed picture of the permissible parameters of such testimony. An expert cannot testify that defendant did not have the *ability* to form the requisite mental state because of the abolition of diminished capacity as a defense by sections 25 and 28. Neither can the expert expressly opine that defendant did not harbor the required specific intent, because section 29 prohibits testimony as to that ultimate fact. But what remains between these two extremes, and is permitted under the parameters of section 28, subdivision (a), is very significant.[21]

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[20]I have briefing on this point from a case where an involuntary manslaughter instruction was requested by counsel but refused by the trial court.

[21]Section 28(a) provides: "Evidence of mental disease, mental defect, or mental disorder shall not be admitted to show or negate the capacity to form any mental state, including, but not limited to, purpose, intent, knowledge, premeditation, deliberation, or malice aforethought, with which the accused committed the act. Evidence of mental disease, mental defect, or mental disorder is admissible solely on the issue of whether or not the accused actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

> [T]he defendant can call an expert to testify that he had a mental disorder or condition (such as or PTSD, or dissociation), as long as that testimony tends to show that the defendant did or did not in actuality (as opposed to capacity) have the mental state (malice aforethought, premeditation, deliberation) required for conviction of a specific intent crime (as opposed to a general intent crime) with which he is charged, except that the expert cannot offer the opinion that the defendant actually did, or did not, harbor the specific intent at issue. Put differently, sections 28 and 29 do not prevent the defendant from presenting expert testimony about any psychiatric or psychological diagnosis or mental condition he may have, or how that diagnosis or condition affected him at the time of the offense, as long as the expert does not cross the line and state an opinion that the defendant did or did not have the intent, or malice aforethought, or any other legal mental state required for conviction of the specific intent crime with which he is charged.

(*Cortes*, *supra*, 92 Cal.App.4th at p. 908.) Thus, the Sixth District concluded, the trial court erred in precluding the expert from testifying "about defendant's particular diagnoses and mental condition and their effect on him at the time of the offense, and in limiting [the expert's] testimony to diagnoses or mental conditions in the abstract and their effects on the general person in the population at large." (*Id*., at p. 909.)

Cortes goes further, holding that it is proper in this situation for an expert to paint the story of a defendant's mental problems with a fairly broad brush.

> [The expert] should have been permitted to testify about defendant's upbringing and traumatic experiences as a child and/or adolescent, inasmuch as defendant's prior traumatic experiences informed [his expert] opinion, and explained the connection between defendant's diagnoses, his mental state and his behavior. He should have been permitted to explain both the psychological condition and the phenomenon of dissociation, and dissociation's relationship to PTSD and defendant's upbringing and traumatic experiences. He should have been permitted to explain the bases for his opinions, including defendant's statements describing his perception of the stabbing.

(*Id*., at p. 910.) More specifically, *Cortes* holds that the trial court erroneously prohibited the expert from testifying that "the defendant's traumatic experiences as an abused adolescent caused him to suffer several DSM IV diagnosable conditions which were (a)

likely to have colored his perceptions of the situation, and (b) impaired his consciousness in specific ways." (*Id*., p. 911.) Although such testimony "would have given the jury a basis to infer that defendant actually did not harbor malice, premeditate, or deliberate, even if [the psychiatrist] did not come out and say that defendant lacked such mental states…, [that] is exactly the type of testimony sections 28, 29, and the case law, permit." (*Id*., at p. 912.)

The favorable prejudice holding in *Cortes* concludes that the exclusion of this evidence hobbled the defense because the excluded testimony was relevant to questions of whether the defendant was not guilty because he acted in self-defense, or whether he was guilty of manslaughter instead of murder because of imperfect self-defense or heat of passion. (*Ibid*.)

Cortes is a very helpful case, in that it is common, in my experience, for prosecutors to seek, and trial courts to impose, considerable restrictions on the scope of expert testimony which, after the abolition of diminished capacity, is confined to the seemingly narrow space between prohibited testimony on "capacity" on the one hand, and the also-prohibited express opinion as to whether the defendant actually formed the requisite intent, on the other. Where the scope of expert testimony is improperly restricted, *Cortes* and the case law it discusses provide a strong basis for arguing error that deprived the defendant of his due process right to present a meaningful defense to the charges. (See, e.g., *Crane v. Kentucky* (1986) 476 U.S. 683, 687 and cases discussed therein, and *United States v. Sayetsitty* (9th Cir. 1997) 107 F.3d 1405, 1413-1414 ["defendant has a constitutional right to have the jury consider defenses permitted under applicable law to negate an element of the offense"].)

b. Instructional Issues.

Instructions on a "diminished actuality" defense, like an intoxication defense, are only given on request, as, under the reasoning of *Saille*, such an instruction would be considered as "pinpointing" the jury's attention to particular facts with regard to the prosecution's burden to prove the mental state element of the charged crime. (*People v.*

Saille, *supra*, 54 Cal.3d at p. 1120; see CALCRIM No. 3428 "Bench Notes" [citing *Saille* for proposition that "court has no sua sponte duty to instruct on mental impairment as a defense to specific intent or mental state . . . [but] must give this instruction on request"].) Both CALCRIM and CALJIC provide an instruction on diminished actuality, although (fortunately) the phrase is not used in either of them. (See CALCRIM No. 3428, CALJIC No. 3.32)[22]

Thus, if you are trial counsel in a case with such a defense, it is imperative that you request such an instruction when it is warranted by the defense theory of the case and expert testimony. Again, be sure to federalize any claim for this "pinpoint" instruction on diminished actuality. Although the California Supreme Court classifies this type of error as subject to *Watson*, state constitutional analysis (see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1135), the Ninth Circuit sees the matter differently, and the error should be federalized as both deprivation of the due process right to present a defense under cases like *Crane* and *Sayetsitty*, and as improper refusal to instruct on the defense theory of the case. (See *Conde v. Henry*, 198 F.3d 734, 739 and *Mathews v. United States*, *supra*, 485 U.S. at 63.)

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[22]The CALCRIM instruction appears to be the better one, as it properly pinpoints the prosecution's burden of proof.

> You have heard evidence that the defendant may have suffered from a mental (disease[,]/ [or] defect[,]/ [or] disorder). You may consider this evidence only for the limited purpose of deciding whether, at the time of the charged crime, the defendant acted [or failed to act] with the intent or mental state required for that crime.
>
> The People have the burden of proving beyond a reasonable doubt that the defendant acted [or failed to act] with the required intent or mental state, specifically: _____ <insert specific intent or mental state required, e.g., "malice aforethought," "the intent to permanently deprive the owner of his or her property," or "knowledge that ..."> . If the People have not met this burden, you must find the defendant not guilty of _____ <insert name of alleged offense> .

(CALCRIM No. 3428)

c. Implied Malice.

Normally, the standards and circumstances under which intoxication evidence and diminished actuality evidence are admissible are consonant. However, as discussed above, there is a legislatively created exception for implied malice, specifying that evidence of voluntary intoxication is not admissible with respect to proof of the mental state required for implied malice. (See *People v. Wright*, *supra*, 35 Cal.4th at p. 985.)[23] But here's the twist. This anti-*Whitfield* amendment to § 22 only applies to *intoxication* evidence, and has no impact with respect to *mental disease and defect* evidence under section 28(a), which applies to proof of "any mental state." Thus, a diminished actuality defense can be interposed when the prosecution's theory of guilt is implied malice. Of course, there will commonly be situations where evidence of mental problems and intoxication will go hand in glove, giving rise to some knotty legal evidentiary questions.

d. Caveat: Felony Murder Exception.

The foregoing analysis and discussion applies to a charge of malice murder. It would not apply, or at least not in the same way, where the theory of guilt is felony murder. This is true because malice is not an element of felony murder, with the prosecution having the burden to prove only defendant's guilt for the underlying triggering felony offense, and that the killing occurred in the course of commission of, or flight from, the felony. (See case law cited at *People v. Robertson*, 34 Cal.4th at 165 [overruled on other grounds in *People v. Chun*, 45 Cal. 4th at 1201].) Thus, expert testimony about your client's mental disorders would have to undermine proof of the mental state element of underlying crime, e.g., robbery, which is much harder to do.

Some years ago I had a murder case where my client was charged with felony

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[23]As suggested above, 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 and that, if applied as such, 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*, *supra*, 476 U.S. at 687.)

murder for the killing of a pizza delivery man during the course of a robbery. Defense counsel put on evidence that, at the time of the crime, the client was out of his mind on PCP, and presented excellent expert testimony to the effect that defendant, who had been diagnosed with schizoaffective disorder, also suffered a PCP induced dissociative delirium at the time of the killing. The prosecutor in that case barely addressed the expert's conclusions, simply arguing to the jury that there was absolutely no question that defendant, whatever drug he was on, had the requisite specific intent to steal when he demanded that the pizza man give him the money; and there was little that could be said, either by trial counsel or by appellate counsel, to refute this point.

It may well be that in felony murder cases such as the one I just described, a defendant may have a better chance with an insanity defense by means of an NGI plea than a diminished actuality defense.

e. Un-Caveat: Aiding and Abetting and *Mendoza*.

With respect to a different species of indirect culpability for murder, aiding and abetting, the story is much better. To prove the guilt of an aider and abetter, the prosecution must show that the defendant "act[ed] with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense. . . ." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) A very favorable California Supreme Court decision in *People v. Mendoza*, *supra*, 18 Cal.4th 1114 holds that the knowledge and intent elements of aiding and abetting culpability are sufficiently akin to a specific intent such that intoxication evidence is admissible to negate proof of such intent.[24]

If intoxication evidence is admissible as to these elements of proof, it inexorably follows that evidence of mental disease or disorder would also be relevant and admissible

[24] *Mendoza* also held that intoxication evidence is admissible even when the theory of vicarious liability involves application of the (now abrogated) "natural and probable consequences" doctrine with respect to a general intent target crime, such as shooting at an inhabited building. And yes, *Mendoza* was my case, and my one and only Supreme Court win.

where it bears on the existence of the requisite knowledge and intent elements of aiding and abetting culpability. Put colloquially, if it's relevant that somebody was wasted when the crime went down, it's obviously going to be relevant that he or she was nuts. (See, e.g., *People v. Hering* (1999) 20 Cal.4th 440, 447, and § 28, subd. (a).)

I should add a caveat as to aiding and abetting culpability that while the question of intent and knowledge is based on subjective factors, another potential issue, the application of the natural and probable consequences doctrine, is based on an objective test, such that the jury should be instructed that evidence of intoxication, mental disease or defect should not be considered as to this question. (See *Mendoza*, *supra*, at p. 1134, and CALCRIM No. 3428.)

B. Parting Salvo: Is There a Defense of Imperfect Heat of Passion From Provocation Applicable to Premeditated First Degree Murder?

Yes, I think there is.

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 unhelpfully assumes that the jury has already rejected this part of the equation.

But neither instruction discusses a salient point, namely that the commission of a homicide while in the 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 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, as current instructions permit, of allowing the jury to *consider* evidence of provocation. If, following the instructions on provocation, the jury concludes that the facts establish, or – more precisely – 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.[25]

Here is a proposed instruction which embodies this concept.

> If you conclude that provocation may have played a part in the unlawful killing, but you conclude beyond a reasonable doubt that the provocation would not have led a reasonable person to act rashly, you should consider whether the provocation actually, but unreasonably, caused the defendant to act without premeditation and deliberation.
>
> If you find that the prosecution has not proved beyond a reasonable doubt that the defendant did not kill as a result of provocation that actually but unreasonably caused him/her to act rashly, and without premeditation and deliberation, you must find the defendant not guilty of first degree murder.

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

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[25] I thought I had dreamed this variant up. But I later learned that appellate attorney Candace Hale had already come up with this concept, proving either that great minds think alike, or that she and I are equally mad. Candace did me one better, and got an OSC issued on habeas in a first degree murder case based on counsel's failure to request an instruction which explained that *subjective* heat of passion could reduce the degree of murder. The case was unpublished, but there is sample briefing, which is available from Ms. Hale on request.

CONCLUSION

The article has grown with the telling, and retelling. While it is already too lengthy, I fear I have only scratched 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 into battle in historic and evolving fields of contestation concerning the heat of passion manslaughter defense to murder and some of its close kin, 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.