S-1-SC-40701

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

STATE OF NEW MEXICO,

Plaintiff-Appellee,

vs.

TYJE GARRETT,

Defendant-Appellant.

Appeal from the Tenth Judicial District, County of Quay
D-1010-CR-2022-0047

DEFENDANT/APPELLANT'S BRIEF IN CHIEF ON DIRECT APPEAL

ORAL ARGUMENT IS REQUESTED

Kurt Mayer
P.O. Box 20188
Albuquerque, NM 87154
505.259.4984

Appellate Attorney for Tyje Garrett

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Statement Regarding Record Citations

District court proceedings were audio recorded and transcripts are CDs containing FTR files, which counsel reviewed using FTR. Proceedings are cited by date and FTR timestamp, i.e., 09.30.2024/12:34:56. The record proper is cited by page number, i.e., RP 1. Documentary and photographic exhibits are cited by number. State's exhibits are cited as "Exh.," while defense and court exhibits denote "Def.Exh.".

Certification of Compliance

The body of this brief exceeds the page limits (35 pages) set forth in Rule 12-213(F)(2) NMRA. Counsel used Century Schoolbook, a proportionally-spaced type style / type face.

As required by Rule 12-213(F)(3) NMRA, counsel certifies that this brief in chief is proportionally spaced and the body of the brief contains 10,984 words. This brief was prepared using Corel Word Perfect, version X9.

I. Introduction

Michael Arellano arrived at his son's graduation party, drunk. His son, Arcelino, lived with his mother, Kirby Angel and her partner, Tyje Garrett. The party was at their home. Arcelino brought his father to the kitchen to get food. Arellano saw Garrett there and asked why he was looking at him funny. The conflict ending with Arellano's death began then.

Arellano provoked Garrett whose rage never subsided. He repeatedly threw "fucking nigger" in his face. He threatened him and called for others to come with guns so they could "burn this motherfucker down." The state did not present evidence that the charged circumstances ever changed. Up until Garrett shot Arellano, the two were still yelling at each other. There was no chance for Garrett to carefully ponder killing Arellano before he did it. Nor was there evidence, as this Court expects, that he actually did think carefully. Thus, the state's evidence was insufficient to prove first degree murder's element of deliberate intent.

As the trial evidence showed Garrett had been provoked, the court provided the jury with the definition of sufficient provocation from the Uniform Jury Instructions (UJI). It also instructed the jury on the elements of first degree murder. However, its instructions did not give guidance on how the jury should evaluate the *effect* of provocation on the element of

deliberate intent. Such guidance was essential because the two states of mind are often mutually exclusive.

As this Court has held, extreme emotions cause the raging mind to temporarily lose the ability to reason and exert control and it must cool before even being *capable* of careful thought and consideration. Sufficient provocation, by definition then, temporarily disables the ability to form deliberate intent. Yet, the court did not instruct the jury if the state failed to disprove sufficient provocation beyond a reasonable doubt, it had to acquit Garrett of first degree murder. Similarly, because the instructions indicated sufficient provocation was relevant only to lesser homicides, a reasonable juror would not naturally have considered or applied it to a first degree element. Instructional omissions deprived the jury of all the legally relevant choices, and infringed Garrett's rights to a complete defense and to have each offense element proven beyond a reasonable doubt.

Faced with a heightened proof burden, scant evidence of actual deliberation, and an abundance of sufficient provocation, the state's entire closing argument was marred by distortions of evidence, speculative legal theories, and evidence not heard at trial. Its pervasive misconduct satisfies the elements of fundamental error. Consequently, Garrett asks the Court to reverse the murder conviction and remand for resentencing or a new trial.

II. Relevant factual background.

Arcelino Arellano invited his father, Michael Arellano, to his high school graduation party. 09.30.2024/16:25:00. Arcelino lived with his mother, Kirby Angel, and her partner, Tyje Garrett. 16:15:00. Garrett is African-American. Exh. 9. Kirby has two daughters with Garrett. 10.02.2024/15:22:30.

It was dark when Arellano arrived at the party, drunk. 10.01.2024/9:26:25; 09.30.2024/16:40:10; 10.01.2024/10:52:20, 11:01:25; 10.02.2024/15:26:15. Arcelino took him inside to the kitchen to enjoy food Garrett had made. 09.30.2024/16:25; 10.02.2024; 15:22:30. Garrett was there, holding his year old daughter. *Id.* Arellano saw Garrett and said "I feel like you're looking at me kind of funny." 09.30.2024/16:28:45. Given his father's "passive-aggressive" attitude and the noticeable "tension," Arcelino thought, "oh man, here we go." 09.30.2024/16:28:30-16:29:15. Words were exchanged. Arellano "storm[ed] out the door," followed by Arcelino. 10.01.2024/9:31:10. Arellano pulled off his shirt. Arcelino pleaded with him, "please go, just leave dad, please go." *Id.* He maneuvered Arellano toward the carport. Deborah Roybal, a family friend, followed.

Garrett came out. He yelled at Arellano that he had chosen not to "come to see his son." 10.01.2024/9:33:20; 9:35:05. He said, "they had never

prevented him from seeing Arcelino, they had invited him to come visit." 9:34:35. Garrett was angry at Arellano for "com[ing] to his domain and disrespect[ing] him like that." *Id.* Arellano said, "fuck you, nigger. I'll kill you and all these niggers." 10.02.2024/15:29:45. Enraged, Garrett said he "would shoot [Arellano] and wouldn't feel bad." 9:35:05. Equally infuriated, Arellano responded, "Fuck you and your woman, she ain't worth a damn either." 9:58:50. He added, "nigger, fuck you, nigger," several times. 10.02.2024/15:28:55. Witnesses kept them from fighting but the hostility and rage continued. 10.01.2024/10:51:15. Even as Roybal moved Arellano across the street, it continued. 10.01.24/9:36:50.

Roybal tried to get Arellano east down the road, away from the house. 10.01.2024/9:34:05. He continued yelling at Garrett. Garrett yelled back. 9:36:10; 10:51:15. Arellano "frequently" shouted "nigger" or "fucking nigger" at Garrett. 9:59:40; 11:05:10. Garrett too wanted to fight. 9:52:25; 10:52:20. He said, "I'll fucking kill you, I'll fuck you up." *Id.* Arellano answered, "I'm right here, c'mon, I'm not scared." 9:36:10. Racist taunts and threats went back and forth. 9:34:35; 9:36:50; 11:04:05-11:06:33. Arellano pushed past Roybal's attempts to keep him away by going back toward the house. 9:36:50.

Roybal told Arellano to call for a ride. He called his brother. 9:38:10; 14:52:50. His voice could be heard 100 feet away: "Bro, shit's going down,

bring the guns, we're going to burn this motherfucker down." 09.30.2024/15:59:05-15:59:20; 10.01.2024/9:38:10. Roybal took the phone, placing it on the cemetery wall. 9:40:40. She told him he was ruining his son's day. Arcelino's friend came over and told Arellano to calm down and leave. 9:40:40. Roybal was still trying to move Arellano east and on the other side of the wall. 9:54:25. Instead, he made it back to the phone, picked it up, and called again: "bring the guns, bring the guys." 9:40:50-9:41:15; Exh. 133.[1] He identified the "guys" he wanted. 9:57:15-:35. From where they stood, Roybal could hear Kirby yelling at Garrett. 9:39:10.

Kirby told Garrett to stop, it was Arcelino's party. 10.02.24/15:31:05. Garrett said he would leave. He went inside, came out, and got in his truck. As he drove east on Quay Road, he passed Arellano and the two men yelled at each other. 10.01.2024/9:43:50; 10:51:45-10:52:20; He drove off from the driveway and paused "for a second" or so. 9:07:15; 9:44:00-9:45:00. No one testified as to what Garrett did in that second or so, or whether his anger subsided. He then pointed his truck to where Arellano stood across the road from the driveway. Def.Exh.C; 10.02.2024/15:39:15. When he got out, the

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[1]Dena Crain apparently called Arellano while he was with Roybal. She remembered him being "very upset." 09.30.2024/15:59:35-16:00:09. "He just kept saying this motherfucker [] over and over again." *Id.* When she asked if he was "okay," he said, "no." She sensed "something was wrong." *Id.* During her call, Arellano didn't ask for guns or people. 16:10:50.

two continued yelling. 09.30.2024/16:45:00; 10.01.2024/9:12:40. The words exchanged are unknown. Garrett did not have a firearm in his hands. *Id.* At some point, Roybal saw a rifle's silhouette between Garrett's legs. 9:47:05. When he pointed it at Arellano, he was still standing at his truck. 9:44:30; 9:11:38; 9:14:56. Arellano moved towards him. 9:44:30/9:48:00-:25. He fell to the ground after the third shot. 10:00:59. He lay on his left side, facing the wall. Garrett fired 12 continuous shots. 09.30.2024/16:33:00; 10.01.2024/13:29:25.

Garrett got in his truck. Others went to Arellano. He was still breathing. 09.30.2024/16:35:00. As Garrett pulled west onto the road, Arellano's brothers drove into the cemetery's east entrance. 10.01.2024/9:22:00/Exh. 7. It would have taken them as little as four minutes to get there. 09.30.2024/3:39:00. Police and medics arrived in their respective vehicles. At least eight people were milling about the area. 10.02.2024/15:40:45-15:44:35.

Garrett was arrested later, miles away in Logan.

Police gathered cartridge casings from the area after it had been walked in and driven through. 10.01.2024/15:10:55. Lt. Hernandez said officers did not know which cartridge was fired first or last. 13:52:00. Det. Villareal said the cartridges probably had been disturbed by others that were

before him. 15:10:55-15:13:52. He said he could not say where Garrett had stood or the order the cartridges dropped to the ground. 15:17:50-15:19:35. Hernandez agreed that casings would bounce when ejected. 13:50:30. Though both claimed Garrett had to be moving towards Arellano while shooting, neither could explain why in sequencing the casings, higher numbers are found behind and to the side of lower numbers; the numbers assigned to the casings on Exhibit 27 were random.

Arellano's postmortem examination revealed his blood/alcohol concentration taken from his heart was 0.251. 10.02.2024/14:27:15. Dr. Kerwin from OMI explained the amount was three times the legal threshold for intoxication in New Mexico. *Id.* She found Arellano had been shot 12 times. 14:08:00. Wounds were across Arellano's torso and on his arms. 14:20:25. With some wounds, she was uncertain where the projectile had entered and exited. 14:17:20. With others, she did not say or was not asked. Kerwin could not determine distance when shot. 14:24:30. She noted no soot or gunpowder burns on the body. 14:25:20. She said Arellano died from wounds to his chest and abdomen. 14:24:55. She did not know if one particular shot had been lethal. 14:24:30.

Garrett was charged with first degree murder and tampering with evidence. RP 1. At trial, he argued he was sufficiently provoked and,

therefore, was guilty only of voluntary manslaughter. The court used the UJI to instruct the jury. The instructions did not explain who carried the proof burden or what the proof standard was for provocation. The court did not say the state had to disprove sufficient provocation beyond a reasonable doubt. It did not tell the jury that failure to disprove sufficient provocation required an acquittal on first degree murder. Defense counsel did not object to the instructions.

In closing, the state said the time to kill Arellano was before Garrett got in the truck. Because he did not, Garrett could no longer claim provocation. 10.03.2024/9:29:40; 9:56:59. Moreover, provocation was nullified if Arellano was too intoxicated to carry out his threats. 9:53:55. Although no one testified Garrett had actually deliberated before shooting Arellano, the state said it had proven deliberate intent: Garrett "could have" deliberated when he "drove down the road" so coming back meant he must have "carefully considered what he was doing." 9:18:40; 9:28:25. The state added "defensive wounds" on Arellano's arms showed Garrett's intent to kill and his flight on a "busy" road showed his sobriety. 9:55:19. No one testified the wounds were defensive or the road was busy. Defense counsel did not object to any of its comments.

A jury found Garrett guilty of both charged offenses. The court imposed

a prison sentence of life plus three years. RP 483.

III. Argument

A. No rational juror could find beyond a reasonable doubt that, before acting, Garrett calmly and carefully reflected on and weighed the consequences for and against taking Arellano's life.

As Garrett will explain, the state did not present direct evidence, or evidence from which a reasonable inference could be derived, that he was able to carefully deliberate "and weigh the consideration for and against" taking Arellano's life. UJI 14-201 NMRA. Instead, the state essentially argued that Garrett was alone in his truck before the shooting and so had time to reflect and because he could have, he must have. This is hardly the substantial evidence of the cool and collected mind necessary to meet the statutory burden for murder in the first degree.

In fact, the evidence showed that Garrett's shooting was a rash and heated reaction to Arellano's non-stop goading and threats. Propelled by rage and fear for his family, Garrett turned his truck, got out, and shot the man who continued to demean and menace him. The sheer number of shots fired are testament to the overwhelming emotion behind them. No one anticipated the day's turn. It was Arellano's son's graduation party. Arellano arrived late and drunk and immediately accused Garrett of a "funny look." Moments later, Arellano called Garrett a "nigger." He continued to use the word

viciously and repeatedly as his grievance escalated until both men were outside being kept separate by others. The person restraining Arellano testified that Arellano made a call to someone to "bring the guns, bring the bros, we're going to burn this motherfucker down." It was then that Garrett got in his truck at his wife's direction. But as Garrett left, Arellano reportedly made a second call, making the same demands. Garrett turned the truck and got out.

There was no moment during the bedlam where Garrett could reflect on the idea of ending Arellano's life and ponder the consequences of doing so. No one testified this took place before Arellano was shot. The state relies on the time in the truck but being alone in his truck before the shooting is not proof of meaningful deliberation. This Court's precedent prescribes that only proof of actual deliberation will affirm a first degree murder conviction. *State v. Adonis*, 2008-NMSC-059, ¶ 22, 145 N.M. 102; *State v. Garcia*, 1992-NMSC-048, ¶ 30, 114 N.M. 269. Here, such proof is missing.

1. The standard of review.

The constitutional right to due process is forfeit when evidence is not sufficient to support a guilty verdict on every element of the charged offense. *Jackson v. Virginia*, 443 U.S. 397, 317-18 (1979). On review, an appellate court must "determine whether . . . each element of the crime [is] established

beyond a reasonable doubt." *Garcia*, 1992-NMSC-048, ¶ 27 (emphasis added). It must also "view the evidence in the light most favorable to the guilty verdict, indulging all *reasonable* inferences and resolving all conflicts in the evidence in favor of the verdict." *State v. Cunningham*, 2000-NMSC-009, ¶ 26, 128 N.M. 711 (emphasis added).

Partiality to the verdict notwithstanding, a jury's conclusion that evidence was sufficient is reversible if it was based on mere speculation. *State v. Slade*, 2014-NMCA-088, ¶ 14, 331 P.3d 930. Similarly, the court will reverse a conviction when the state's proof simply piles inference upon inference. *Id.* Evidence for a proposition that is "derived only by speculation among equally plausible alternatives is not substantial evidence of the proposition." *Id.* (cleaned up). Thus, a reviewing court must scrutinize the evidence "to ensure . . . a rational jury . . . found beyond a reasonable doubt the essential facts required for a conviction." *Id.* Its scrutiny considers the entire record, not just the evidence that supports the verdict. *State v. Flores*, 2010-NMSC-002, ¶ 24, 147 N.M. 542 (examining "totality of the evidence in [the] record"), *overruled on other grounds by State v. Martinez*, 2021-NMSC-002, 478 P.3d 880. If the evidence on any element falls short, the conviction is set aside. *State v. Vigil*, 2010-NMSC-003, ¶ 22, 147 N.M. 537.

Here, the state failed to prove the "deliberate intent" element as

required. It did not prove beyond a reasonable doubt that Garrett had the opportunity to carefully deliberate beforehand and thoughtfully weigh the pros and cons of killing Arellano, or that he did so. *Slade*, 2014-NMSC-088, ¶ 20. Accordingly, Garrett asks the Court to set aside his conviction for first degree murder.

2. The state did not present evidence that Garrett coolly reflected on the shooting before carrying it out.

For decades, the Due Process Clause has required that the state prove each element of the charged offense beyond a reasonable doubt. *In re Winship*, 397 U.S. 358, 364 (1970). The state charged Garrett with first degree murder, which required "substantial evidence" that the "killing was with the deliberate intent to take away the life of [] Arellano." *State v. Rudolfo*, 2008-NMSC-035, ¶ 29, 144 N.M. 305; RP 434. The killing could not be rash or impulsive. Indeed, the court instructed the jury that "deliberate intent" was established with proof of "careful thought and the weighing of consideration for and against the proposed course of action." RP 434. Here, the state simply pointed to the fact that Garrett spent a short time alone in his truck. It proposed the interval, however brief, was an opportunity for reflection. Ironically, the interval's brevity argues against the deep reflection that is necessary as proof. Without more, the state's evidence was insufficient

to prove that Garrett acted with "deliberate intent" when he caused Arellano's death.

Incontrovertible evidence prior to the shooting shows Garrett in a highly emotional state - a state caused solely by Arellano's relentless hostility and aggression. Arellano never stopped. From the first epithet when he arrived, his fulminating increased in degree (death threats) and scope ("all you," not just Garrett). Nor did he leave, instead calling for armed reinforcements to come to the house. Neither the provocation nor the emotions induced ever subsided. Despite the state's counter-argument, the facts support Garrett's contention that he could not and did *not* conduct a cool assessment of what to do before taking action.

a. Legal standards.

The distinction between first and second degree murder is based on the legislature's judgment that "'one who meditates an intent to kill and then deliberately executes it is more dangerous, more culpable or less capable of reformation than one who kills on sudden impulse.'" *Austin v. United States*, 382 F.2d 129, 134 (D.C. Cir. 1967), *overruled on other grounds by United States v. Foster*, 783 F.2d 1082 (D.C. Cir. 1986) (en banc) (*quoting Bullock v. United States*, 122 F.2d 213, 214 (D.C. Cir. 1941)). "The distinction differentiates between those killings that . . . although "intentional" [] lack

the gravity associated with first degree murder." *Garcia*, 1992-NMSC-048, ¶ 19. First degree requirements of "deliberation" and "premeditation" are meant to set apart murders that are not done rashly or on sudden impulse. This Court has made clear that the legislature did not intend "for first degree murder to serve as a catch-all category for every intentional killing." *State v. Tafoya*, 2012-NMSC-030, ¶ 38, 285 P.3d 604. Therefore, when the state charges first degree murder, it "has a heightened burden commensurate with the severity of punishment reserved for that crime." *Adonis*, 2008-NMSC-059, ¶ 14.

Notably, a jury may not find deliberate intent to take another's life solely from the fact there was time to deliberate. "[M]ere evidence of time to form a deliberate intent is not enough . . . there must be other evidence that the defendant actually formed such intent." *Slade*, 2014-NMCA-088, ¶ 20; *Garcia*, 1992-NMSC-048, ¶ 30 (evidence must show defendant did form deliberate intent, not that he "could have"). The distinction is important because exploring state of mind at the time of the crime may prove not only the *inability* to deliberate but also that "a deliberate intent to kill" was not formed. *State v. Balderama*, 2004-NMSC-008, ¶ 31, 135 N.M. 329.

State of mind at the time of the offense might not be established by direct evidence. It might be inferred by evidence of "the defendant's conduct .

. . in the light of the surrounding circumstances." 2 Wayne R. LaFave, Substantive Criminal Law § 14.7(a), at 480 & n.24 (2d ed. 2003). The "surrounding circumstances" commonly include: (1) evidence of planning activity - i.e., facts showing prior conduct "directed toward the killing"; (2) evidence of motive involving "the defendant's prior relationship and conduct with the victim"; and/or (3) evidence regarding the nature of the killing that shows its manner was so "particular and exacting" as to indicate it was carried out according to "a preconceived design." *Id.* at 480 & n.26; *accord Flores*, 2010-NMSC-002, ¶ 21 (number of wounds, prolonged struggle, attitude towards victim, defendant's statements); *State v. Taylor*, 2000-NMCA-072, ¶ 22, 129 N.M. 376. ("carefully crafted plan to kill"). While deliberate intent may be inferred from evidence in the aggregate, the aggregate still "must be analyzed in the context of other evidence." *Slade*, 2014-NMSC-088, ¶ 21. In other words, if other evidence demonstrates the jury relied on speculation to infer deliberate intent, its deliberate intent finding may be challenged. *Id.* at ¶ 22.

b. The state failed to prove that Garrett's actions were anything but a reaction to Arellano's deliberate ongoing provocation.

The state offered no evidence Garrett had "crafted a plan to kill." Arellano's family testified the two families got along well, supporting the

absence of existing conflict or prior motive. 09.30.2024/15:44:20-:35. The scene at the party did not unfold in a preconceived manner but was messy and rapidly evolving. In fact, it all started when Arellano accused Garrett of a "funny look" and then called him a "nigger."

Consider that fateful moment. Consider what informed Garrett's state of mind in the minutes before he turned a rifle on Arellano. In that time, Arellano, in the presence of Garrett's family, friends and neighbors:

➛entered the house and immediately accused Garrett of looking at him "kind of funny" 09.30.2024/16:26;

➛left the house and told Garrett multiple times, "nigger, fuck you nigger" 10.02.2024/15:28:55;

➛shouted, "fuck you, fuck you nigger, I'll kill you fucking nigger, I'll kill you and all these niggers" 10.02.2024/15:29:45;

➛yelled, "fuck you and your woman, she ain't worth a damn either!" 10.01.2024/9:31:10; 9:58:50;

➛repeatedly called him "fucking nigger" or "pinche mayate"[2] 10.01.2024/9:59:45; 10:00:00; 11:05:10;

➛twice telephoned others to "bring the guns, bring the bros, shit's going

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[2]The jury presumably understood the Spanish expression of "fucking nigger." No juror asked that it be translated. Nor did the parties or the court.

down, we're going to burn this motherfucker down" and specifically identified "the bros" whom he wanted to back him up.

10.01.2024/9:38:10.

The assault on Garrett was pointedly racist from the beginning. The chosen epithet was freighted with history, compounded by being unprovoked, and repeated over and over in front of family and friends. It eventually sapped Garrett's self-control. Given the evidence, it is clear Garrett would not have shot Arellano had he not been sufficiently provoked by the constant racist jibes and threats. Under these conditions, it is a leap too far to infer Garrett's brief drive allowed him to "cool off," think carefully about taking Arellano's life, and weigh the pros and cons of killing him. No witness described Garrett "cooling off" or absorbed in thought. But his state of rage, humiliation, and fear was witnessed and undeniable.

c. A comparison of the legal standards for "deliberate intent" and the evidence at trial shows that the jury's decision rested on speculation unsupported by evidence in the record.

Any finding that Garrett's mind suddenly cooled, making it possible for him to mull over a plan to kill Arellano was an inference based on mere speculation. Witnesses described the two men as highly agitated and intoxicated throughout their confrontation. Arellano's son (Arecelino), his

former partner (Kirby), and her father (Andrew) confirmed Arellano was drunk and belligerent. 09.30.2024/16:28:45-16:29:15; 16:40:35-16:42:00; 10.01.2024/10:52:20; 11:04:05; 10.02.2024/15:26:15-15:31:05. Although Andrew and Roybal said Garrett also used racial slurs, they could not recall what they were. However, no one forgot Arellano's, least of all Garrett. Arellano meant to provoke him and he succeeded. When Garrett became visibly angry, Arellano dared him to fight. 9:34:35; 9:36:10; 10:51:15-10:52:10; 11:04:05-11:06:30. Nobody said he composed himself inside the truck. Yet, the state asked the jury to infer that he did and find "deliberate intent" in lieu of presenting evidence of actual deliberation.

It is evident that neither Garrett nor Arellano recognized they were trapped in a spiraling tit-for-tat. Their volley of threats became automatic. Both Andrew and Roybal said they never stopped. Even when separated, the men would move back toward each other. Exhibit 27 shows Arellano's hat on a cemetery wall approximately 25 feet east of Garrett's driveway. Roybal got Arellano that far before he backtracked west, across from Garrett's house. Notably, Roybal, Arcelino, and others could not keep Arellano away from the Garrett residence. Having made calls for the "bros" to come with "guns," Arellano expected them to find him where he stood.

The eventual violence was not deliberate, as defined by having a clear

motive or being carefully crafted. By all accounts, Garrett's mind was consumed with Arellano's antagonism. The record is clear no one said otherwise. Seeing Arellano had moved back closer to his house again, Garrett, having driven half a block, also turned toward Arellano. With his emotions at a peak fueled by threats, he got out of the truck, both men still yelling at each other. Arcelino testified Garrett had nothing in his hands when he came out of the truck. 09.30.2024/16:45:50. His friend, Gabriel, said the same thing. 10.01.2024/19:14:56. Before the boys got up the driveway to the house, they heard shots. There was no moment where Garrett calmed his raging mind and coolly contemplated whether to kill Arellano or not.

Garrett's multiple shots and the scatter-shot pattern of hits evince a spur of the moment impulse.[3] *See Austin*, 382 F.2d at 134. His action was violent and deadly but much violence or a great many wounds "is not relevant in this regard, as such a killing is just as likely (or perhaps more likely) to have been on impulse." LaFave § 14.7(a), at 481& n.34; *see also Adonis*, 2008-NMSC-059, ¶ 24 (firing multiple shots does not alone indicate deliberation before shooting); *Slade*, 2014-NMCA-088, ¶ 35 (in context of "melee" without other evidence of state of mind, number of shots fired does not support

[3]*See* 10.02.2024/14:17:20-14:24:30 (Kerwin describing location of gunshot wounds).

inference of actual deliberation). The jury's conclusion that Garrett actually deliberated was an inference reached by speculation. It remains unsupported by other evidence and unproven beyond a reasonable doubt.

This Court's precedent makes clear that when, like here, actors are engaged in a heated confrontation that elicits extreme emotions, there must be objective evidence that proves the raging mind was so tempered that it could and actually did engage in careful thought. *Garcia*, 1992-NMSC-048, ¶ 28 (quarrel preceding stabbing reflected state of mind); *Adonis*, ¶¶ 4-6, 24 (stepping out of apartment and firing multiple shots expressed rash, impulsive thinking). Here, objective evidence supported the likelihood Garrett acted impulsively while in the grip of heated emotions fanned by Arellano. Faced with its burden to prove, the state seized on "could have" instead of "actually did." It told the jury Garrett could have "stayed in the house" or "kept driving" and deliberated then. 10.3.2024/9:18:40; 9:28:25. Alternatively, it asked the jury to infer Garrett "could have" deliberated when he drove part-way down the block before turning toward Arellano. *Id.*

Evidence that Garrett may have had the opportunity to deliberate is not enough. "[T]he burden remains on the [s]tate to produce evidence that tends to show that the killer actually did so." *Adonis*, 2008-NMSC-059, ¶ 22 (internal quotation makers and citation omitted); *Garcia*, 1992-NMSC-048,

¶ 30 (same). Thus, for the state here to ask the jury to infer that had Garrett stayed in the house or driven away, or that by driving down the block, he "could have" deliberated requires corroboration that he "actually deliberated before killing the victim." *Adonis*, ¶ 25. If corroboration existed, it would be in the record. Its absence is telling.

Moreover, Garrett staying in the house does not support the proposition that he actually deliberated. No one knows where he went inside the house, what he did, or how long he stayed there before coming out again and getting in his truck. Only speculation can fill those blanks with deliberation. "Such an inferential leap must be supported by other specific evidence tending to prove" actually deliberation. *Adonis*, 2008-NMSC-59, ¶ 25. Likewise, continuing to drive away. Only by speculating can one theorize he deliberated. Crucially, *neither staying inside or driving away ever happened.* The same problem is true for the time driving down the block. Witnesses said Garrett was in his truck for just a few minutes. Roybal said when Garrett passed Arellano, the two were still yelling at each other, indicating passions had not cooled. 9:43:40-9:43:55. No one described a change in his demeanor while in the truck. No one detailed his thoughts while driving. Deliberate intention was not established when objective evidence of a mind under duress had not changed. Arellano's death was the outcome of Garrett being pushed

too far.

Garrett's reaction was driven by more than rage. Fear, too, helped him pull the trigger. Nothing could be worse than his family being hurt or killed as threatened. Now, the man was standing outside his house. There was no evidence Garrett actually considered the consequences of his action. When he pointed the rifle at Arellano, in that moment, his mind was "deaf to the voice of reason." *Johnson v. State*, 129 Wis. 146, 108 N.W. 55, 60 (1906). What happened next is revealing even if it took place after Arellano had been shot. Arellano's first call for "bros and guns" occurred at 2135. The 911 call after the shooting was recorded at 2145. 10.01.2024/14:52:50. The provocation, escalation, and culmination happened quickly. Additionally, Arellano's reinforcements actually arrived just after he was shot and just as Garrett was driving off. Exh. 7. Arellano's brother, David, testified his house was 4 minutes from Garrett's; his brother, Daniel, testified it took 8 minutes to drive the mile. Arellano's friend, Dena, spoke to him at 2138 and testified that she heard yelling, that Arellano was very upset, and that "something was wrong." 15:59:35-16:00:09. Garrett's fears were justified as were Dena's.

Garrett notes the state suggested proof of deliberate intent was established by his exclamation he would kill Arellano and wouldn't regret it. 10.01.24/9:28:25 (citing Roybal's testimony). An inference of deliberate intent

derived from certain testimony "must be analyzed in the context of other evidence." *Slade*, 2014-NMCA-088, ¶ 21. Here, the significance the state assigns to the remark is inapt. Garrett's remark cannot be disassociated from the anger and fear Arellano provoked. Nor did the evidence show careful thought produced his words. Quite the opposite; it was an impetuous, reactive utterance. Consider Andrew's succinct description of the scene: "two . . . belligerent . . . drunks arguing . . . both threatening to kill each other" with Arellano repeatedly inserting, "fucking nigger." 10.01.2024/10:51:45; 11:05:10; 11:08:05. The most plausible inference from the actual evidence is that Arellano's incessant provocation precluded "judging and viewing the situation in a calm and reasonable manner." *State v. Kidd*, 1917-NMSC-056, ¶ 5, 24 N.M. 572.

Contrary to the state's intimations before the jury, first degree murder is not set apart from lesser murders because it is intentional and the others are not. First degree is an intentional killing as are some others. The difference is it takes place after careful thought and weighing the considerations involved in the act. Second degree murder also is an intentional killing but it stems from a rash or impulsive act. "If the state merely proves that the accused acted rashly or impulsively, rather than deliberately, and if the accused acted intentionally and *without* justification

or provocation, then the facts would only support second-degree murder." *Tafoya*, 2012-NMSC-030, ¶ 37 (emphasis added). As the state would agree, without evidence of deliberation, at most it established second degree murder.

The state admitted which degree of murder it had proven at closing. There, it asked when did Garrett actually weigh the pros and cons of taking Arellano's life? 10.03.2024/9:28:25. It answered the question, "we don't know." *Id.* Even if Garrett "could have" reflected on killing Arellano, the state still was expected to put forward evidence he "*actually did so*." *Adonis*, 2008-NMSC-059, ¶ 22 (emphasis added); *see also Garcia*, 1992-NMSC-048, ¶ 30 ("deliberate intent" not met without evidence defendant "*ever* formed such intent.") (emphasis in original). By its answer, the state acknowledged the doubt it was tasked with eliminating. According to *Adonis*, remaining doubt about deliberate intent necessitates setting aside Garrett's first degree murder conviction.

In fact, because the evidence establishes an impulsive act *with* provocation, Garrett asks the Court to set aside the murder conviction and, in the interests of justice, directly remand the case for entry of judgment on the lesser included offense, voluntary manslaughter. *State v. Revels*, __-NMSC-__, ¶ 39-47, __ P.3d __ (S-1-SC-39841).

d. The state only proved voluntary manslaughter because it did not prove beyond a reasonable doubt that any intentional shooting was unprovoked.

The state's argument for deliberate intent is, at a minimum, dubious and thin. As argued earlier multiple times, the ongoing threats and racist barbs perpetuated a cycle of rage and reaction, a scenario that does not promote cool minds, much less calm deliberation. Because the state minimized the evidence of Arellano's relentless provocation – which kept Garrett angry, deeply resentful, and afraid for his family – and dismissed its relevance in understanding the shooting, it never was able to explain why the shooting occurred. The facts depict an unplanned fatal shooting that occurred amid great turbulence. There was no evidence of motive or a plan and no basis for the jury to conclude Garrett had actually thought carefully about killing Arellano before the shooting. While mere insults are not adequate provocation for voluntary manslaughter, words meant to provoke are and Arellano chose and repeated the most awful ones. The witnesses related that Arellano's words enraged Garrett, becoming the catalyst for killing him in the heat of passion.

The prosecution must "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 v. Wilbur*, 421 U.S. 684. 697-98

(1975). If the court does not "impose this requirement" on the prosecution, it relieves it of "its obligation under the Due Process Clause to prove the defendant guilty of murder beyond a reasonable doubt." *United States v. Lofton*, 776 F.2d 918, 920 (10th Cir. 1985). As there was evidence here that Garrett shot Arellano in the "heat of passion on sudden provocation," the state had to prove beyond a reasonable doubt the absence of impulse, i.e., the presence of deliberate intent. *Id.* at 921. Because it did not, the Court should set aside the first degree murder conviction.

Voluntary manslaughter is defined as a killing where the defendant knew his acts "created the strong probability of death or great bodily harm." UJI 14-220 NMRA. The intentional acts must be the "result of sufficient provocation," *id.,* which means "any action, conduct or circumstances which arouse anger, rage, fear, sudden resentment or terror or other extreme emotions." UJI 14-222 NMRA. The provocation is "sufficient" when it would "affect" the ability of an "average" person to reason and "cause the temporary loss of self control." *Id.*; *see also Lofton*, 776 F.2d at 920-22 ("heat of passion" negates malice and if provocation not disproved beyond a reasonable doubt, defendant guilty of voluntary manslaughter). Provocation is insufficient "if an ordinary person would have cooled off before acting." *Id.* If Arellano's epithets were merely "insulting," his words might be insufficient provocation

for manslaughter. However, "informational" words can be sufficient because it is recognized they provide meaning to circumstances, ensuing arguments and other actions of the parties . . . ." *Sells v. State*, 1982-NMSC-125, ¶ 7, 98 N.M. 786; *see also* LaFave § 15.2(b)(6), at 499-500 & n.60.

What the state overlooked were the "circumstances" from which this emotionally charged confrontation arose. Arellano was upset over Arcelino living with Garrett, Kirby, and the two young girls Garrett had fathered with Kirby. Roybal revealed that after Arellano first left the house, she heard Garrett tell him that they had never prevented him from seeing Arcelino and that they had invited Arellano to visit him. 10.01.2024/9:34:35. She added that Garrett said "it was up to him that he didn't come to see his son." 9:35:05. Garrett was furious that Arellano had "come to his domain and disrespect[ed] him like that." *Id.* Arellano didn't back down, telling Garrett, "fuck you and your woman, she ain't worth a damn either." *Id.* With that match struck, the wounding and rage never stopped. In Andrew's view, "it was a lost cause" as each continued to "throw gas on the fire." 10:52:10.

The context of this "chaos" was lost on the state. 10.01.2024/11:04:05. The violence erupted, not as the state theorized – after Garrett had calmly and carefully thought about taking Arellano's life and had weighed the cost of leaving him alone and not being prosecuted, or shooting him and possibly

being imprisoned for life. The eruption was born from a clash of ideas of right and wrong: Garrett believing he should not have to endure Arellano's racist put-downs and threats to him and his family and Arellano believing he should not have to be a guest in Arcelino's life and endure the affront of another man living with the mother of his son. For both men, it was a combustible mix of pain and resentment neither could manage. Rather, each defended their manhood with hostility and aggression stoked by alcohol, partners in an inexorable dance toward tragedy.

There was no proof that Garrett ever made the malicious calculations the state attributed to him. There was abundant proof that he was engulfed by powerful emotions. The heated exchange was a "lost cause" neither man could escape. Neither man had had trouble with the other until that day. Witnesses at the party described Garrett's intense emotional response to Arellano announcing his arrival to the party with a loaded racial epithet. After Arellano had called twice for "bros and guns" and moved back toward Garrett's house, Garrett turned toward Arellano and confronted him swiftly and violently, his self-control overcome.

The state bore the burden of proving murder but its evidence raised more doubt than clarity about Garrett's state of mind at the time of the shooting. Deliberation is not just thinking beforehand about doing

something. It means considering, weighing, pondering "for such a length of time after provocation is given . . . as [is] sufficient for the blood to cool." *State v. Kotovsky*, 74 Mo. 247, 249-50 (1881). How could Garrett's blood cool when the provocation and rage never stopped? Just the sight of the other was enough to keep the blood boiling. Thus, seeing Arellano move back closer and closer to his house precipitated a reaction no one could foresee mere minutes before.

Lacking conclusive evidence of planning, motive, or intent beforehand, the state failed to meet its burden for deliberate intent murder. In fact, the objective record here supports a construction of events wherein Garrett acted on sufficient provocation and killed *without* malice. Only evidence established beyond a reasonable doubt that Garrett's overheated emotions had cooled can offset that he acted under sufficient provocation. As repeatedly noted, the state presented no such evidence of "cooling off." Therefore, what it proved was guilt of the lesser-included offense of voluntary manslaughter. The Court should vacate Garrett's murder conviction and sentence and directly remand the case to the district court for entry of judgment on voluntary manslaughter only. *Revels*, __-NMSC-__, ¶ 47.

B. The trial court committed fundamental error by not instructing the jury to consider the effect of sufficient provocation on first degree murder's deliberate intent element and its failure to do so relieved the state of its burden to disprove sufficient provocation beyond a reasonable doubt.

As a matter of law, one who is sufficiently provoked, as that term is defined in UJI 14-222, is unable to form the deliberate intent necessary for first degree murder. *See Kidd*, 1917-NMSC-056, ¶ 5 (actions "impelled" by provocation "overcome . . . the exercise of judgment of an ordinary man . . . [and] render his mind incapable of . . . that distinct intent . . . essential to [first degree] murder . . . ."). Here, the court failed to instruct the jury on the debilitating effect provocation has on forming intent. The jury was never told that if it found Garrett's conduct had been sufficiently provoked, he was not guilty of first degree murder. Instead, it was told "sufficient provocation reduces second degree murder to voluntary manslaughter," linking provocation only to crimes other than the first degree murder it was deciding. RP 436. *See State v. Parish*, 1994-NMSC-073, ¶ 23, 118 N.M. 39 (confusion avoidable if jury told not guilty if "conduct met the definition of self-defense").

The jury was told the state must disprove provocation beyond a reasonable doubt for second degree murder. RP 435; UJI 14-210. Then it was told the state must prove sufficient provocation for voluntary manslaughter.

RP 436; UJI-14-220. But what about first degree murder, the crime charged? If sufficient provocation is presented *as a defense* to the deliberate intent element, what is the state bound to do? The court failed to give the jury guidance on how sufficient provocation affects the deliberate intent element. For example, if the jury found Garrett was sufficiently provoked, he is presumed not dispassionate enough to form deliberate intent. The state, then, is bound to prove that Garrett's mind was not so disabled or that he was able to *and* actually did form the required intent. As noted earlier, ***it*** carries the "heightened burden commensurate with the severity of . . . that crime." *Adonis*, 2008-NMSC-059, ¶ 14.

Here, the court's instructions effectively forestalled a valid defense by sidelining the relevance of sufficient provocation to the element of deliberate intent as a meaningful way to challenge the charge. Put another way, the hash of instructions on provocation as it related to other offenses obscured the vital and recognized way it can affect the intent necessary for first degree murder. Ultimately, the court's error not only lessened the state's burden, it violated Garrett's Fifth and Sixth Amendment rights to present a complete defense and to a jury determination on every element of the charged offense. *Cool v. United States*, 409 U.S. 100, 104 (1972) (creating barrier to jury consideration of relevant defense evidence reduced level of proof necessary for

government to carry its burden); *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006) (evaluating one party's evidence at the expense of contrary evidence is so restrictive as to violate the right to present a complete defense); *Apprendi v. United States*, 530 U.S. 466, 476-77 (2000). Garrett asks the Court to set aside the murder verdict and remand for a new trial. *See State v. Benally*, 2001-NMSC-033, ¶ 22, 131 N.M. 258 (jury confusion and misdirection from court's instructions required new trial).

1. The standard of review and pertinent legal standards.

When, like here, the defendant does not object to the court's instructions or fails to offer his own, this Court reviews the instructions for fundamental error. *State v. Mascarenas*, 2000-NMSC-017, ¶ 7, 129 N.M. 230. The Court will reverse the conviction if the "error goes to the foundation [] of a defendant's rights or . . . to the foundation of the case or take[s] from the defendant a right which was essential to his defense and which no court could or ought to permit him to waive." *Id.* (internal quotations and citation omitted).

Even if the jury finds the defendant guilty of the greater offense, as it did here, a court's failure to give an instruction is not harmless if jurors have not been given all legally relevant choices. *State v. Benavidez* 1980-NMSC-

097, ¶ 5, 94 N.M. 706; *State v. Reynolds*, 1982-NMSC-091, ¶ 11, 98 N.M. 527. Although an instruction may be "straightforward and perfectly comprehensible on its face," it still may confuse or misdirect the juror. *Benally*, 2001-NMSC-033, ¶ 12. Likewise, "instructions which, through omission or misstatement, fail to provide a juror with an accurate rendition of the relevant law." *Id.* An instructional error is fundamental error if other instructions do not resolve the confusion. *Id.*, ¶ 16.

2. The court's failure to explain to the jury sufficient provocation's legal effect on the deliberate intent element diminished the state's burden of proof and deprived the jury of useful legal instruction on how to properly evaluate Garrett's defense.

As already suggested above, the court's instructions were confusing. It misdirected the jury as to the relevance of sufficient provocation and how it applies to first degree murder's deliberate intent element. *See Parish*, 1994-NMSC-073, ¶ 4 (reversible error if "reasonable juror would have been confused or misdirected."). With sufficient provocation credibly raised as a defense, the court should have explained that provocation can, at a minimum, impair the careful thought and weighing of considerations necessary to prove deliberate intent. *See, e.g.*, UJI 14-5111 NMRA (explaining if defendant found intoxicated, jury must consider "what effect" this had on "ability to form the intent" necessary for charged offense). Conversely, it also could have

said it was the state's burden to prove that Garrett's actions were not the result of sufficient provocation. *See Mullaney*, 421 U.S. at 704 ("Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of . . . sudden provocation . . . in a homicide case."). The court's omissions meant critical determinations regarding the state's proof were eliminated from the jury's deliberations.

Benally and *Parish* are instructive here. In *Benally*, an earlier instruction did not discuss the state's burden of proving the defendant had not acted in self defense. Later instructions did describe the state's self defense burden. This Court held a jury "naturally" would be "inclined to believe" that the earlier omission was deliberate and that an element or standard of proof discussed later would apply only to the charge discussed later. 2001-NMSC-033, ¶ 18. The Court noted that numerous other instructions separated the two at issue, which made it unlikely the jury would apply law from the later instruction to the earlier one. *Id.* ¶ 19.

The jury's inclination would be the same here. Consider how the jury was instructed. Sufficient provocation was attached to the lesser homicide instructions without an explanation of its relevance to first degree murder. As in *Benally*, a jury could have interpreted sufficient provocation to be applicable only to the lesser homicides. Thus, having not heard otherwise,

any testimony here about sufficient provocation might be deemed irrelevant to deliberations on first degree murder. Even a countervailing instruction on the state's burden when sufficient provocation becomes a defense might have mitigated the jury's "natural" misinterpretation. Instead, the court risked allowing the jury to lessen the state's burden and to short change a valid defense.

Moreover, like in *Benally*, the applicability of instructions given on charges discussed at different times caused confusion that was reinforced by intervening instructions. Here, too, an instruction told the jury it should consider each crime charged separately. RP 433. That instruction would have moved the jury to evaluate the elements of the first degree charge separately from those of second degree and voluntary manslaughter. *Benally*, 2001-NMSC-033, ¶ 20. Then UJI 14-6001 NMRA forbade the jury from picking out one instruction or parts of an instruction and disregarding others. *Id.*; RP 431. Again, elements pertinent to the lesser charges would not be part of first degree deliberations. This is especially so when the court also instructed the jury that it must first come to a unanimous decision on first degree murder before it could consider the lesser charges. RP 441-42. Like in *Benally*, omitted instructions established fundamental error that warrants a new trial.

Garrett is aware that the court's instructions were derived from the UJI issued by this Court. But in *Parish*, the Court acknowledged it was "impossible to create a written code that anticipates every eventuality." 1994-NMSC-073, ¶ 25 (quotation marks, citations omitted). The instructions *Parish* found deficient also were instructions from the UJI and, like here, "used directly as prescribed." *Id.* ¶ 6. Still, the Court held the instructions were "confusing" and had misdirected the jury. *Id.* ¶ 23. Although UJI instructions are presumed "correct statements of law," the Court is not constrained from "insuring that the rights of individuals are protected." *Id.* ¶ 26. Because the instructions did not inform the jury "on all questions of law essential for a conviction of [the] crime submitted to the jury," the Court reversed Parish's conviction. *Id.* ¶¶ 6, 12. (quotation marks, citation omitted).

Parish was charged with second degree murder and voluntary manslaughter. *Id.* ¶ 3. At trial, he claimed he had merely defended himself. The jury was not "explicitly told" that if credible evidence supported Parish's self defense claim, it became the state's burden to rebut his defense. *Id.* ¶ 15. Nor was it instructed that if the state failed its burden, the jury had to find Parish not guilty. *Id.*

This Court identified five incurable problems with the *Parish* instructions, all of which are replicated here. First, because sufficient provocation was only connected to the lesser homicides, a reasonable juror might not have understood its relevance or application in a first degree murder. 1994-NMSC-073, ¶ 8. Second, the conviction cannot be rescued even if the two instructions had been placed next to each other. *Id.* ¶ 13. Without more, a reasonable juror would not know how sufficient provocation *as a defense* can frustrate the required element of deliberate intent. Third, when used as a defense, without guidance on a proof standard, the sufficient provocation instruction was ambiguous. *Id.* ¶ 19. The jury would not know the state also had the burden to *disprove* sufficient provocation beyond a reasonable doubt. *Cf. State v. Gonzales*, 2007-NMSC-059, ¶ 19, 143 N.M. 25 (defendant need only point to evidence that supports elements of sufficient provocation). That, in fact, once "properly raised by the defense, it becomes a necessary issue which the State must disprove in order to establish" the elements of first degree murder. *Parish*, 1994-NMSC-073, ¶ 10. Fourth, the instructions were confusing and misdirected the jury on how to deliberate on sufficient provocation. *Id.* ¶ 23. The jury did not know if circumstances "fell within [its] definition," sufficient provocation would "supersede" deliberate intent and foreclose a first degree conviction. *Id.*, ¶¶ 22-23. Fifth, without

clear direction, the jury might not understand that if the state failed to disprove sufficient provocation then it must acquit Garrett of first degree murder. Like in *Parish*, the UJI here proved confusing and failed to instruct the jury on "all questions of law essential for a conviction of [the] crime submitted . . . ." *Id.* ¶ 12.

In *Parish*, the Court commented that to avoid confusion, the jury need only have been told it was required to find the defendant not guilty if "his conduct met the definition of self-defense." *Id.* ¶ 23. So too here, had the jury simply been told it must acquit Garrett of first degree murder if the state failed to prove he was *not* sufficiently provoked. *See State v. Robinson*, 1980-NMSC-049, ¶ 33, 94 N.M. 406 (sufficient provocation to kill is manslaughter, not first degree murder); *State v. Nevares*, 1932-NMSC-007, ¶ 13, 36 N.M. 41 (same). In short, *Benally* and *Parish* highlight the problem when sufficient provocation is contrasted with the self defense instruction in the UJI.

In UJI 14-5171 NMRA, a jury is directly told it is the state's burden to rebut a self defense argument beyond a reasonable doubt. The instruction unambiguously places the burden of disproving a justification for an act on the prosecution, which is consistent with constitutional requirements. *See Mullaney*, 421 U.S. at 702-04 (burden of disproving heat of passion on sudden provocation no different than disproving self defense and both required by

Due Process Clause). In other words, the two defenses are similar insofar as sufficient provocation mitigates an act and reduces culpability for a greater offense, while self defense justifies an act and exonerates the defendant. But *both* demand a rebuttal by the state beyond a reasonable doubt. *See id.*, at 695 (sudden provocation "most important factor" in determining degree of culpability in homicide); *Parish*, 1994-NMSC-073, ¶ 22 (both instructions describe situations arousing fear and ask jurors to decide whether reasonable person would respond like defendant). Ambiguous instructions invite confusion and a substantial risk that jurors might misapply the proof standard, if applied at all. Without clarification, the jury might even believe Garrett had to prove he was sufficiently provoked – precisely the error condemned in *Mullaney*. 421 U.S. at 703 (finding requirement defendant prove provocation by a preponderance "intolerable"). Compared to the self defense instruction, the instructions here were inherently confusing or ambiguous and, as given, violated due process.

In sum, with sufficient provocation credibly raised as a defense, the court was constitutionally required to provide instructions explaining that provocation was germane to deliberate intent and the state was burdened with proving beyond a reasonable doubt that Garrett was *not* sufficiently provoked. Instead, the court minimized or eliminated sufficient provocation

from the jury's first degree murder deliberations, which, in turn, nullified Garrett's defense. *California v. Trombetta*, 467 U.S. 479, 485 (1984) (fundamental right to meaningfully present complete defense). Likewise, his right to have a jury determination on each element of the charged offense beyond a reasonable doubt. U.S. Const. amends. V, VI, XIV; N.M. Const. art. II, § 18. This type of constitutional error is structural and is only remedied by reversing the conviction. *Sullivan v. Louisiana*, 508 U.S. 275, 280-82 (1993). Garrett, therefore, asks the Court to reverse the murder conviction and remand for a new trial.

C. The state's pervasive misconduct during closing argument requires reversal of Garrett's convictions.

At trial, the state had to prove the deliberate intent necessary for first degree murder. At the same time, it had to disprove sufficient provocation as a *defense* to the charge, and it had to do both beyond a reasonable doubt. At closing, it presented "could have" scenarios for the jury to infer deliberation with no other supporting evidence. It solicited such a wobbly inference because its intent argument was weak from lack of proof. It talked about sufficient provocation but in a way that downplayed or left unclear its huge significance to both intent and Garrett's defense. It characterized the volatile circumstances as "an argument" as if to suggest at any moment it could cool and it was Garrett's burden to prove provocation was sufficient.

10.03.2024/9:27:00. It referenced "facts" not proven at trial. It misstated the law, fudged the proof burden and the proof standard, conflated the "cooling off" necessary for deliberation with proof of no provocation, and repeatedly obfuscated provocation's application and relevance to the charge *and* Garrett's defense to it. Unfortunately, misconstruing the law and distorting evidence likely confused or misled the jury and deprived Garrett of a fair trial.

1. The standard of review and relevant legal principles.

A "verdict should be based upon the law and evidence[.]" *State v. Cummings*, 1953-NMSC-008, ¶ 11, 57 N.M. 36. "It is error . . . to misstate the law applicable to the case, and the trial judge has a duty to restrain such arguments." Francis Amendola, et al., 23A C.J.S. Criminal Procedure and Rights of Accused § 1771 (May 2024 update); *see also State v. Garvin*, 2005-NMCA-107, ¶ 22, 138 N.M. 164 (misstatements of law on mens rea had "such a persuasive effect as to cause the jury to convict the defendant based on less than criminal state of mind"). In *Berger v. United States*, the Supreme Court stressed that prosecutors have a duty to "refrain from improper methods calculated to produce a wrongful conviction . . . ." 295 U.S. 78, 88 (1935). Their "sole duty" is "to see that justice is done." *State v. Cooper*, 2000-NMCA-041, ¶ 15, 129 N.M. 172.

Garrett did not object to the state's closing argument or rebuttal comments. The Court, therefore, reviews Garrett's misconduct claim for fundamental error. *State v. Sosa*, 2009-NMSC-056, ¶ 35, 147 N.M. 351. Misconduct becomes fundamental error when "it is so egregious and had such a persuasive and prejudicial effect on the jury's verdict that the defendant was deprived of a fair trial." *State v. Allen*, 2000-NMSC-002, ¶ 95, 128 N.M. 482 (quotation marks, citation omitted). A spurious and misleading argument is prejudicial when there is a "reasonable probability" it was "a significant factor in the jury's deliberations in relation to the rest of the evidence before them." *Sosa*, 2009-NMSC-056, ¶ 35 (quotation marks, citation omitted). In assessing the impact of misconduct, the Court considers: (1) if the state's comments intruded on "some distinct constitutional protection"; (2) if the statements were "repeated and pervasive" or "isolated and brief"; (3) if the defense "invited" the comments. *State v. Lensegrav*, __-NMSC-__, ¶ 28, __ P.3d__ (S-1-SC-39542) (citation omitted).

Although the factors above are "useful . . . context is paramount." *Sosa*, 2009-NMSC-056, ¶ 34. For example, if the prosecutor "improperly manipulated" a "crucial fact" on which the case turned, the "probability of error is greater." *Id.* Ultimately, the Court must decide whether the state's "comments materially altered the trial or likely confused the jury by

distorting the evidence." *Id.*

2. In closing argument, the state misstated the law, shifted its proof burden to Garrett, and referenced facts outside the record.

The state admitted it had no proof what Garrett was thinking on the short drive from his house. 10.03.204/9:28:25. Still, with no supporting evidence, it asked the jury to find he "could have" been carefully thinking about ending Arellano's life. It then asked the jury to consider its finding as proof of actual deliberation beyond a reasonable doubt. As Garrett explains, the state's short cut was one of many questionable tactics to "distort the body of evidence before the jury," especially as it related to deliberate intent. *Sosa*, 2009-NMSC-056, ¶ 38.

a. The state misstated the correct legal standard for evaluating sufficient provocation.

1. promoting an incorrect legal standard by which to judge provocation: To rebut Garrett's defense, the state said evidence showing Garrett "had time to drive down the road" and "sit in his truck for a few minutes" proved "there was no provocation." 10.03.2024/9:56:59. This is not a correct statement of the legal standard by which sufficient provocation is evaluated. First, it unduly narrows the scope of evidence a jury must consider to determine whether provocation was sufficient. Provocation is not determined from a single frame in time. The jury examines "*any* action,

conduct or circumstance" that might contribute to arousing extreme emotions. UJI 14-222; RP 438. (emphasis added). Second, provocation is legally insufficient only when "an ordinary person would have cooled off before acting." *Id.* Cooling off is legally required as pitched emotions can short circuit self-control and the ability to reason. Proof, then, is typically in tandem: the charged circumstances and the charged emotions cool before self-control and the ability to reason are deemed restored.

Witness testimony confirms Arellano and Garret were still yelling and combative when Garrett briefly drove off and again when he returned. It shows the race-baiting, threats, and failed attempts to keep the men apart continued. The state had the same record. It skipped all the provocative circumstances that affect deliberation and picked out Garrett's short drive to propose to the jury that he "cooled off," he deliberated, so no provocation. In one sweep, it truncated the evidence considered, replaced actual deliberation with "cooling off," substituted speculation for evidence, and ignored its proof standard altogether. Then by circumscribing for the jury which circumstances should inform its deliberations, it showed it "had already weighed the evidence." *Sosa*, 2009-NMSC-056, ¶ 32. Doing so allowed the jury to ignore evidence it was required by law to objectively evaluate. *See State v. Diaz*, 1983-NMCA-091, ¶ 18, 100 N.M. 210 (misconduct for counsel to

invade "province" of court by attempting to instruct jury).

2. lessening its proof burden by encouraging speculation: As noted above, the state presented a snippet of the record to the jury and invited it to infer what happened on Garrett's drive. But an inference without other supporting evidence is just speculation. The state knew that by charging first degree murder, it had a "heightened burden" to prove Garrett "actually did" deliberate. *Adonis*, 2008-NMSC-059, ¶¶ 14, 22. It snipped "cooling off" from provocation's legal standard, applied it to its "could have" moment in the truck, and conveniently claimed proof of intent *and* insufficient provocation. The state repeatedly conflated proving the intent element with disproving sufficient provocation. It repeatedly used the same speculative inference for both. Its sleight of hand is particularly egregious because it knew its burden was proof beyond a reasonable doubt. Misleading the jury and using its confusion to ease its burden was, at the very least, improper. At worst, it intruded on a "distinct constitutional protection" - Garrett's Fifth Amendment expectation the burden be satisfied.

3. adding an element to provocation not based in law: The state's discussion of voluntary manslaughter introduced the idea of a defendant acting "in the rush of the moment." Its example was Garrett "run[ning] over Michael after Michael maybe said he was going to kill him."

10.03.24/9:29:40. Later in its rebuttal, it repeated if Garrett "was so worried about *that* he could have ran over Arellano right then, he could have shot him with a firearm before he got in the truck to leave." 9:56:59. (emphasis added).[4] It ended its rampant speculation by telling the jury that since, "in the rush of the moment," Garrett took neither course, "we don't have voluntary manslaughter . . . don't have second degree [murder] either." Its version of events was quick and easy to digest but it misstated the elements of sufficient provocation, voluntary manslaughter, and second degree murder and its theory of guilt was untethered from current law.

Sufficient provocation does not include an element of reflexive action "in the rush of the moment." If circumstances that arouse anger or rage are ongoing, the question becomes whether other evidence demonstrates the ordinary person would have cooled off before acting. The state's argument creates a temporal point after which provocation no longer can apply. In other words, since Garrett did not act when first aroused, there is no time later where sufficient provocation can apply to mitigate Arellano's shooting, irrespective of actual circumstances or other evidence. *See Diaz*, 1983-

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[4]It is still unclear what the word "that" refers to. Presumably, it means Arellano's threats. The state's new premise proposes by not acting right away "in the rush of the moment," provocation evaporates and second degree murder and voluntary manslaughter are no longer options for the jury to consider.

NMCA-091, ¶ 18 (misconduct for prosecutor to offer underhanded way for jury to disregard defense even if it believed it meritorious).

b. The state devised a legal theory and proof burden to defeat Garrett's sufficient provocation defense and persuade the jury his defense was absurd.

The state incorrectly claimed Garrett argued he was "so intoxicated that he couldn't mean to kill" Arellano.[5] 10.03.24; 09:53:55. It went on,

> But we can't also say that Arellano was so intoxicated that he was going to kill Garrett and his babies and burn his house down can we? By that same token we would have to say he didn't have any intent to do that so there is no sufficient provocation.

Id. Once again, when faced with a dearth of evidence with which to meet its heightened burden, the state defaults to irrelevant distraction. Thus, its feint and its spurious argument: regardless of ample evidence of provocation, Arellano was too intoxicated to intend to kill Garrett and his children so it was impossible for Garrett to have been sufficiently provoked. Not only is the argument a contrivance without legal basis but it undeniably flips the proof burden onto Garret. Arellano's intent has no part in any decision the jury was required to make. The state's novel argument was meant only to defeat Garrett's sufficient provocation defense without proof. It is yet another instance of the state misdirecting the jury's deliberations by misstating the

[5]Garrett argued alcohol added to anger is a deadly combination and alcohol added to threats of violence is provocation. 10.03.2024/9:44:00-9:50:00.

law. *See Diaz*, 1983-NMCA-091, ¶¶ 16-18, 20-22 (fundamental error for prosecutor to misstate instructional law and proof burdens for jury).

c. The state introduced claims not supported at trial to prove elements.

The state claimed that wounds on Arellano's arm were "defense wounds" that showed he was "trying to protect himself." 10.03.2024/9:55:19. Accordingly, continuing to shoot was proof of Garrett's deliberate intent to kill. The record is silent on defensive wounds. Dr. Kerwin did not identify entrance or exit wounds because she could not remember. The state did not ask her if wounds were defensive. The state's comments had to be based on evidence. To promote unsubstantiated claims to establish an offense element was clear misconduct. *State v. Duffy*, 1998-NMSC-014, ¶ 56, 126 N.M. 132, *overruled on other grounds by State v. Tollardo*, 2012-NMSC-008, ¶ 37, n.6, 275 P.3d 110; *State v. Medema*, __-NMCA-__, ¶¶ 30-31, __P.3d___ (A-1-CA-39883).

So too its claim Garrett's deliberate intent was undulled by alcohol because "he was able to drive 20 miles down a busy road." No evidence showed the road was busy as Garrett drove. Worse yet, the state's comment to the jury assumes deliberate intent was established. This Court stressed in *Cummings*, "a statement of facts entirely outside of the evidence, and highly prejudicial to the accused cannot be justified as argument." 1953-NMSC-008,

¶ 8. When proof of elements is missing, the prosecution "should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds." *Bruton v. United States*, 391 U.S. 123, 129 (1968). In its closing, the state conceded it had no evidence Garrett had actually deliberated even as it made repeated statements that he had.

3. The state's controversial comments were prejudicial and likely a significant factor in the jury's deliberations.

The state's questionable comments were "repeated and pervasive" and not "invited" by the defense." *Lensegrav*, __-NMSC-__, ¶ 28. The state's closing is replete with examples of misconduct. That examples appear throughout its entirety illustrate a "calculated, pervasive theme." *Sosa*, 2009-NMSC-056, ¶ 32. Examples include misstating the law or legal standards; impermissibly truncating or distorting the body of evidence; replacing evidence with speculation; repeatedly interchanging elements, arguments, and proof of deliberate intent with proof of insufficient provocation; introducing facts not in the record; and obfuscating or surmising to distract from its lack of evidence. While it may argue some missteps were unintentional, some misconduct was so egregious and prejudicial its effect cannot be excused by such a claim. The state's comments defied *Berger*'s

admonition to "refrain from improper methods calculated to produce a wrongful conviction," 295 U.S. at 88, and were likely "a significant factor in the jury's deliberations." *Sosa*, 2009-NMSC-056, ¶ 35. Accordingly, Garrett has established the elements of fundamental error and asks the Court to reverse the murder conviction and remand for a new trial. *Cummings*, 1953-NMSC-008, ¶¶ 12-13.

Conclusion

Based upon the foregoing arguments, Garrett asks the Court to reverse the murder conviction and remand for resentencing on the lesser-included offenses or a new trial or a retrial on any remaining charges.

Respectfully submitted,

Kurt Mayer
P.O. Box 20188
Albuquerque, NM 87154
505.259.4984

s/Kurt Mayer
Kurt Mayer
Appellate Counsel for Tyje Garrett

Request for Oral Argument

Garrett requests oral argument. Oral argument is necessary in order to clarify the facts and the parties' positions with respect to the important issues raised in this case.

s/Kurt Mayer
Kurt Mayer
Appellate Counsel for Tyje Garrett

Certificate of Service

I hereby certify that upon acceptance by Odyssey File & Serve, a copy of this brief, e-filed this 7th day of July, 2025, will be served electronically upon Van Snow vsnow@nmdoj.gov at the NMDOJ Criminal Appeals Division.

s/Kurt Mayer
Kurt Mayer
Appellate Counsel for Tyje Garrett