IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. **STEVEN DOUGLAS HLEBO,** Defendant and Appellant.	No. H047358 (Santa Clara County Superior Court No. 217076)

APPELLANT'S OPENING BRIEF

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SANTA CLARA,
THE HONORABLE SHARON A. CHATMAN, JUDGE

Joseph Doyle, ESQ.
Staff Attorney
State Bar No.: 271447
95 S. Market Street, Suite 570
San Jose, CA 95113
(408) 241-6171
fax: (408) 241-2877
joe@sdap.org

Attorney for Appellant
Steven Douglas Hlebo

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APPELLANT'S OPENING BRIEF

STATEMENT OF APPEALABILITY

This appeal is from a final judgment of conviction after jury trial and is authorized by Penal Code[1] section 1237, subdivision (a).

STATEMENT OF THE CASE

On August 28, 2018, Steven Hlebo was indicted on one count of murder (§ 187, subd. (a)) for the January 2016 killing of Kyle Myrick. (1CT 1-2.) He pleaded not guilty and proceeded to jury trial. (1CT 6, 46.) Trial began on March 25, 2019, and Hlebo was ultimately convicted of second-degree murder. (1CT 46, 163; 5RT 806.) On June 14, 2019, Hlebo was sentenced to fifteen years to life in prison, and on July 29, 2019, he filed a timely notice of appeal. (1CT 177, 252; 5RT 81.)

STATEMENT OF FACTS

a. The day of the incident

In 2016, Steven Hlebo was working at GP Sports, a motorcycle shop in San Jose. (2RT 175.) One morning in January, Hlebo's boss, Pete Diaz, asked him to assemble a couple of all-terrain vehicles (ATVs) in an outdoor, gated storage area behind the store. (2RT 179.) Hlebo worked for a while on the ATVs, but when it started to rain, Diaz asked Hlebo's coworker, Kyle Myrick, to help Hlebo bring the ATVs inside. (2RT 180.) That was around 2:15 p.m. (2RT 180.)

Myrick brought one ATV into the shop, but by 3:30 p.m., neither Hlebo nor Myrick had come back inside. (2RT 182.) Diaz

[1] Subsequent undesignated statutory references are to the Penal Code.

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grew concerned and went to check on them, but when he got outside, the gate to the storage area was locked. (2RT 182.) Diaz walked past a building on the property that had been destroyed by a fire to get to another gate to the storage area, but that gate was locked, too. (2RT 183.) Diaz yelled out, and Hlebo eventually opened the gate. (2RT 183.) Diaz asked where Myrick was, and Hlebo said that he didn't know. (2RT 183.) At the time, Diaz didn't notice anything about Hlebo's appearance except that he was wearing a rain jacket that Diaz had given him earlier in the day. (2RT 184.) Hlebo's demeanor was otherwise "fairly quiet." (2RT 184.)

Around 5:00 p.m., the other ATV had still not been brought inside, so Diaz again went to check on Hlebo and Myrick. (2RT 184-185.) Again, the gate was locked. (2RT 184-185.) Hlebo eventually came to the door, and Diaz asked him where Myrick was. (2RT 185.) Hlebo said that he didn't know. (2RT 185.) Hlebo's truck was now backed up to the burned-out building near the storage area, which Diaz found odd. (2RT 185.) The building was rarely used except to store oil, and employees were not supposed to keep their vehicles there. (2RT 187.)

Diaz asked Hlebo why his truck was there, and Hlebo said, "I'm just – you know, just keeping it out of the way." (2RT 187.) He added, "Well, I'm taking it to that place, you know, that place." (2RT 187.) Diaz said that he didn't know what place Hlebo was talking about, and he asked him to move his truck. (2RT 187.) Hlebo said he would. (2RT 187.)

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Surveillance video showed Hlebo backing his truck onto the GP Sports property at 4:54 p.m. and leaving at 5:06 p.m. (3RT 442.)

b. The search for Kyle

Around this time, Diaz became worried about Myrick, and he and some other employees started looking for him. (2RT 185.) Diaz looked throughout the store and checked to see whether Myrick had clocked out. (2RT 189.) He hadn't. (2RT 189.) Hlebo helped look for Myrick, too, until some of the employees went toward the burned-out building, at which point Hlebo said, "I don't want to go in there because it's scary." (3RT 349.) One employee, Trevor Adams, continued toward the building, but Hlebo grabbed him and said, "Let's not go in there." (3RT 349.) Adams asked why not, and Hlebo responded, "Because there's ghosts in there." (3RT 349.) Adams left, and Hlebo clocked out shortly afterward. (2RT 191-192; 3RT 352.)

Adams later returned to the burned-out building with a flashlight and another employee. (3RT 352.) Adams went into the building and saw "a lot of blood." (3RT 352.) Blood was pooled on the floor and sprayed on the walls. (3RT 419.) There was also a trail of blood away from the room (3RT 420), and a severed human ear was later found on the floor. (3RT 475.) Myrick was still missing. (3RT 355.)

That night, the police set up surveillance around Hlebo's home, and when Hlebo arrived late that night, he was taken into custody. (3RT 403-404, 411-412.) In Hlebo's truck, the police found blood stains as well as a pair of bloody tennis shoes, both of

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which were later matched to Myrick. (4RT 491, 494-497, 613-627.)

Myrick's body was eventually found on Jamison Creek Road, "a couple hundred yards up from Highway 9 in the Boulder Creek area in the Santa Cruz mountains." (3RT 442.) An autopsy revealed that Myrick had suffered significant head trauma. (4RT 553.) The injuries were consistent with blows from a metal bolt commonly found on the GP Sports premises. (1RT 160-161; 4RT 551.) The autopsy also revealed a subdural hematoma, a potentially fatal collection of blood between the skull and the brain. (4RT 553.) Myrick's left eye, right eye, nasal bridge, and jaw were all fractured, and there was evidence of subarachnoid hemorrhages. (4RT 554.) There were also patterned abrasions and lacerations on Myrick's neck as well as hemorrhages in his neck muscles. (4RT 554.) His hyoid bone—the bone underneath his tongue—was also fractured. (4RT 554.) The cause of death was multiple blunt-force injuries with sharp-force features. (4RT 555.)

The prosecution also presented testimony from an expert in bloodstain-pattern analysis. (4RT 574-575.) The expert indicated that this was a "severe beating" involving "repeated blows." (4RT 584.) It appeared that Myrick was on the floor while being attacked, while Hlebo was standing. (4RT 585.)

c. The descriptions of Hlebo and Myrick

Prosecution witnesses described both Hlebo and Myrick in terms of physical appearance and demeanor. Hlebo was somewhere around six foot three or six foot four and 250 pounds

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(2RT 176, 3RT 340), whereas Myrick was only five foot six or five foot seven and 140 pounds (3RT 371)[2]. Multiple coworkers testified that, on the morning of the killing, Hlebo seemed off or short-tempered. Diaz said Hlebo "shouted" at him at one point and seemed "a little angry." (2RT 181.) When Diaz saw Hlebo later in the day, however, he was "very quiet." (1RT 191.)

Another coworker saw Hlebo around 2:30 or 3:00 p.m., and Hlebo seemed "a little aggravated" and "very short" when the coworker spoke with him. (2RT 222.) That coworker had never seen Hlebo have any problems with Myrick before. (2RT 222.) Still another coworker said Hlebo seemed "frustrated" or "irritated" to be working on the ATVs, particularly in the rain. (2RT 248.) That coworker saw Hlebo "snap" at Myrick in the store. (2RT 250.) Ordinarily, however, Hlebo was "pretty easygoing." (2RT 257.)

The prosecution elicited testimony that, in contrast to Hlebo, Myrick was calm or "chill" and didn't have any problems with anyone. One coworker said he had never had a problem with Myrick personally and had never known Myrick to be "confrontational or hostile towards people in any way." (2RT 217.) Another said he had never known Myrick to have problems with anyone. (2RT 234.) A third said Myrick was "very calm . . . a very chill dude." (3RT 332.) That coworker had never known Myrick to "act in a confrontational or hostile or aggressive manner with anyone" or to "pick any fights with anyone." (3RT 335-336.) Finally, the person who had gotten Myrick the job at GP Sports

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[2] Another witness said five foot eight and 170 pounds. (2RT 172-173.)

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said he was “a great guy . . . a very nice kid” who was never “confrontational or hostile or aggressive” and who never “interact[ed] with anybody in an angry manner” or “pick[ed] a fight” with anyone. (3RT 368.)

d. The recorded phone call

The prosecution introduced a recorded jail phone call in which Hlebo admitted to the killing. In the call, Hlebo was speaking with his brother, and he told his brother that he “beat the shit out of that guy, and he died.” Hlebo added that “instead of calling the police or whatever,” he “threw him in [his] car and took him over to ocean, and threw him in the water.”[3] (1CT 99.)

In the call, Hlebo said that he “just kinda snapped.” (1CT 99.) His brother asked Hlebo what happened and whether Myrick had committed or admitted to doing something that Hlebo didn’t like. (1CT 100.) Hlebo replied, “there was a little bit of this and that to him.” (1CT 100.) Later in the call, Hlebo said that he “wasn’t sleepin’ real well, and [Myrick] kinda had said somethin’ to uh, the effect of uh, somethin’ about, you know, my wife bein’ a whore or whatever, and I was like, motherfucker.” (1CT 101.) Hlebo said, “in hindsight it probably wasn’t the best way to go.” (1CT 101.)

Towards the end of the call, Hlebo’s brother said, “Hang in there, man.” (1CT 102.) Hlebo responded, “Exploded, you know, and snapped, and you know, once, once it’s game on, you know, once it’s go, it’s go. So, so yeah. Dude died because he caught me

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[3] As noted above, Myrick’s body was in fact later found in a ditch off Highway 9 in the Santa Cruz Mountains. (3RT 442.)

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on the wrong day. And uh, instead of, you know, callin' an ambulance or police or whatever, you know, I put him in my car, and drove uh, drove with him for a while. And you know, that's that." (1CT 103.)

e. The defense evidence

The defense called only one witness, Hlebo's wife, Jennifer. She said Hlebo left the house that morning to go to work. (4RT 654.) They spoke at some point about lunch plans. (4RT 654.) That night, Ms. Hlebo was on her computer pulling documents, so she could schedule her CPA exam. (4RT 656.) When Hlebo came home that night, she spoke with him briefly but didn't remember a substantial conversation. (4RT 658.) She didn't remember him changing his clothes or showering. (4RT 658.) She thought he went into the back to a trailer where he would work on things outside or play with the dogs. (4RT 658.)

At some point, Ms. Hlebo realized that Hlebo had left. (4RT 659.) She thought he might have gone to his parents' house, which would not have been unusual. (4RT 659.) She didn't hear from him again until he got home around 2:30 a.m. (4RT 660.) At some point the police woke them up, calling for everyone in the house to come out. (4RT 662-663.) She was taken to the police station where she spoke with Hlebo briefly. (4RT 665.) She said she knew upon speaking with him that something was "very wrong." (4RT 664.)

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ARGUMENT

I. The Trial Court Deprived Hlebo of His Sixth and Fourteenth Amendment Right to Present a Defense by Excluding Evidence of His Visual Hallucinations the Day of the Killing; Hlebo was Deprived of the Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments.

A. Introduction

At trial, defense counsel sought to introduce evidence that on the morning of the killing, Hlebo was suffering from visual hallucinations. (1RT 32-38.) Specifically, defense counsel wanted to elicit that Hlebo had told his boss that he had seen "brain matter" or "gray matter" under his truck. (1CT 55-58.) Defense counsel argued that this evidence was admissible both under Evidence Code section 356 (1RT 32-33) and to show "the facts and circumstances surrounding Mr. Hlebo that day." (1RT 102.) Defense counsel added that it would give context to statements that the prosecution planned to elicit about Hlebo being "quiet" or "exhausted," and it would also show the state of mind of Diaz when he was talking to Hlebo. (1RT 36, 102.)

The prosecutor objected. She said the statements were "not 356" because they were not made at the same time as the other conversations the prosecution intended to introduce. (1RT 31-32.) Further, the prosecution sought to exclude the statements if they were being introduced to question Hlebo's "capacity or his mental health." (1RT 31-32.) She argued that without an expert the jury would be confused by the information. (1RT 36.) Finally, the prosecutor said that she did not believe "statements regarding seeing brain matter under the truck" were relevant. (1RT 104.)

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They would merely "interject[] the issue of mental health into this case where there is none." (1RT 104.)

In its ruling, the court acknowledged "you [do not] need an expert opinion to indicate that someone was acting oddly." (1RT 36-37.) But ultimately, the court said the statements were hearsay and their non-hearsay purpose—the "state of mind of Mr. Diaz"—was not relevant. (1RT 106.) The court did allow testimony about how Hlebo seemed in terms of irritability as well as other observations about his demeanor, saying "then you can argue both sides in terms of how that impacts his state of mind." (1RT 106.) But the court did not permit the defense to introduce Hlebo's statements for that same purpose. (1RT 106.)

As will be shown below, this ruling was incorrect. Hlebo's "state of mind" was central to the case, as both the prosecutor and defense attorney argued. (See, e.g., 5RT 734 [prosecution closing argument], 771 [defense closing], 789 [prosecution rebuttal].) Indeed, the sole issue at trial was Hlebo's mental state at the time of the killing, and the prosecutor argued at length that the mental-state evidence that was admitted (i.e., that Hlebo was tired or irritable) showed malice. (5RT 736, 789, 795-796.) But this evidence would have been completely undercut by the evidence of hallucinations: Hlebo was not just "off" or "irritable," as the prosecutor suggested. He was in the middle of a psychotic episode, and this was central to the defense case.

The defense case was that Hlebo had committed a voluntary manslaughter. (1RT 21; 7RT 776-782.) Based on Hlebo's phone call to his brother, the defense argued that Myrick

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provoked Hlebo, and Hlebo killed in the heat of passion. (7RT 776-782.) But there was a weakness in the argument: While a reasonable person might react rashly to a particularly offensive insult, who in their right mind would kill because of it? That was where the hallucinations would have come in. Hlebo was not in his right mind at the time of the killing, which his statements to Diaz showed. So the hallucinations were necessary for the defense to explain why the killing unfolded the way it did and why it was still a voluntary manslaughter. (See *People v. Beltran* (2013) 56 Cal.4th 935, 949 ["The killing reaction [in the heat of passion] therefore is the extraordinary reaction, the unusual exception to the general expectation that the ordinary person will not kill even when provoked."].)

Indeed, by excluding the hallucinations, the court prevented the defense from contesting the only thing that really mattered: Hlebo's state of mind at the time of the killing. His state of mind was the only issue at trial, yet the defense was hamstrung in trying to argue it. Accordingly, the court's decision to exclude the evidence was an abuse of discretion. And because the excluded evidence went to an issue that was crucial to the defense case, the court's error deprived Hlebo of his federal constitutional right to present a defense and was prejudicial under any standard.

B. Cognizability

Under Evidence Code section 354, a "judgment or decision" shall not be reversed based on the "erroneous exclusion of evidence," unless the error resulted in a miscarriage of justice

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and the "substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means." (Evid. Code § 354, subd. (a).) Here, the "substance, purpose, and relevance" of the excluded evidence was "made known" to the court in the following ways:

- The prosecution filed a written motion identifying the contested evidence (1CT 55-58);
- Defense counsel argued the statements were admissible under Evidence Code section 356, as well as to show "the facts and circumstances surrounding Mr. Hlebo that day," to give context to statements Hlebo being "quiet" or "exhausted," and to show Diaz's state of mind (1RT 32-33, 36, 102); and
- The prosecution argued Hlebo's mental health was irrelevant to the case (1RT 31-32, 36, 104).

Further, when the motion was argued, all sides were familiar with the facts of the case as well as the prosecution and defense theories. The prosecution had provided a detailed description of the allegations and proposed evidence. (1CT 21-25.) The defense had announced that it would proceed on a theory of voluntary manslaughter. (1RT 21.) And the court had agreed to give the voluntary-manslaughter instruction. (1RT 39.)

An objection is sufficient if it fairly apprises the trial court of the issue it is being called upon to decide. (Code Civ. Proc. §§ 646, 647; *Cooper v. Mart Associates* (1964) 225 Cal.App.2d 108, 118.) In criminal cases, an objection will preserve an issue for appeal as long as the record shows that the court understood the issue presented. (*People v. Bolinski* (1968) 260 Cal.App.2d 705, 722-723; *People v. Briggs* (1962) 58 Cal.2d 385, 409-410.)

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Here, the court was well-apprised of the issue it was being called upon to decide: the admissibility of an identifiable piece of evidence for the reasons stated by defense counsel. Defense counsel was clear about her theory of the case and the reason she wanted the statements admitted. Perhaps her argument could have been better articulated, but it more than sufficed to alert the court to the question it was being called upon to decide and to provide the prosecution the chance to make its position known. Thus, it was adequate to preserve this issue for appeal. (*Bolinski*, supra, 260 Cal.App.2d at pp. 722-723; *Briggs*, *supra*, 58 Cal.2d at pp. 409-410.)

That said, if this court finds counsel failed to preserve the issue, then Hlebo was denied the effective assistance of counsel, as described in section I.F. below.

C. Standard of review

A trial court's ruling regarding the admissibility of evidence is generally reviewed for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 725.) A trial court abuses its discretion when it "misunderstands or misapplies the applicable legal standard." (*Hernandez v. Amcord, Inc.* (2013) 215 Cal.App.4th 659, 680.) And while review for abuse of discretion is deferential, "it is not empty." (*People v. Williams* (1998) 17 Cal.4th 148, 162.) A court's discretion is limited by the legal principles governing the subject of its actions. (*People v. Jacobs* (2007) 156 Cal.App.4th 728, 738.) Thus, appellate courts "review a trial court's decision whether a statement is admissible under [the] Evidence Code . . . for abuse of discretion." (*People v. Grimes* (2016) 1 Cal.5th 698, 711-712, citations omitted.) But "[w]hether a trial court has

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correctly construed [the] Evidence Code . . . is . . . a question of law that [courts] review de novo." (*Ibid.*)

D. The court erred in excluding evidence of Hlebo's visual hallucinations.

The Fourteenth Amendment's due process clause, as well as the Sixth Amendment's compulsory process and confrontation clauses "guarantee[] criminal defendants a meaningful opportunity to present a complete defense." (*Crane v. Kentucky* (1986) 476 U.S. 683, 690.) A trial court abuses its discretion, and offends the Sixth and Fourteenth Amendments, when it completely excludes defense evidence designed to negate an essential element of the offense. (*Id.* at pp. 690-691; *Chambers v. Mississippi* (1973) 410 U.S. 284, 302; see also *People v. Cortes* (2011) 192 Cal.App.4th 873, 909, 912.)

Here, Hlebo was charged with murder, which meant the prosecution had to prove malice. (§ 187, subd. (a).) The defense was that Hlebo lacked malice because he killed in the heat of passion. (1RT 21; 5RT 776-782.) Accordingly, to convict Hlebo of murder, the prosecution had to prove beyond a reasonable doubt that Hlebo did not kill in the heat of passion. (*Mullaney v. Wilbur* (1975) 421 U.S. 684, 704; *People v. Rios* (2000) 23 Cal.4th 450, 462.) That is, the prosecution needed to show that Hlebo did not kill while under the "actual influence of a strong passion" induced by legally sufficient provocation. (*People v. Moye* (2009) 47 Cal.4th 537, 550, citing *People v. Wickersham* (1982) 32 Cal.3d 307, 327.) To do this, the prosecution needed to negate the defense argument with respect to provocation.

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The defense argument was that Myrick provoked Hlebo by insulting his wife, and Hlebo snapped, killing Myrick in a rage. (1RT 21; 5RT 750-751, 776-782.) This defense was supported by Hlebo's description of what happened as well as by the brutality of the killing itself, which strongly suggested a rage killing rather than something that resulted from "deliberation and judgment." (See *People v. Barton* (1995) 12 Cal.4th 186, 201.)

But still, the killing was difficult to make sense of. Both sides discussed its seeming irrationality (see, e.g., 5RT 749 [defense closing], 795 [prosecution rebuttal]), and no doubt, that irrationality left some jurors wondering what exactly happened. Jurors, after all, strive to make sense of the cases before them. (Griffin, *Narrative, Truth, and Trial* (2013) 101 Geo. L.J. 281, 293 ["Experimental research has yielded the insight that jurors do not, by and large, estimate probabilities when determining the events that transpired in a case; rather, they draw conclusions based on whether information assembles into plausible narratives."].) So it is important for each side in a trial to be able to construct a coherent narrative out of the facts. (*Ibid*.; see also *Old Chief v. United States* (1997) 519 U.S. 172, 188 [the prosecution "may fairly seek to place its evidence before the jurors, as much to tell a *story of guiltiness* as to support an inference of guilt . . . ."], emphasis added.)

That's where the hallucinations came in. As noted above, the defense argument was that Myrick insulted Hlebo's wife, causing Hlebo to fly into a rage and kill him. In evaluating this argument, the jury might have thought that it was plausible that

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two men moving ATVs in the rain might have had words. People at work occasionally argue, and it is not farfetched to think that one of them might have said something out of line. And while the prosecutor argued that Hlebo's claim of provocation was a self-serving lie (5RT 789), it was as reasonable an explanation for the killing as any other—indeed, even the prosecution acknowledged being unable to fully explain what happened. (5RT 795 ["So do we want to know why he killed Kyle Myrick? Yes . . . But unfortunately we can't always do that in a case like this."].)

Further, the jury might have thought that, if sufficiently insulting words were exchanged, the argument might have ended in violence. People often react rashly to perceived insults, and the DA even conceded in closing that "a reasonable person might have punched [Myrick]" if Myrick had called his wife a whore.[4] (5RT 745.) So the first two prongs of the defense argument, while not conclusively proven, were at least plausible.

But the third prong of the argument—that Hlebo *in fact* killed as a result of this provocation—still needed support. Certainly Hlebo killed in a rage. That seems beyond question, if only because of the nature of the killing. But did he kill in a rage *as a result of* the provocation? That part of the argument lacked

[4] The prosecutor nevertheless argued that punching someone would still not have been an act done out of passion rather than judgment, suggesting, it seems, that such a punch would have been a careful, deliberate act. The full quote is as follows: "If true, a reasonable person might be offended. Likely, a reasonable person might have used their judgment and left or walked away. Possibly, a reasonable person might have told Kyle off if he had said such a thing. And rarely, a reasonable person might even have punched Kyle. But a reasonable person would not have reacted rashly, without deliberation, from passion and rather than judgment." (5RT 745.)

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evidentiary support because there was no explanation for why Hlebo would have killed based on a mere insult. Everyone has been tired. Everyone has been irritable, and most people have been insulted at one time or another. Yet very few people kill. And while heat of passion does not require that the provocation be such as would cause a reasonable person to *kill*—after all, reasonable people do not kill—it does require the jury to understand why the defendant would have gone beyond the reasonable person's merely rash reaction and killed as a result of the provocation. (See *Beltran*, *supra*, 56 Cal.4th at p. 949.)

The hallucinations would have answered that question. Reasonable people do not kill, but Hlebo was not behaving like a reasonable person. He was not experiencing things as a reasonable person would have. He was suffering from some sort of psychological break, seeing things that were not there, so he was under a unique strain, something most people have never had to suffer. So if his behavior was unreasonable (and surely it was), then it was because he was not experiencing things as reasonable people do.

Of course, this is not to say that, because Hlebo was suffering from this psychological strain, he imagined the provocation altogether. (See *People v. Elmore* (2014) 59 Cal.4th 121, 134.) As discussed below, while Hlebo was suffering from some visual hallucinations, he was still able to function in the world. He was not completely disconnected from reality. The hallucinations would have shown only that Hlebo was having some sort of psychological event on the day of the killing, one that

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would have caused him to react to the provocation more rashly than the average man. Where the average man would have reacted rashly by yelling at or punching Myrick (see 5RT 745), Hlebo reacted *more* rashly because of what he was going through that day. Under *Beltran*, *supra*, 56 Cal.4th at p. 949, this was something the defense needed to explain.

The prosecutor, however, argued at length that Hlebo's personal circumstances were not relevant to provocation in any way—indeed, the court gave an erroneous pinpoint instruction to this effect, as is discussed below. (5RT 720-721 [instruction], 736, 789, 796 [prosecution argument].) But while the legal sufficiency of the provocation must be judged from an objective standpoint, there is still a subjective aspect to heat of passion: the defendant must actually have been under the heat of passion when he killed. (*Moye*, *supra*, 47 Cal.4th at p. 550, citing *Wickersham*, *supra*, 32 Cal.3d at p. 327.) And in the words of defense counsel, "what was going on with Mr. Hlebo that day" was extremely relevant to whether Hlebo actually killed in the heat of passion. They were pivotal to the defense, and excluding them deprived Hlebo of the federal constitutional right to present a complete defense. (*Crane*, *supra*, 476 U.S. at pp. 690-691; *Chambers*, *supra*, 410 U.S. at p. 302; *Cortes*, *supra*, 192 Cal.App.4th at p. 912.)

E. The error was prejudicial under any standard.

Because the exclusion of Hlebo's statements violated his federal due process rights, this Court should review for prejudice under *Chapman v. California* (1967) 386 U.S.18. Under

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Chapman, the burden is on the prosecution to show that the error was harmless beyond a reasonable doubt. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139-140.)

But the error requires reversal even under the more lenient standard set forth in *People v. Watson* (1956) 46 Cal.2d 818. Under *Watson*, the error "requires reversal of a conviction if, taking into account the entire record, it appears reasonably probable the defendant would have obtained a more favorable outcome had the error not occurred." (*People v. Ledesma* (2006) 39 Cal.4th 641, 716.) A "reasonable probability," however, does not mean more likely than not, but rather means merely a reasonable chance or more than "an abstract possibility." (*People v. Wilkins* (2013) 56 Cal.4th 333, 351.) Moreover, the more favorable outcome here means just that the jury would not have unanimously agreed to convict. (*People v. Soojian* (2010) 190 Cal.App.4th 491, 519.)

Here, the error was prejudicial under either standard. As a preliminary matter, Hlebo was entitled to the instruction on voluntary manslaughter. Courts must instruct "on all theories of a lesser included offense which find substantial support in the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 162, citing *People v. Flannel* (1979) 25 Cal.3d 668, 684.) Further, it has long been the law of this state that any conduct—verbal or physical—can constitute the required provocation so long as the conduct would "excite an *irresistible passion* in a reasonable person." (*People v. Valentine* (1946) 28 Cal.2d 121, 138-139, citing *People v. Hurtado* (1883) 63 Cal. 288, 292, emphasis in the original.)

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Here, Hlebo told his brother that he had "snapped" or "exploded" after Myrick had called his wife a demeaning word insulting her fidelity. (1CT 99-101.) This is precisely the kind of conduct that can serve as provocation for voluntary manslaughter. (See *People v. Le* (2007) 158 Cal.App.4th 516, 528 ["[P]rovocation can include the verbal taunts of an unfaithful wife and infidelity."].)

Some courts have found that, at least in certain circumstances, words alone do not constitute sufficient provocation for heat of passion. (See, e.g, *People v. Manriquez* (2005) 37 Cal. 4th 547, 585-586 [name calling and taunting insufficient to warrant voluntary-manslaughter instruction]; *People v. Najera* (2006) 138 Cal.App.4th 212, 215 [use of homophobic slur insufficient].) But as noted above, any conduct can suffice, so long as it would cause a reasonable person to act rashly. (*Valentine*, *supra*, 28 Cal.2d 121, 143-144.) Taunts of infidelity have been recognized as sufficiently provocative conduct. (*Le*, *supra*, 158 Cal.App.4th at p. 528.) And while the taunt here was not *from* Hlebo's wife (see *ibid*.), it was *about* Hlebo's wife, and even the prosecution acknowledged that a reasonable person might yell at or punch someone based on this kind of insult. (5RT 745.) This essentially concedes that the conduct, if true, would be enough to cause a reasonable person to act rashly.

With respect to the effect the exclusion of Hlebo's statements had on the jury's verdict, the error put the prosecution in an unfair position of strength. With the evidence of Hlebo's visual hallucinations excluded, the prosecution was able

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to portray him as merely an irritated or short-tempered man and to then use that portrayal as the motive for the killing. (See, e.g., 5RT 733, 743-744.) The prosecutor was also able to cast doubt on the provocation itself by pointing to Hlebo's outsized reaction and arguing that no one would kill based on a mere insult. (5RT 745.) The implication here was that, while Hlebo undoubtedly killed in a rage, the insult must never have occurred, since no one would have reacted that way to a mere insult. Something must explain the killing, like Hlebo's irritability or fatigue, but it could not have been just an insult. (5RT 745.)

That is what the defense was fighting against. The killing here did not make sense, but the hallucinations would have allowed Hlebo to provide a coherent narrative, one that could have explained how a legally sufficient provocation—one that would have led a reasonable man to act rashly—in fact led him to go beyond a mere rash reaction and kill. The prosecutor argued that, while an ordinary, reasonable man might yell or even resort to violence in response to a sufficiently provocative insult, the ordinary, reasonable man would not go beyond that. (5RT 745.) But voluntary manslaughter is not for the ordinary, reasonable man. (*Beltran*, *supra*, 56 Cal.4th at p. 949.)[5] Voluntary

[5] In *Beltran*, the Court explained the conceptual underpinnings of voluntary manslaughter: "As [*Maher v. People* (1862) 10 Mich. 212] suggested, society expects the average person not to kill, even when provoked. As Professor Dressler stated, we punish a person who kills in the heat of passion or upon provocation because '[h]e did not control himself as much as he should have, or as much as common experience tells us he could have, nor as much as the ordinarily law-abiding person would have.' (Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale* (1982), 73 J. Crim. L. & Criminology 421, 467, original italics.) However, if one does kill in this state, his punishment is mitigated. Such a killing is not justified but

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manslaughter is for the unreasonable man, the one who does not control himself as much as a reasonable man would. (*Ibid.*) The hallucinations would have allowed the defense to explain why Hlebo was such a man. They were the missing piece for the defense argument, and that is why the court's error in excluding them was so prejudicial.

A potential rejoinder to this is that if Hlebo were imagining brains under his truck, then he might have imagined the provocation as well. (See *Elmore*, *supra*, 59 Cal.4th at p. 134.) Indeed, according to this argument, Myrick might never have said anything at all. Hlebo might simply have thought that Myrick had said something, or else Hlebo might have had some other, completely different hallucination that led to the killing.

But this argument would ignore the evidence that, whatever hallucinations Hlebo was suffering, he was still able to function in the world. He was married. He had a job. And except for Diaz, none of his coworkers appeared to recognize his mental-health issues.

So Hlebo was not completely disconnected from reality. He was simply dealing with a stressor that few people have ever had to deal with, and that stressor made him unable to "control himself as much as he should have, or as much as common experience tells us he could have, nor as much as the ordinarily

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understandable in light of 'the frailty of human nature.' (*Maher*, *supra*, 10 Mich. at p. 219.) The killing reaction therefore is the extraordinary reaction, the unusual exception to the general expectation that the ordinary person will not kill even when provoked." (*Beltran*, *supra*, 56 Cal.4th at p. 949.)

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law-abiding person would have." (*Beltran*, *supra*, 56 Cal.4th at p. 949.)

Further, it was not the defense's burden to prove what happened. (*People v. Saavedra* (2007) 156 Cal.App.4th 561, 570.) The defense burden was only to raise a doubt as to malice, and the hallucinations were relevant to raising that doubt. So even if the evidence was not unequivocally good for the defense, it was still sufficient to result in a reasonable probability of a different verdict.

F. Defense counsel's failure to provide a sufficient offer of proof deprived Hlebo of the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitution.

As noted above, counsel here fairly apprised the court of the issue it was being called upon to decide. The evidence was identified in the prosecution's motion in limine, and counsel articulated its purpose and relevance. (1CT 55-58; 1RT 21, 32-33, 36, 102.) This was all that was needed for counsel to preserve the issue for appeal. (See Evid. Code § 354; *Bolinski*, supra, 260 Cal.App.2d at pp. 722-723; *Briggs*, *supra*, 58 Cal.2d at pp. 409-410.)

That said, if counsel's arguments were insufficient to preserve the issue for appeal, then Hlebo was deprived of the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States Constitutions as well as article I, section 15 of the California constitution. In *Strickland v. Washington* (1984) 466 U.S. 668, the Supreme Court set forth the two requirements to establish a valid claim of ineffective

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assistance of counsel. First, the defendant must show that counsel's performance fell below "an objective standard of reasonableness under prevailing professional norms." (*Id.* at p. 687.) Under these prevailing professional norms, defense counsel is required to make proper objections. (See, e.g., *Ledesma*, *supra*, 43 Cal.3d at p. 222; *People v. Mozinga* (1983) 34 Cal.3d 926.) Further, when making objections, counsel must state all meritorious grounds on the record, as there can be no tactical reason for objecting on only some meritorious grounds but not on others. (*People v. Asbury* (1985) 173 Cal.App.3d 362, 366.)

Second, the defendant must prove that "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable." (*Strickland*, *supra*, 466 U.S. at p. 694.) "A reasonable probability is a probability sufficient to undermine confidence in the outcome" of the trial. (*People v. Mayfield* (1993) 5 Cal.4th 142, 199.)

Counsel here wanted to introduce Hlebo's statements to Diaz. She argued multiple times that the statements were relevant. But if her argument was inarticulate—if she failed to fully voice why the statements were relevant such that the court understood their purpose—then that was a failure on her part. Counsel must make relevant objections, and when counsel makes objections, counsel must make them on all meritorious grounds. (*Asbury*, supra, 173 Cal.App.3d at p. 366.) There can be no tactical reason for objecting halfway or otherwise offering an inadequate offer of proof. (See *ibid.*) Accordingly, to the extent

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counsel failed to properly explain to the court the reason for the evidence, she was constitutionally ineffective.

Moreover, as explained above, the evidence was important. It would have allowed the defense to offer a positive theory as to what happened, one a jury could understand. In the absence of this evidence, the defense was unable to counter the prosecution's theory of the case and portrayal of Hlebo. So for the reasons stated above, the evidence was prejudicial.

II. Defense Counsel's Failure to Object to Evidence of Myrick's Good Character Deprived Hlebo of the Effective Assistance of Counsel Under the Sixth and Fourteenth Amendments to the United States Constitution.

A. Introduction

At trial, the defense was that Hlebo killed in the heat of passion. Central to this defense was that Myrick had provoked Hlebo by insulting his wife. To rebut this argument, the prosecution introduced evidence from multiple witnesses that Myrick was a calm or peaceful person. Each witness said he was calm or "chill," and none of them had ever known him to have problems with anyone. (2RT 217, 234; 3RT 335-336, 368.) One said he had never known Myrick to be "confrontational or hostile towards people in any way." (2RT 217.) Another said he was "very calm . . . a very chill dude," whom the witness had never seen "act in a confrontational or hostile or aggressive manner with anyone." (3RT 332, 335-336.) Indeed, a friend of Myrick's, one who had gotten him the job at GP Sports, said he was "a great guy . . . a very nice kid," who was never "confrontational or

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hostile or aggressive" and who never "interact[ed] with anybody in an angry manner" or "pick[ed] a fight" with anyone. (3RT 368.)

This was all inadmissible character evidence, and it rebutted a central part of the defense case. Yet defense counsel never objected to the evidence. (1RT 40; 2RT 217, 234, 299; 3RT 309-311, 335-336, 368.) She discussed evidence that she hoped to use to rebut the character evidence, but she never argued that the evidence was inadmissible in itself. This failure denied Hlebo the right to the effective assistance of counsel. Further, because the evidence was a major part of the prosecution's argument that there was no provocation—the central issue for the defense at trial—the error was prejudicial.

B. Cognizability

While ineffective-assistance claims are generally best raised in habeas corpus proceedings, errors resulting from ineffective assistance of counsel may be raised on direct appeal if there can be no sound tactical reason for counsel's conduct or inaction. (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266; *People v. Guizar* (1986) 180 Cal.App.3d 487, 492, fn. 3; *People v. Stratton* (1988) 205 Cal.App.3d 87, 94.) A claim of ineffective assistance is appropriately reviewed on the appellate record alone where counsel's error was "so gross as to jump out of the record and require no supplemental explanation." (*In re Arturo A.* (1992) 8 Cal.App.4th 229, 243.) As will be shown below, that is the case here.

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C. Reasonably competent counsel would have objected to the inadmissible testimony.

At trial, Hlebo had the right to the effective assistance of counsel under the Sixth and Fourteenth Amendments to the United States constitution and article I, section 15 of the California constitution. As noted above, in *Strickland*, *supra*, 466 U.S. 668, the Supreme Court set forth the two requirements to establish a valid claim of ineffective assistance of counsel. First, the defendant must show that counsel's performance fell below "an objective standard of reasonableness under prevailing professional norms." (*Id*. at p. 687.) Under these prevailing professional norms, defense counsel is required to make proper objections. (See, e.g., *Ledesma*, *supra*, 43 Cal.3d at p. 222; *Mozinga*, *supra*, 34 Cal.3d 926.) Further, when making objections, counsel must state all meritorious grounds on the record, as there can be no tactical reason for objecting on only some meritorious grounds but not on others. (*Asbury*, *supra*, 173 Cal.App.3d at p. 366.)

Second, the defendant must prove that "there is a reasonable probability that, but for counsel's failings, the result would have been more favorable." (*Strickland*, *supra*, 466 U.S. at p. 694.) On appeal, the defendant must also show that there was no reasonable explanation for trial counsel's conduct. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

As a preliminary matter, character evidence is generally inadmissible to prove someone's conduct on a particular occasion. (Evid. Code § 1101, subd. (a).) Evidence Code section 1103 permits the introduction of character evidence in certain

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circumstances—such as when the defense introduces evidence of the victim's character, in which case the prosecution may rebut it—but when the defense does not introduce evidence of the victim's bad character, the prosecution may not introduce evidence of the victim's good character. (*People v. Gurule* (2002) 28 Cal.4th 557, 623.)

Here, Hlebo introduced no evidence that Myrick had a violent or aggressive character.[6] The prosecutor elicited the good-character evidence only to prove that Myrick could not have provoked Hlebo because he was such a peaceful, calm person. And indeed, that is precisely how the prosecutor used the evidence in closing. (5RT 744.) The prosecutor argued explicitly that "that type of confrontational, hostile, or aggressive action by Kyle was not in his character. He didn't do things like that." (5RT 744.) This evidence was plainly inadmissible under Evidence Code section 1101, and counsel should have objected to it. (See *Gurule*, *supra*, 28 Cal.4th at p. 623.)

Further, counsel could have had no tactical reason for not objecting to this evidence. Counsel was clear that she was pursuing voluntary manslaughter (1RT 21), and the only way to pursue that theory was to argue that Myrick provoked Hlebo (or at least that Hlebo reasonably believed Myrick had provoked him). (See *People v. Lee* (1999) 20 Cal.4th 47, 59.) Myrick's character for peacefulness thus strongly undercut a key element

[6] Hlebo did eventually introduce evidence Myrick had been disciplined at work, but as is discussed below, this was only in response to the prosecution's improper character evidence. (2RT 399; 3RT 309-311.)

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of the defense, so there could have been no tactical reason not to try to exclude the inadmissible testimony.

And in fact, counsel did try to blunt the impact of the testimony by introducing evidence that Myrick had been disciplined at work. (2RT 299; 3RT 309-311.) So counsel clearly appreciated how prejudicial the character evidence was, yet counsel appeared not to understand that it was inadmissible. At sidebar, for instance, counsel argued that Myrick's disciplinary record was necessary to rebut the prosecution's character testimony, but tellingly, counsel did not argue that the character testimony itself was inadmissible. (2RT 299; 3RT 309-311.) Counsel had even anticipated during motions in limine that the prosecution might introduce evidence of Myrick's good character. (1RT 40.) But rather than argue that such evidence would be inadmissible, she merely asked the court to tentatively exclude her own rebuttal evidence unless it became relevant. (1RT 40.) This all suggests that counsel simply did not realize that the evidence was inadmissible. (See *Asbury*, *supra*, 173 Cal.App.3d at pp. 365-366.)

When counsel does not know the law, counsel cannot make reasonable tactical choices. (See *Asbury*, *supra*,173 Cal.App.3d at pp. 365-366.) Counsel here did not know the law—if she had known the law, she would have argued that the prosecution's character evidence was inadmissible. (See 1RT 40; 2RT 299; 3RT 309-311.) Since counsel did not know the law, her failure to object could not have been tactical. (See *Asbury*, *supra*, 173 Cal.App.3d

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at pp. 365-366.) Therefore her performance fell below the prevailing standards of professional norms. (*Ibid.*)

D. The admission of the character evidence was prejudicial.

As noted above, under the *Strickland* standard, Hlebo must show a "reasonable probability" of a more favorable outcome but for counsel's errors. (*Strickland*, *supra*, 466 U.S. at p. 687.) Here, the defense was that Hlebo killed Myrick in the heat of passion as a result of legally sufficient provocation. (1RT 21; 5RT 769-771.) The evidence of provocation came from Hlebo's phone call to his brother (see 1CT 99-103), but there were no witnesses to corroborate his statement. So any evidence that could prove or disprove provocation would be crucial to the jury's verdict.

The improperly admitted evidence of Myrick's good character bore directly on that issue. It was powerful propensity evidence that suggested that Myrick would never have provoked Hlebo as Hlebo described, while also portraying Myrick as a sympathetic victim who did not deserve what happened to him. Jurors tend to overvalue propensity evidence as a general matter (see, e.g., *Old Chief*, *supra*, 519 U.S. at pp. 180-82), and studies of victim-impact evidence show that evidence of a victim's sympathetic character traits significantly increases the likelihood of jurors voting for the death penalty. (Deise & Paternoster (2013) *More Than a "Quick Glimpse of the Life": The Relationship Between Victim Impact Evidence and Death Sentencing*, 40 Hastings Const. L.Q. 611, 628 [existing empirical evidence "suggests, but does not prove, that victim impact evidence appeals to the emotions of jurors thereby leading them to

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sentence defendants to death"], 641 [study finding victim-impact evidence made jurors feel more "emotionally aroused," "ashamed," "upset," "hostile," "angry," and "vengeful"].)

While there are obvious differences between good-character evidence at trial and victim-impact evidence at capital sentencing, these studies show that the victim's character matters to jurors. Jurors care about who the victims are, and evidence about a victim's sympathetic character traits can sway jurors against a criminal defendant. Indeed, such evidence makes it more likely not just that jurors will convict but that they will impose the most severe penalty the law allows. Accordingly, its admission here—where it was on a central point of contention and the prosecutor relied on it in closing argument—was prejudicial.

III. The Jury Instructions on Murder Misstated the Law on Provocation and Did Not Require the Prosecution to Prove the Absence of Provocation and Heat of Passion, Thereby Depriving Hlebo of His Right to Due Process and Trial by Jury Under the Sixth and Fourteenth Amendments.

A. Introduction

At trial, Hlebo was charged with murder as well as with voluntary manslaughter under a heat-of-passion theory. The court gave the standard homicide instructions, CALCRIM Nos. 500, 520, 521, and 522, as well as CALCRIM No. 570 for voluntary manslaughter. (1CT 148-154; 5RT 716-721.) The court also gave a pinpoint instruction entitled, "FOCUS IS ON THE VICTIM'S PROVOCATION." (1CT 155.) The instruction read:

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> The provocation that causes a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment must be caused by the victim. The provocation would have caused a person of average disposition, in the same situation and knowing the same facts, to act rashly and without due deliberation, that is, from passion rather than from judgment. The focus is on the victim's conduct and what the victim did to provoke the defendant.

(1CT 155; 5RT 720-721.)

The problem with these instructions was that they omitted a necessary element from the definition of murder. (1CT 149-150; 5RT 716-717.) When the jury is instructed on voluntary manslaughter under a heat-of-passion theory, the prosecution must affirmatively disprove heat of passion to convict the defendant of murder. (*Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.) That is, the absence of heat of passion becomes an element of murder. (*Ibid*.) The homicide instructions here, however, failed to identify the absence of heat of passion as an element of murder, and thus the instructions improperly relieved the prosecution of its burden of proof. (1CT 149-150; 5RT 716-717.)

What's more, the voluntary-manslaughter instruction told the jury that they had to make affirmative findings about the existence of provocation, further shifting the burden to the defense. (1CT 153-154; 5RT 719-720.) So while the voluntary-manslaughter instruction (CALCRIM No. 570) did say that the prosecution needed to disprove heat of passion beyond a reasonable doubt, the instruction as a whole contradicted itself and thus failed to correctly instruct the jurors on what they

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needed to find. (1CT 153-154; 5RT 719-720.) Further, the pinpoint instruction shifted the burden by saying, "the focus is on the victim's conduct and what the victim did to provoke the defendant," when "the focus" here, as in all criminal cases, was on what the prosecution had established beyond a reasonable doubt, not on what the defense had established the decedent had done. (1CT 155; 5RT 720-721.) And finally, the jurors were never told how to fill out the verdict forms or that they could consider the charges in any order they wanted. (1CT 125-157; 5RT 700-721.) So there was nothing in the instructions as a whole that could have corrected the court's misstatements of the law.

In short, the jurors were told they could convict Hlebo of murder without first considering heat of passion. The remainder of the instructions then shifted the burden of proving heat of passion to the defense, and the one instruction that could arguably have cured this error—that the jury can consider the charges in any order they want—was not given. Taken together, therefore, these instructions improperly reduced the prosecution's burden of proof and denied Hlebo due process of law.

B. Cognizability and standard of review

In assessing whether a jury instruction correctly states the law, this court must apply an "independent or de novo standard of review." (*People v. Posey* (2004) 32 Cal.4th 193, 218.) In doing so, the court must view the challenged instruction in the context of the instructions as a whole. (*Boyde v. California* (1990) 494 U.S. 370, 378.) When the instructions are ambiguous, the court must consider whether there is a reasonable likelihood the jury

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applied the instruction in an impermissible manner. (*People v. Houston* (2012) 54 Cal.4th 1186, 122; *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. omitted.) But when the instructions are clearly erroneous, such as when they omit a necessary element of the crime, constitutional error has occurred, and the reasonable-likelihood test does not apply. (See *People v. Elguera* (1992) 8 Cal.App.4th 1214, 1220; *Ho v. Carey* (9th Cir. 2003) 332 F.3d 587, 592; but see *People v. Catlin* (2001) 26 Cal.4th 81, 151; *People v. Snead* (1993) 20 Cal.App.4th 1088.)

With respect to cognizability, while defense counsel did not object to the instructions, Penal Code section 1259 permits appellate review of any instruction affecting the defendant's "substantial rights." An instruction impairs the defendant's substantial rights when it relieves the prosecution of the burden of proving each element of the charged crimes beyond a reasonable doubt. (*People v. Flood* (1998) 18 Cal.4th 470, 491.) Under such circumstances, no objection is necessary to preserve the issue for appeal. (*Id*. at p. 482, fn. 7.) That was the case here.

C. The homicide instructions omitted an element from the definition of murder and misstated the burden of proof on heat of passion and thus were "clearly erroneous."

In a criminal trial, the defendant is presumed innocent. (*In re Winship* (1970) 397 U.S. 358, 363-364; § 1096.) The burden is on the prosecution to prove each element of the offense beyond a reasonable doubt, and unless the prosecution has done so, the defendant is entitled to an acquittal. (*Ibid*.) Further, the court must instruct the jury that the burden is on the prosecution to

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prove each element of the charged offense, and this obligation includes identifying what those elements are. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.) If the instructions fail to do this—that is, if they relieve the prosecution of the burden of proving every element of the offense beyond a reasonable doubt—then they violate the defendant's rights under both the United States and California Constitutions. (*Flood*, *supra*, 18 Cal.4th 470, 479-480; see also *Middleton v. McNeil* (2004) 541 U.S. 433, 437.)

The instructions here relieved the prosecution of the burden of proving malice beyond a reasonable doubt by omitting from the definition of murder the absence of heat of passion. CALCRIM No. 520, which defines murder and which the court gave to the jury, omitted from the elements of murder the absence of heat of passion. (1CT 149-150; 5RT 716-717.) The instruction said that to prove Hlebo guilty of murder, the prosecution needed to prove only two elements: causation and malice. (1CT 149-150; 5RT 716-717.) The instruction went on to explain what causation and malice were, and the instruction ended by saying, "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521." (1CT 149-150; 5RT 716-717.) But the instruction nowhere said that the prosecution must disprove heat of passion. (1CT 149-150; 5RT 716-717.)

This was an incorrect statement of the law. When voluntary manslaughter is charged alongside murder, the

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absence of heat of passion is an element of murder. (*Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.) That is, the prosecution must affirmatively *disprove* heat of passion, and the defendant may not be convicted unless the prosecution has done so. (*Ibid.*) So by omitting the absence of heat of passion from the instructions on murder, the court was telling the jury that it could convict Hlebo of murder without considering a necessary element of the crime.

Further, the prosecutor argued the case precisely that way. In closing, the prosecutor said that murder involved only causation and malice and that manslaughter merely "mitigated down" an otherwise valid murder conviction. (5RT 735-736.) Hlebo was guilty of murder, according to the argument, because he killed Myrick with malice aforethought. (5RT 734.) Heat of passion was simply not relevant to whether Hlebo committed murder, at least not in the first instance. (5RT 731-736.) Rather, according to both the prosecutor and the instructions, it was only after the jury first found Hlebo guilty of murder that "we either elevate it up to a first degree murder . . . or we reduce it down and mitigate it to voluntary manslaughter in the heat of passion." (5RT 735-736.)

But again, that is an incorrect statement of the law. The jury was not meant to first find Hlebo guilty of murder and then "reduce it down" or "mitigate it" based on heat of passion. The jury was meant to consider heat of passion as a part of murder. (See *Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.) If Hlebo did kill in the heat of passion—or rather, if

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the prosecution failed to show that he didn't—then there would be nothing to "reduce." (See *ibid.*) Hlebo would simply be not guilty of murder. But by omitting the absence of heat of passion from the definition of murder, the court permitted—indeed, required, since malice and causation were otherwise not contested—a murder conviction before the jurors ever considered heat of passion. This was incorrect.

Of course, jury instructions must not be considered in isolation. (*Boyde*, *supra*, 494 U.S. at p. 378.) But the remaining instructions only deepened the problem. CALCRIM No. 570, for instance, contains multiple incorrect statements about heat of passion "reducing" a murder and about what the jury "must decide" with respect to provocation, which here, further shifted the burden to the defense. (1CT 153-154; 5RT 719-720.) CALCRIM No. 570 says:

- 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;
- 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;
- You *must decide* whether the defendant was provoked and whether the provocation was sufficient.

(1CT 153-154; 5RT 719-720, emphasis added.) But the jury need not "decide" whether the defendant was provoked. (See *Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.) The jury may remain entirely agnostic on that point and still render a verdict. If the jurors do not decide whether the defendant was in

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fact provoked—that is, if they are unsure of whether the defendant was provoked—then they must acquit of murder. That is, uncertainty still leads to a valid verdict—one of acquittal—so the jurors here no more needed to resolve the question of provocation than they did the question of innocence. It was simply not an issue, yet the instructions made it one.

Similarly, heat of passion no more "reduces" a murder than self-defense does. A killing is simply not a murder if it was done in the heat of passion just as a killing is not a murder if done in self-defense. (See § 197.) So while courts may talk about voluntary manslaughter "reducing" a murder (see, e.g., *People v. Landry* (2016) 2 Cal.5th 52, 97), that is not an issue for the jury to decide. (See § 1126 ["In a trial for any offense, questions of law are to be decided by the court, and questions of fact by the jury."].) The issue for the jury is only whether a murder was committed, and if the killing was committed in the heat of passion, then it was not.

Further, while CALCRIM No. 570 does say the prosecution must disprove heat of passion beyond a reasonable doubt (see 5RT 720), that language was not enough to cure the errors in the other instructions. As noted above, other language in CALCRIM No. 570 directly contradicts this language, so there was no way for the jurors to know which instruction to follow. And more importantly, based on how the jurors were instructed on murder, they could never have reached the voluntary-manslaughter instruction in the first place. Jurors cannot return a verdict on a lesser offense once they have convicted on the greater. (See

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People v. Moran (1970) 1 Cal.3d 755, 763.) So once the jurors found Hlebo guilty of murder, they could not consider voluntary manslaughter.

Indeed, that is exactly what the prosecutor told the jurors. She said that once they found Hlebo guilty of murder, their job was done. (5RT 747-748 [explaining how to fill out verdict forms and saying, "If you find him not guilty of first, you find him guilty/not guilty of second. If he is guilty of a second, you're done."].) There was nothing more for them to consider. And while jurors are permitted to consider the charges in any order they want (*People v. Kurtzman* (1988) 46 Cal. 3d 322, 332), the court here did not tell them that. (1CT 125-157; 5RT 700-721.) And in fact, they were told that some instructions did not even apply to the case depending on what they found. (1CT 126; 5RT 704.)

The prosecutor in fact highlighted this instruction before discussing voluntary manslaughter. She said, "CALCRIM 200, one of the instructions, indicates that some of the instructions may not apply depending about your findings of the facts. You can disregard any instruction that does not apply based on facts determined by you not to exist." (5RT 742.) And from there, she started talking about voluntary manslaughter, the clear implication being that the voluntary-manslaughter instructions would not apply if the jurors had already found Hlebo guilty of murder.

So not only were the jurors *not* told they could consider the charges in any order they wanted, they were also told that the voluntary-manslaughter instruction may not even apply. And

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based on how the instructions were written, that was correct—instructions on lesser-included offenses don't apply once the jury has convicted of the greater offense. (*Moran*, *supra*, 1 Cal.3d at p. 763.) But here an essential element of the greater offense was contained only in the instruction for the lesser offense. (1CT 148-154; 5RT 716-721.) So in essence, the jurors were told that an element of murder may not apply, depending on their findings of the facts. This was a patently incorrect way of instructing the jury. (*Cummings*, *supra*, 4 Cal.4th at p. 1311.)

There was also one final error in the instructions: the pinpoint instruction. In that instruction, the court told the jury that "the provocation…must be caused by the victim." (1CT 155; 5RT 720-721.) This was incorrect for two reasons. First, the instruction misstated the law with respect to where the provocation must come from. The instruction said, "The provocation . . . must be caused by the victim." But that's not right. The provocation must come from the decedent *or* be reasonably thought to have come from the decedent. (*Moye*, *supra*, 47 Cal.4th at pp. 549–550.) By saying that the provocation could come only from the victim, the court was improperly telling the jury that Hlebo's reasonable beliefs did not matter—that is, that even if Hlebo reasonably believed Myrick had provoked him, that alone would not suffice. That was incorrect.

Second, the instruction was ambiguous with respect to the phrase, "the focus." The court said, "The focus is on the victim's conduct and what the victim did to provoke the defendant." (1CT 155; 5RT 720-721.) But that left open the question: the focus of

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what? The focus of the jurors' attention? The focus of the voluntary-manslaughter instruction? The instruction on heat of passion has multiple components, none of which are any more important than the others. There must be provocation. (*Beltran*, *supra*, 56 Cal.4th at p. 942.) The provocation must be such as would cause a reasonable person to act rashly, and the defendant must in fact have acted while in the heat of passion. (*Ibid*.) None of these elements is any more "the focus" of the inquiry than the others, so by telling the jury that "the focus" was on only one element, the court misstated the law.

Indeed, by emphasizing just one component of the instructions—Myrick's actions—the court further shifted the burden of proof. The focus in this case, as in all criminal cases, was supposed to be on whether the prosecution had proved the charges beyond a reasonable doubt. (See *Winship*, *supra*, 397 U.S. at pp. 363-364; § 1096.) In making that determination, the jurors did not need to focus on "what the victim did to provoke the defendant." That is because they did not need to determine what Myrick did to provoke Hlebo. (See *Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.) They needed to determine only whether the prosecution had proved that Myrick did not provoke Hlebo (or that such provocation was not sufficient or that Hlebo did not in fact act in the heat of passion). So by telling the jurors that "the focus" was on "what the victim did to provoke the defendant," the court was telling them that they had to make a determination about whether Myrick had provoked Hlebo. That, too, was incorrect.

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In short, the court improperly omitted an element from the definition of murder, and while the voluntary-manslaughter instruction said the prosecution needed to disprove heat of passion, this lone statement failed to correct the omission. Numerous other statements throughout the instructions—including the court's pinpoint instruction—contradicted that statement on the prosecution's burden. And based on the erroneous instructions, the jury could never have reached voluntary manslaughter, anyhow, because once the jurors had found Hlebo guilty of murder, they were, in the words of the prosecutor, "done." (5RT 747-748.) Accordingly, because the instructions relieved the prosecution of the burden of disproving heat of passion, they violated Hlebo's Sixth and Fourteenth Amendment rights. (*Flood*, *supra*, 18 Cal.4th 470, 479-480; see also *Middleton*, *supra*, 541 U.S. at p. 437.)

D. Even if the instructions were not "clearly erroneous," the jurors likely misapplied them.

For the reasons stated above, the instructions here were "clearly erroneous." The court therefore need not consider whether the jurors were likely to misapply them. (See *Elguera*, *supra*, 8 Cal.App.4th at p. 1220; *Ho*, *supra*, 332 F.3d at p. 592.) That said, even if the instructions were merely ambiguous rather than clearly erroneous, there are two reasons to believe the jurors misapplied them.

First, since at least the 1970s, researchers have studied how well jurors understand jury instructions. (Marder, *Bringing Jury Instructions Into the Twenty-First Century* (2006), 81 Notre Dame L.Rev 449, 451.) Generally, the answer is: not very well.

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(*Ibid.*) Pattern instructions usually use legal jargon, ambiguous language, and awkward grammar, all of which make them confusing to jurors. (*Id.* at p. 454.) Further, jury instructions are often organized in ways that are difficult to discern, and pattern instructions in particular are written in such general terms that it is often difficult for jurors to apply them to the case at hand. (*Id.* at p. 451,454.)

Multiple studies over the past several decades have confirmed the difficulty that jurors have in understanding jury instructions. (Marder, *supra*, 81 Notre Dame L.Rev at pp. 454-455, citing Elwork et al., *Juridic Decisions: In Ignorance of the Law or in Light of It?* (1977) 1 Law & Hum. Behav. 163.) For instance, in one study conducted by the National Science Foundation, mock jurors were assigned to one of three groups—a group receiving no jury instructions, a group receiving pattern jury instructions, and a group receiving jury instructions rewritten to increase comprehension. (*Id.* at p. 455.) The jurors then watched a videotaped trial using actors and were given a questionnaire designed to test comprehension. (*Ibid.*)

The study found that the pattern jury instructions were no more effective at conveying the relevant legal principles than no instructions at all. (Marder, *supra*, 81 Notre Dame L.Rev at p. 455.) That is, while the rewritten instructions were helpful at increasing comprehension for the group that received those, the comprehension errors were the same for the group that received the pattern instructions as it was for the group that received no jury instructions at all. (*Ibid.*)

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Other studies have confirmed this finding and have shown that comprehension does not meaningfully increase when mock jurors are given a chance to deliberate before answering questions or even when people who actually served as jurors are surveyed. (Marder, *supra*, 81 Notre Dame L.Rev at pp. 455-458.) Indeed, one survey of former jurors found that they understood the jury instructions less than half the time. (*Id*. at p. 457, citing Reifman et al., *Real Jurors' Understanding of the Law in Real Cases* (1992) 16 Law & Hum. Behav. 539, 550.) So, given the difficulty jurors typically have in understanding jury instructions, there is no reason to think that the jurors here would have been able to correctly apply the instructions, especially given that the instructions were both incorrect and at times self-contradictory.

Second, a recent working paper analyzed the CALCRIM instructions for heat-of-passion manslaughter and found that the level of juror understanding was "strikingly low." (Redbird, *The Impact of Jury Instructions on Heat of Passion Manslaughter Determinations* (2022) Northwestern Inst. for Policy Research, at p. 6, available at https://www.ipr.northwestern.edu/documents/working-papers/2022/wp-22-08.pdf, last visited February 1, 2022.)[7] The paper was written by Dr. Beth Redbird, a professor of

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[7] Reviewing courts routinely cite social-science research in resolving the issues in front of them. (See, e.g., *Rivera v. Division of Industrial Welfare* (1968) 265 Cal.App.2d 576, 589, fn. 20 ["The 'Brandeis brief,' which brings social statistics into the courtroom, has become a commonplace."]; *Ashby v. Ashby* (2021) 68 Cal.App.5th, 491, 518 [noting appellant had offered "no legal authority precluding the use of law review articles in appellate briefing"].) This occurs in the United States Supreme Court (see, e.g., *Miller v. Alabama* (2012) 567 U.S. 460, 471 [noting previous decisions "rested not only on

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sociology at Northwestern University, and it was published by Northwestern's Institute for Policy Research. (*Id*. at p. 1.) The paper details an experiment Dr. Redbird conducted involving the CALCRIM heat-of-passion jury instructions. (*Id*. at pp. 1-2.) Dr. Redbird provided survey participants with a brief factual scenario involving a killing between two coworkers. (*Id*. at p. 2.) The killing was possibly the result of verbal provocation. (*Ibid*.)

Dr. Redbird then had the survey participants watch a video of someone reading the CALCRIM instructions and then answer a series of questions to test their comprehension. (Redbird, *supra*, Inst. for Policy Research at p. 1-2.) The survey group included

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common sense . . . but on science and social science as well"), the California Supreme Court (see, e.g., *People v. Lemcke* (2021) 11 Cal.5th 644, 667 [noting the "large body of research" into eyewitness identifications], and the California Courts of Appeal (see, e.g., *In re Woods* (2021) 62 Cal.App.5th 740, 762-763 (dis. opn. of Bendix, J.) ["Certainly, social science has influenced legislative acts and appellate jurisprudence as reflected in [Penal Code] section 3051 itself and in the very appellate debate before us. Social science has produced statistics about recidivism by sex offenders that arguably would support both sides in this debate."]; *People v. Linn* (2015) 241 Cal.App.4th 46, 68, fn. 10 [noting "recent empirical research suggesting that a significant number of people do not feel free to leave when approached by police"]). At least one other working paper from Northwestern's Institute for Policy Research has been cited in federal court. (See *Gilliam v. U.S. Dept. of Agriculture* (E.D. Pa. 2020) 486 F.Supp.3d 856, 861, citing Schanzenbach & Pitts, *How Much Has Food Insecurity Risen? Evidence from the Census Household Pulse Survey* (2020) Northwestern Inst. for Policy Research.) And the law-review article by Professor Marder has been cited in courts at both the state and federal level. (See, e.g., *United States v. Becerra* (9th Cir. 2019) 939 F.3d 995, 1001; *United States v. Robinson* (7th Cir. 2013) 724 F.3d 878, 887-888; *Batchelor v. State* (Ind. 2019) 119 N.E.3d 550, 563.) A request for judicial notice seems not to be required when advocates bring to the court's attention scholarly papers relevant to the issues at hand. (See *Rivera*, *supra*, 265 Cal.App.2d at p. 589, fn. 20; *Ashby*, *supra*, 68 Cal.App.5th at p. 518; see also *People v. Wilcox* (2013) 217 Cal.App.4th 618, 626 [noting law review articles "can help inform us," though "they do not compel a particular result"].) Nevertheless, because of appellate counsel's role in the creation of Dr. Redbird's paper, a request for judicial notice with a declaration fully explaining the paper's origin is being filed contemporaneously with this brief.

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897 participants recruited via Amazon's Mechanical Turk program, "an online platform where individuals may opt to take surveys for payment." (*Id*. at p. 1.) Most of the participants had at least some level of college education, which meant that the survey participants were, on the whole, more educated than the general population. (*Id*. at p. 2)

Nevertheless, when asked six true-or-false questions about the jury instructions, only 5.2 percent of participants were able to answer all of them correctly. (Redbird, *supra*, Inst. for Policy Research at p. 3.) Sixty-two percent thought that, for the defendant to be convicted a manslaughter, the burden was on the defense to prove the defendant was acting rashly or emotionally. (Id. at p. 5.) Seventy percent thought the defense had to prove that a reasonable person would have killed under similar circumstances. (*Ibid*.) Fifty percent thought the defense had to prove both, and 80 percent thought that the prosecution could carry their burden on murder by showing that a reasonable person would not have killed under similar circumstances. (*Ibid*.)

As discussed above, these are all incorrect statements. The defense has no burden to prove manslaughter, and the prosecution must show that a reasonable person would not have acted rashly, not that a reasonable person would not have killed. (*Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462; *Beltran*, *supra*, 56 Cal.4th at p. 949.) Further, when asked directly who had the burden of proof, more than half of the participants believed that the defense had some or all of the burden of proving heat of passion. (Redbird, *supra*, Inst. for

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Policy Research at p. 5.) Moreover, this incorrect belief increased the likelihood of a guilty verdict on murder, even when those same participants believed the defendant was telling the truth about the provocation and even found his anger reasonable. (*Id*. at p. 6.)

So, based on this research, not only were the instructions given here incorrect, they were also incomprehensible. Survey participants were simply not able to reliably and correctly answer questions about the burden of proof based on these instructions. This makes sense given that, as discussed above, the instructions affirmatively misstated the burden of proof and were otherwise self-contradictory. But of course, courts are obligated to correctly instruct the jury on the law (*Flood*, *supra*, 18 Cal.4th 470, 479-480.) The court here did not, and because of the way the instructions were written, the jurors almost certainly misapplied them. (See *Houston*, *supra*, 54 Cal.4th at p. 122; *Estelle*, *supra*, 502 U.S. at p. 72, fn. omitted.)

E. The error was prejudicial under any standard.

Failure to instruct properly on voluntary manslaughter has been viewed as state error only. (See *Moye*, *supra*, 47 Cal.4th at pp. 555-556; *Breverman*, *supra*, 19 Cal.4th at p. 170, fn. 19.) But because the instruction incompletely defined the malice element of murder, Hlebo asserts that it is federal error. (See *Breverman*, *supra*, 19 Cal.4th at p. 178 (dis. opn. of Kennard, J.); *Moye*, *supra*, 47 Cal.4th at p. 558, fn. 5; see *id*. at pp. 563-565 (dis. opn. of Kennard, J.); see also *People v. Thomas* (2013) 218 Cal.App.4th 630, 645-646 [*Chapman* applies when court fails to instruct on

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provocation and the claim is raised as federal error under *Mullany*, *supra*, 421 U.S. at p. 704 for not giving accurate instruction on malice].) The issue is currently on review in the Supreme Court in *People v. Schuller* (2021) 72 Cal.App.5th 221, 237 (review granted Jan. 19, 2022, S272237). In any case, however, both the state and federal standards of prejudice are met here.

At trial, certain facts were established without doubt: Myrick and Hlebo were alone in the back storage area of GP Sports. (2RT 180-185.) No one had ever seen them have any prior conflicts (2RT 217, 222; 3RT 332, 335-336, 368), yet Hlebo killed Myrick and did so brutally. Hlebo told his brother he "snapped" (1CT 99), and there doesn't seem to be a view of the facts in which that isn't true—at a minimum, this was an emotional, impulsive killing, reflecting no planning or premeditation. (See *People v. Nazeri* (2010) 187 Cal.App.4th 1101, 1118.) Something incited the killing, but the prosecution could not say what. They could never establish a satisfying motive, which the prosecutor even conceded in her final argument. (5RT 795 ["So do we want to know why he killed Kyle Myrick? Yes . . . But unfortunately we can't always do that in a case like this."].) The prosecution was simply left without an explanation for what happened.

That is where Hlebo's statement to his brother came in. Hlebo provided the only plausible explanation for the killing. No other piece of evidence besides Hlebo's statement to his brother could explain it. It's true that no one could corroborate Hlebo's statement, and the prosecutor argued Hlebo had a motive to lie.

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(5RT 789.) But Hlebo's motive to lie was no different than that of anyone facing incarceration, (see *People v. Alvarez* (1996) 49 Cal.App.4th 679, 688), and it is hardly unusual for one person to be the only witness who can testify to an event at trial. (See Fisher, *The Jury's Rise as Lie Detector* (1997) 107 Yale L.J. 575, 593, fn. 48.) Perhaps Hlebo could not carry the affirmative burden of proving what happened, but the burden was not his to bear. (*Mullaney*, *supra*, 421 U.S. at p. 704; *Rios*, *supra*, 23 Cal.4th at p. 462.)

And that is why the instructions were prejudicial: neither side was in a strong position to explain what led to the killing, so the side with the burden was bound to lose. The prosecution had no evidence of motive, and the defense had only Hlebo's statement. But the instructions gave the defense a burden they could not carry, and conversely, the instructions relieved the prosecution of needing to prove the one element they could not prove. Causation was uncontested as was malice (except insofar as heat of passion negates malice). (5RT 750-751.) So the prosecution had no difficulty proving those. The problem for the prosecution was proving the absence of heat of passion, and that is precisely the element they did not have to prove under the erroneous instructions.

Indeed, the arguments the prosecution used to disprove heat of passion were unavailing. For instance, the prosecutor argued that there was no reason for Hlebo and Myrick to have been in the building where Myrick was killed. (5RT 737.) Therefore, Hlebo must have chased Myrick in there. (5RT 737.)

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But as defense counsel pointed out, it was raining the day of the killing, and the building was the nearest place to take shelter. (5RT 760.) Further, there was no physical evidence suggesting Hlebo chased Myrick, and the burned-out building would not have been a logical place to seek safety, if Hlebo had been chasing Myrick. So Myrick's presence in the building hardly refuted heat of passion.

Similarly, the prosecutor pointed to Hlebo's attempt to cover up the crime as evidence that he was not acting in the heat of passion. (5RT 745-746.) But consciousness-of-guilt evidence does not prove the level of the crime. (See *People v. Carrington* (2009) 47 Cal.4th 145, 189.) One can be consciously guilty of only manslaughter and still seek to hide that fact.

So, in short, the prosecution lacked tangible evidence to disprove heat of passion, but the jury instructions relieved them of the burden of doing so. Moreover, the instructions were written in such a way that no reasonable juror could understand that the burden was in fact on the prosecution to disprove heat of passion. (See Redbird, *supra*, Inst. for Policy Research at pp. 5-6.) So, in light of the defects in the prosecution's case, the erroneous instructions were prejudicial under any standard.

IV. The cumulative errors mandate reversal under both state law and the Fourteenth Amendment to the United States Constitution.

When the combined effect of individual errors "denied [the defendant] a trial in accord with traditional and fundamental standards of due process," relief is compelled. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298.) Thus, *Chambers* held that

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"erroneous evidentiary rulings can, in combination, rise to the level of a due process violation" under the Fourteenth Amendment to the United States Constitution. (*Montana v. Egelhoff* (1996) 518 U.S. 37, 53; see also *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 & fn. 15.)

The same is true under state law. (*People v. Hill* (1998) 17 Cal.4th 800, 844-845; *Parle v. Runnels* (9th Cir. 2007) 505 F.3d 922, 932-933.) And if at least one of those multiple errors is of federal constitutional dimension, the court must evaluate their cumulative effect under the *Chapman* standard. (See *People v. Stritzinger* (1983) 34 Cal.3d 505, 520-521.) Even under the "reasonable probability" standard, however, the cumulative effect of the errors here was prejudicial.

The reason the errors were cumulatively prejudicial is that they each went to different aspects of the prosecution case. Excluding Hlebo's hallucinations allowed the prosecution to paint an incomplete—and false—picture of Hlebo as a petty, short-tempered man who killed for no reason. (See, e.g., 5RT 733, 743-744.) And at the same time, the defense was denied the chance to tell their own coherent narrative. Meanwhile the evidence that Myrick was "calm" or "chill" or someone "who never had a problem with anyone" allowed the prosecution to impermissibly argue Myrick would never have provoked Hlebo because it was against his nature. (5RT 744.) It also permitted the prosecution to put forward evidence that would convince the jury a murder conviction would be "morally reasonable." (See *Old Chief*, *supra*, 519 U.S. at p. 188.)

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Both errors then compounded the prejudice resulting from the incorrect jury instructions. That is, the evidentiary errors weakened the defense's argument for heat of passion while the instructions relieved the prosecution of needing to disprove it. In effect, these combined errors took voluntary manslaughter out of the hands of the jury and deprived Hlebo of his right to present a defense. They require reversal.

CONCLUSION

Three errors occurred at trial, and these errors both individually and cumulatively deprived Hlebo of due process and a fair trial. First, Hlebo was prevented from showing that, far from being merely short-tempered or tired, he was suffering from visual hallucinations the day of the killing. This evidence would have rebutted the prosecution's motive evidence, such as it was, and more importantly, explained to the jury why Hlebo would have reacted the way he did to an insult that might have led someone to physical violence, but not to kill.

Second, the prosecution presented naked character evidence for the purpose of showing Myrick's propensity to behave peacefully. Defense counsel failed to object to this evidence even though it was deeply damaging to the case and directly opposed to counsel's trial strategy. And third, the jury instructions relieved the burden of disproving heat of passion. This was the central issue in the case and the one element the prosecution had little ability to prove. Therefore, the instructions, especially when coupled with the evidentiary errors, were prejudicial and require reversal.

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Dated: February 2, 2022

RESPECTFULLY SUBMITTED:

/s/ *Joseph Doyle*

Joseph Doyle
Attorney for Appellant
Steven Douglas Hlebo

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CERTIFICATE OF WORD COUNT

I, Joseph Doyle, hereby certify in accordance with California Rules of Court, rule 8.360, subdivision (b)(1), that this brief contains 13,783 words as calculated by the Microsoft Word software in which it was written.

I declare under penalty of perjury under the laws of California that the foregoing is true and correct.

Dated: February 2, 2022

Respectfully submitted,

/s/ *Joseph Doyle*

Joseph Doyle

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DECLARATION OF SERVICE BY E-MAIL AND U.S. MAIL

Case Name: ***People v. Hlebo***
Case No.: **H047358**

I declare that I am over the age of 18, not a party to this action and my business address is 95 S. Market Street, Suite 570, San Jose, California 95113. On the date shown below, I served the within ***APPELLANT'S OPENING BRIEF*** to the following parties hereinafter named by:

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Attorney General's Office
455 Golden Gate Ave., Ste. 11,000
San Francisco, CA 94102-7004
[attorney for respondent]
SFAGDocketing@doj.ca.gov

Superior Court - Appeals
191 N. First Street
San Jose, CA 95110
sscriminfo@scscourt.org

District Attorney's Office
70 West Hedding, West Wing
San Jose, CA 95110
Motions_dropbox@dao.sccgov.org
dca@dao.sccgov.org

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Steven Hlebo, BJ7340
Corr. Training Facility - Central
P.O. Box 689
Soledad, CA 93960-0689

I declare under penalty of perjury the foregoing is true and correct. Executed this 2nd day of February, 2022, at San Jose, California.

/s/ *Priscilla A. O'Harra*
Priscilla A. O'Harra

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