IN THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

15-1738

UNITED STATES OF AMERICA

Appellee,

v.

GORDON LASLEY, JR.

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
HONORABLE LINDA R. READE, CHIEF U.S. DISTRICT COURT JUDGE

APPELLANT'S BRIEF

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SUMMARY OF THE CASE

Defendant killed his parents in their home on the Meskwaki Settlement in Tama, Iowa. He was charged and tried on two counts of first degree murder in Indian Country, but the jury returned a verdict of second degree murder on both killings. In doing so, the jury rejected the government's allegation of premeditated killings, but also rejected defendant's insanity defense.

At sentencing defendant faced an advisory guidelines range of 360-life, and the district court imposed consecutive life sentences. Defendant now appeals, respectfully asserting the court erred in not instructing the jury on the lesser included offense of involuntary manslaughter. Defendant also respectfully submits that the court imposed an unreasonable sentence.

REQUEST FOR ORAL ARGUMENT

Defendant respectfully requests that he be granted 10 minutes of oral argument to address the issues presented.

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JURISDICTIONAL STATEMENT

The decision appealed: Defendant Gordon Lasley, Jr., appeals from judgment and sentence entered against him in the United States District Court for the Northern District of Iowa following jury trial, judgment and sentence on two counts of second degree murder. Defendant challenges the trial court's failure to instruct on the lesser included offense of involuntary manslaughter, and the trial court's imposition of life sentences.

Jurisdiction of the court below: The United States District Court had jurisdiction over appellant's federal criminal case pursuant to 18 U.S.C. § 3231: "The district courts of the United States shall have original jurisdiction . . . of all offenses against the laws of the United States."

Jurisdiction of this court: This court has jurisdiction of the appeal pursuant to 28 U.S.C. § 1291: "The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

The defendant filed a timely notice of appeal on April 7, 2015, from the judgment formally entered on March 25, 2015. *See* Fed. R. App. P. 4(b)(1)(A)(i).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ABUSED ITS DISCRETION IN NOT INSTRUCTING THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER

Authorities

Stevenson v. United States, 162 U.S. 313, 16 S. Ct. 839, 40 L. Ed. 2d 980 (1896)

United States v. One Star, 979 F.2d 1319 (8th Cir. 1992)

II. WHETHER DEFENDANT'S CONSECUTIVE LIFE SENTENCES ARE UNREASONABLE

Authorities

United States v. Dautovic, 763 F.3d 927 (8th Cir. 2014)

18 U.S.C. § 3553(a)

STATEMENT OF THE CASE

Nature of the Case: This is a direct appeal by defendant, Gordon Lasley, Jr., following jury trial, judgment and sentence on two counts of second degree murder in Indian Country. Defendant was sentenced to consecutive terms of life imprisonment.

Factual and Procedural History: On April 9, 2014, defendant was indicted in the Northern District of Iowa on two counts of first degree murder in Indian Country in violation of 18 U.S.C. §§ 1111 and 1153. (DCD 2). Pretrial proceedings were focused on various evidentiary disputes, and then the focus at trial was largely on the competing testimony for and against defendant's insanity defense.

The basic facts of the killings were not disputed. Defendant lived in his parents' basement at their Meskwaki Settlement home in Tama, Iowa. (Trial Tr. p. 115-16). His long-term girlfriend, Antonia, and their three children, lived apart from defendant, but on the evening of February 5, 2014, all were gathered at the parents' home. (Trial Tr. pp. 237-38, 245-49).

Antonia and two of the children left about 8:30 p.m. The youngest child, five-year-old D.L., was asleep on defendant's bed at the time and remained behind. (Trial Tr. pp. 251-53). Defendant was under the influence of a small amount of

marijuana at the time but seemed in good spirits. (Trial Tr. pp. 249-52, 438-39, 447).

At some point during the next hour or so, defendant turned violent. He picked up a machete in the home and attacked his parents, Gordon, Sr., and Kim Lasley. (Trial Tr. pp. 175-80, 364). Multiple cutting and stabbing wounds were inflicted, and both Gordon, Sr., and Kim Lasley bled to death in short order. (Trial Tr. pp. 191-95, 208-09, 211-16, 220).

The reason for the sudden violence had to be gleaned from statements defendant made to his girlfriend Antonia, and his brother Tysin, shortly after the incident, and from statements defendant made to mental health professionals in subsequent evaluations. The latter statements, of course, were not taken into evidence for the truth of their assertions, but only for the purpose of evaluating the basis for the opinions of the mental health professionals who testified in the case. (DCD 11, p. 11; Jury Instr. No. 10).

On the day of the killings, defendant expressed an apparently unfounded concern that he had AIDS or some other sexually transmitted disease. A Facebook post from someone that day had warned of such diseases on the settlement, and defendant texted a copy of the posting to Antonia and told her he thought they should get tested. (Trial Tr. pp. 246-47, 268, 884-85).

The subject or concern may have been a trigger for the later violent outburst against his parents. Defendant telephoned Antonia right after the killings, and after making some odd statements about how one is not supposed to be afraid to die, defendant said he brought up to his parents the subject of AIDS and syphilis on the settlement. (Trial R. pp. 253-54, 279). Defendant's father, who was under the influence of alcohol and marijuana, reportedly said the disease was present "right here," in himself. (Trial Tr. pp. 207-08, 254, 279-80). After relaying this comment, defendant told Antonia he had killed his parents. (Trial Tr. p. 254).

Antonia initially thought defendant was joking, but a follow-up call from Antonia to Kim Lasley's phone was answered by defendant, and he repeated that he had indeed killed his parents. Defendant told Antonia, "don't be scared," and "We're free. We're saved." (Trial Tr. pp. 255, 280-81).

Antonia hung up the phone and immediately left her residence and went to a friend's house. She called defendant from there, on speaker phone so her friend could hear, and defendant again affirmed that he had killed his parents. (Trial Tr. pp. 256-57, 307). He repeated that he and Antonia were "free." (Trial Tr. pp. 257, 316). He added, "My mom and dad raised me wrong. The white man's religion is wrong." (Trial Tr. pp. 257, 282, 307). Defendant's tone in all of the calls was essentially flat and emotionless. (Trial Tr. pp. 277-78, 281, 315).

Shortly after the calls with Antonia defendant appeared at the home of his brother, Tysin. Despite the cold temperature outside, defendant wasn't wearing shoes or a coat. (Trial Tr. pp. 331, 389). He put his hand on Tysin's shoulder and said, "I'm sorry. I'm sorry." (Trial Tr. p. 331). He then whispered, "I killed mom and dad." (Trial Tr. p. 331). When asked how he did it, defendant said, "I used a machete." (Trial Tr. p. 335).

Defendant told Tysin, "I wasn't raised right. Me and Toni weren't supposed to have kids together." (Trial Tr. pp. 336, 382). He added, "I'm losing it, man. I've been losing it." (Trial Tr. pp. 336, 365). Defendant also said that he needed to be "cleansed," and that he was now "healed" and "heading toward the light." (Trial Tr. pp. 366-67, 381-84). Defendant told Tysin, "It's all a blur. It feels like somebody else has control." (Trial Tr. p. 369).

Defendant's relationship with Antonia had been of some concern to him because Antonia had been "adopted" into the Lasley family under a Meskwaki custom that permitted a person to join another's family after someone in that family had passed away. (Trial Tr. pp. 239, 272-74, 344, 1027-28). Defendant's aunt disapproved of the relationship because of Antonia's status as a "cousin" (by custom), and the matter seemingly weighed on defendant. (Trial Tr. p. 344). Defendant appeared to believe in the notion that a person could impose "bad

medicine" – – a sort of voodoo or hex – – on another, and he wondered if his aunt had done so to him because of her disapproval of the relationship with Antonia. (Trial Tr. pp. 269-74, 1459-62, 1492, 1536).

Tysin testified that defendant sounded like he believed killing his parents was a way to heal himself from the perceived wrongful relationship with Antonia. (Trial Tr. p. 368). Tysin also said defendant sounded like someone had "told" him as much – – a suggestion that defendant was hearing voices. (Trial Tr. p. 368).

Defendant had been raised Christian, and his comments to Antonia that the "white man's religion is wrong" was the first time Antonia had heard defendant espouse as much. (Trial Tr. pp. 282-83). It was clear, however, that defendant had embraced some aspects of Meskwaki culture and beliefs (Trial Tr. pp. 269-70, 273-74, 284-85, 917, 1029), but on the night of the killings defendant told Tysin that Meskwaki ways are "messed up." (Trial Tr. pp. 352, 366, 434-44).

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The picture that emerged from the defendant's conversations with Antonia and Tysin right after the killings was that defendant lost his mind and lost control during an argument that ignited his concerns about having sexually transmitted diseases, or an improper relationship with Antonia, or both. Defendant's statements

to the mental health professionals who evaluated him were generally in this vein. (Trial Tr. pp. 516-27; 678-89, 1489-94, 1517, 1535).

Defendant seemingly viewed the killings as healing or cleansing, but exactly from *what* isn't very clear. The signals sent by defendant's comments were mixed and basically reflected a troubled mind. The dispute at trial was whether mental illness caused the killings, or, as the government argued, the killings caused the signs of mental disturbance. (Trial Tr. p. 1596).

The irrational thinking that seemingly led to the killings divided the mental health experts. Dr. Arthur Konar testified for the defense and opined that defendant suffered from paranoid schizophrenia that prevented defendant from "accurately interpret[ing] reality" at the time of the incident. (Trial Tr. pp. 564-76). Dr. Dewey Ertz, also for the defense, concluded that defendant suffered from delusional disorder and a brief psychotic episode that impaired his ability to appreciate his actions at the time. (Trial Tr. pp. 666, 678-96, 704-07). The government's expert, Dr. Chris Grote, rejected the aforementioned diagnoses and concluded that defendant had a "provisional" diagnosis of antisocial personality disorder. (Trial Tr. pp. 1475-76, 1516-24, 1543-44). Dr. Grote found defendant's "bad medicine" beliefs not the product of a "delusion," but merely reflective of

defendant's cultural beliefs or his marijuana intoxication on the night of the incident. (Trial Tr. pp. 1516-17).

Defendant had some episodic anger and assaultive history (Trial Tr. pp. 290-93, 302, 936-37, 1054, 1134-35, 1207, 1406-07, 1417-18, 1429-30, 1442), and a history of marijuana and alcohol abuse (Trial Tr. pp. 63, 262-63, 298, 577-78, 653, 656, 1476), but in general was viewed by those close to him as a quiet, good-natured person and a good father to his children. (Trial Tr. pp. 62, 70-71, 267, 287, 310-11, 898, 1242, 1262, 1281, 1292, 1309). Defendant also generally had a good relationship with his parents. (Trial Tr. pp. 57-58, 240, 258-60, 353, 357-59). His father was an alcoholic and was mean and insulting when drinking; this was a source of friction between defendant and his father, but they were never violent toward each other, and defendant had a very close and loving relationship with his mother. (Trial Tr. pp. 58-59, 77, 240-41, 258-60, 296-97, 301-02, 321-22, 337-38, 357-59).

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The case was primarily defended on the basis of an affirmative defense of insanity, but defendant also challenged the government's allegation that he acted with premeditation and malice aforethought. (Trial Tr. pp. 489-91, 1569-70). The district court denied defendant's motions for judgment of acquittal premised on

those grounds, and further denied defendant's request for a lesser included offense instruction on involuntary manslaughter. (Trial Tr. pp. 1567-68).

The case was thereafter submitted to the jury on the filed charges of first degree murder, with a lesser included option of second degree murder - - an unlawful killing with malice, but without premeditation. The jury was also duly instructed on the insanity defense. (DCD 100, pp. 15-21). Following lengthy deliberations, the jury acquitted defendant on the charges of first degree murder, but convicted defendant on the lesser included charges of second degree murder. (DCD 103).

The presentence report thereafter determined an advisory guidelines sentencing range of 360 – life. (PSR p. 28). Defendant requested an adjustment of the range for acceptance of responsibility in light of his insanity defense and recognition of responsibility for an unlawful killing, but the district court denied an acceptance reduction because defendant went to trial and "did vigorously contest intent and premeditation. . . ." (Sent. Tr. p. 28). Defendant otherwise requested a sentence at the low end of the range (Sent. Tr. pp. 23-24), but the court viewed the crimes as acts of first degree murder that warranted life sentences. (Sent. Tr. pp. 30-38). The court accordingly sentenced defendant to consecutive life terms of imprisonment with five years of supervised release. (Sent. Tr. pp. 38-39).

Notice of appeal was timely filed April 7, 2015, from the judgment formally entered March 25, 2015. (DCD 120 and 122).

SUMMARY OF THE ARGUMENT

Defendant challenges both his conviction and sentence on two counts of second degree murder in Indian Country.

Defendant respectfully challenges his conviction on the ground that the jury should have been instructed on the lesser-included offense of involuntary manslaughter. The circumstances of the case were bizarre, horrific, and mystifying, as defendant killed both of his parents with a machete in a sudden and senseless act. Defendant asserted the affirmative defense of insanity, and conceded an unlawful killing, but also challenged the allegation that he acted with malice aforethought and premeditation. (Trial Tr. pp. 489-90, 1569-70). This posture opened the door for an involuntary manslaughter finding, as defendant's evidence of mental impairment could have rationally allowed the jury to reject insanity yet find that defendant acted without malice and intent to kill.

Defendant also respectfully submits that his sentence was unreasonable, as it was heavily based on a finding of premeditation and deliberation that was rejected by the jury and not sufficiently established one way or the other to justify the weight accorded it in determining defendant's sentence.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN FAILING TO INSTRUCT THE JURY ON THE LESSER INCLUDED OFFENSE OF INVOLUNTARY MANSLAUGHTER

Standard of Review: Defendant requested and was denied a jury instruction on the lesser included offense of involuntary manslaughter. Review of such a ruling is said to be for abuse of discretion. *See United States v. Never Misses A Shot*, 781 F.3d 1017, 1026 (8th Cir. 2015); *United States v. Martin*, 777 F.3d 984, 997 (8th Cir. 2015); *United States v. Bordeaux*, 980 F.2d 534, 538 (8th Cir. 1992) (finding that the district court "did not abuse its discretion in refusing to instruct on voluntary manslaughter."); *but see United States v. Ayala-Lopez*, 493 F. App'x 120, at *4 (1st Cir. 2012) (unpublished) (applying de novo review); *United States v. Chapman*, 615 F.2d 1294, 1301 (10th Cir. 1980) (Holloway, J., dissenting) (rejecting abuse of discretion review).

Abuse of discretion review is applied, however, with an important caveat. The district court's discretion is limited to the gatekeeping function of determining whether the evidence as a whole rationally permits (would rationally support) verdict on the lesser:

> We review for abuse of discretion a trial court's decision whether to instruct on a lesser included offense; however, that discretion is not broad ranging "but is focused

> narrowly on whether there is any evidence fairly tending to bear on the lesser included offense." In fact, we have cautioned that a "trial court may properly deny a defendant's request for a lesser included offense instruction only when there is *no evidence* to reasonably support that conviction."

United States v. Toledo, 739 F.3d 562, 568 (10th Cir. 2014) (emphasis original; citations omitted); *see also United States* v. *Snarr*,704 F.3d 368, 389 (5th Cir. 2013) ("'While a defendant's request for a lesser included offense charge should be freely granted, there must be a rational basis for the lesser charge . . . .'") (citation omitted); *United States v. Jones*, 586 F.3d 573, 575 (8th Cir. 2009) ("This court reviews . . . for abuse of discretion. *But* a defendant is entitled to an instruction on a lesser included offense if the evidence would permit a rational jury to find him guilty of the lesser offense and acquit him of the greater.") (emphasis added; citation omitted); *United States v. Arnt*, 474 F.3d 1159, 1163 (9th Cir. 2007) (noting the relevant question as: "Does the record contain evidence that would support conviction of the lesser offense?"); *United States v. Williams*, 197 F.3d 1091, 1095 (11th Cir. 1999) ("An abuse of discretion may occur where the evidence would permit the jury rationally to acquit the defendant of the greater, charged offense and convict him of the lesser.").

In short, it is a rational verdict inquiry, and not a weight or strength of the evidence test. *See Keeble v. United States*, 412 U.S. 205, 208, 93 S. Ct. 1993, 1995, 36 L. Ed. 2d 844 (1973) ("[I]t is now beyond dispute that the defendant is entitled to

an instruction on a lesser included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater."); *Stevenson v. United States*, 162 U.S. 313, 315, 16 S. Ct. 839, 40 L. Ed. 2d 980 (1896) ("The evidence might appear to the court to be simply overwhelming to show that the killing was in fact murder, and not manslaughter, . . . and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court."); *accord United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992) ("[T]he 'some evidence' requirement may still be met if the conclusion as to the lesser offense may be inferred from the evidence presented . . . . The jury is also free to accept the testimony of one or more witnesses in part only, and thereby create its own version of the events at issue.") (citation omitted).

Merits: Federal law recognizes and punishes two types of homicide: murder, defined as an unlawful killing with malice aforethought; and manslaughter, defined as an unlawful killing *without* malice aforethought. 18 U.S.C. §§ 1111(a) and 1112(a). Murder is split into first and second degree, with first degree requiring a certain aggravating fact in addition to malice – – typically premeditation. 18 U.S.C. § 1111(a).

Manslaughter "is of two kinds:" voluntary and involuntary. 18 U.S.C. § 1112(a). Voluntary manslaughter is defined as a killing "[u]pon sudden quarrel or heat of passion." 18 U.S.C. § 1112(a). Involuntary manslaughter is defined as an unlawful killing negligently caused by non-felonious illegal acts, or lawful acts committed in an unlawful manner. 18 U.S.C. § 1112(a); *see also United States v. One Star*, 979 F.3d at 1321 (noting the mental state for involuntary manslaughter as "gross" or "criminal" negligence.); *United States v. Bald Eagle*, 849 F.2d 361, 362 (8th Cir. 1988) ("The rule in this circuit is that a conviction for involuntary manslaughter requires a finding that defendant 'acted grossly negligently. . . .'").

The killings here were prosecuted as first degree murder, as the government alleged the aggravating element of premeditation. (DCD 2). The jury rejected that element of premeditation, however, and returned a verdict of second degree murder – – the only remaining unlawful killing alternative presented. The jury was not allowed to consider the lesser homicide charge of involuntary manslaughter – – an unlawful killing not reflecting malice or intent to kill.

Defendant respectfully submits it was error not to instruct the jury on the lesser included offense of involuntary manslaughter, as the jury could have rationally found that defendant acted without malice aforethought and intent to kill due in part to a mental impairment.

"It is well settled that involuntary manslaughter is a lesser included offense of murder." *United States v. One Star*, 979 F.2d 1319, 1321 (8th Cir. 1992). Defendant was therefore entitled to the instruction if the jury could have rationally acquitted him of second degree murder and convicted him of involuntary manslaughter. *United States v. One Star*, 979 F.2d at 1320.

The difference between murder and involuntary manslaughter is one's state of mind:

> [I]nvoluntary manslaughter differs from murder to the extent that it requires a reduced level of culpability when committing the same physical act. The requisite mental state for involuntary manslaughter is "gross" or "criminal" negligence, a far more serious level of culpability than that of ordinary tort negligence, but still short of the extreme recklessness, or malice required for murder. The physical element of involuntary manslaughter, however, remains the same as the physical element for murder: unlawfully causing the death of another.

United States v. One Star, 979 F.2d at 1321; *see also United States v. Serawop*, 410 F.3d 656, 666 n.7 (10th Cir. 2005) ("Insofar as involuntary manslaughter is concerned, malice is lacking because there is no intent to kill."); *United States v. Quintero*, 21 F.3d 885, 890 n.3 (9th Cir. 1994) ("[I]nvoluntary manslaughter is differentiated from voluntary manslaughter . . . by the absence of *intent*.").

Here, the jury could have reasonably rejected malice. The incident was sudden and largely inexplicable, particularly with regard to defendant's mother, with

whom defendant shared a very close and loving relationship. There was no sane motive for this out-of-the-blue incident, and the jury rightly rejected the notion that the killings were a premeditated act.

The jury was also free, of course, to reject insanity as a complete defense, yet still find that defendant suffered from a significant mental impairment at the time of the killings. *See United States v. One Star*, 979 F.2d at 1321 (emphasizing that the jury could accept witness testimony "in part only, and thereby create its own version of the events at issue."). Malice is "an intent, at the time of a killing, willfully to take the life of a human being, and an intent willfully to act in callous disregard of the consequences to human life . . . ." Eighth Circuit Model Jury Instructions – Criminal 6.18.1111A-1 (2014); *accord United States v. Johnson*, 879 F.2d 331, 334 (8th Cir. 1989). Willfulness in this context means a culpable state of mind – – essentially a bad purpose. *See United States v. Robertson*, 709 F.3d 741, 745 (8th Cir. 2013). If defendant were indeed in a psychotic delusional state, as opined by one expert, or not accurately interpreting reality because of schizophrenia, as opined by another, the jury could rationally reject the allegation that he acted with malice and intent to kill.

The complete circumstances of the killings, though still speculative, may have reflected voluntary manslaughter upon sudden quarrel more than involuntary

manslaughter. *See United States v. Lincoln*, 630 F.2d 1313, 1320 (8th Cir. 1980) (affirming voluntary manslaughter conviction, but rejecting involuntary manslaughter as a lesser in a quarrel/assault case because "assault resulting in serious bodily injury is a felony."); *United States v.Wallette*, 580 F.2d 335, 338-39 (8th Cir. 1978) (rejecting involuntary manslaughter as a lesser in quarrel/assault-with-firearm case because conduct constituted felonious reckless endangerment under applicable law); *but see United States v. Toledo*, 739 F.3d 562, 568-69 (10th Cir. 2014) (finding involuntary manslaughter warranted in quarrel/assault case); *United States v. F.D.L. and R.L.R.*, 836 F.2d 1113, 1118 (8th Cir. 1988) (finding evidence sufficient to support involuntary manslaughter conviction where victim was beaten unconscious and left in an abandoned automobile in subfreezing temperatures); *United States v. Begay*, 833 F.2d 900, 901-03 (10th Cir. 1987) (finding involuntary manslaughter instruction warranted in quarrel/assault case); *United States v. Eagle Elk*, 711 F.2d 80, 81 (8th Cir. 1983) (affirming on other grounds an involuntary manslaughter conviction where victim was struck several times in the head with the butt of a rifle); *United States v. Iron Shield*, 697 F.2d 845, 846-48 (8th Cir. 1983) (finding evidence sufficient to support involuntary manslaughter conviction where defendant brandished a knife and then

apparently left safety of house "in pursuit" of victim killed by a knife wound to the chest in domestic violence incident).

Voluntary manslaughter is a rational verdict in a sudden fight upon quarrel case. *See*, *e.g.*, *United States v. Draper*, 599 F. App'x 671 (9th Cir. 2015) (unpublished); *United States v. Hurley*, 543 F. App'x 249, 253 (3d Cir. 2013) (unpublished); *United States v. Lincoln*, 630 F.2d 1313, 1317-19 (8th Cir. 1980); *DeMarrias v. United States*, 453 F.2d 211, 214-15 (8th Cir. 1972) (accepting evidence that defendant and victim argued and fought during a drunken stupor, and in light of absence of motive for murder, finding the crime "at best be[ing] explained as voluntary manslaughter."); s*ee generally United States v. Delaney*, 717 F.3d 553, 555-59 (7th Cir. 2013) (ruminating on concepts of malice aforethought and heat of passion). The instant case may well have been just that – – a sudden fight provoked by quarrel over something said or alleged about sexually transmitted disease. *See generally United States v. Bordeaux*, 980 F.2d 534, 537-38 (8th Cir. 1992) (discussing heat of passion and "sudden" quarrel elements of voluntary manslaughter).

But voluntary and involuntary manslaughter are two sides of the same coin –– an unlawful killing mitigated by an absence of malice. Here, the defendant's mental health experts testified that defendant was in a delusional, or psychotic, or

schizophrenic state at the time of the killings, such that he could not accurately interpret reality. (Trial Tr. pp. 564-65, 575-76, 666, 673, 689). Given such impaired perception, it was really for the jury to say whether defendant picked up the machete and swung it at his parents with an intent to kill them. Logic may dictate an intent to kill given the nature of the killings, but logic can't always provide the answers in evaluating the actions of an individual with a troubled mind.

These were motiveless, senseless, inexplicable killings that occurred in a crazed fashion. Defendant is no monster, though, and the jury would have been within its right to find that because of defendant's messed up state of mind he did not act willfully and with an intent to kill, either generally or specifically. The district court thus erred in precluding the jury from considering the manslaughter alternative, essentially confining the jury to a murder or nothing verdict.

II. DEFENDANT'S CONSECUTIVE LIFE SENTENCES ARE UNREASONABLE

Standard of Review: A federal criminal sentence is subject to direct appellate review for both procedural error and substantive reasonableness. *Gall v. United States*, 552 U.S. 38, 128 S. Ct. 586, 597, 169 L. Ed. 2d 445 (2007); *United States v. Feemster*, 572 F.3d 455, 461 (8th Cir. 2009) (en banc).

Procedural errors include, *inter alia*, errors in the calculation of the advisory Guidelines range, failing to duly consider and apply the statutory sentencing factors of 18 U.S.C. § 3553(a), giving weight to clearly erroneous facts, and failing to adequately explain the choice of sentence. *Id.* A defendant must timely object in the district court in order to preserve any procedural sentencing error for review; otherwise, review is limited to plain error for mere failure to object, and review is extinguished altogether for a party who affirmatively invites or accepts the alleged procedural error. *United States v. Campbell*, 764 F.3d 874, 878 (8th Cir. 2014); *United States v. Hoffman*, 707 F.3d 929, 935 (8th Cir. 2013).

The substantive reasonableness of a sentence is reviewed in light of the various sentencing considerations embedded in 18 U.S.C. § 3553(a). *United States v. Ford*, 705 F.3d 387, 389 (8th Cir. 2013); *United States v. Jeffries*, 615 F.3d 909, 910 (8th Cir. 2010). The district court, however, "has wide latitude to weigh the § 3553(a) factors in each case and assign some factors greater weight than others in determining an appropriate sentence." *United States v. Bridges*, 569 F.3d 374, 379 (8th Cir. 2009). A sentence thus is not unreasonable merely because this court would have weighed the factors differently and imposed a different sentence. *United States v. Scott*, 732 F.3d 910, 918-19 (8th Cir. 2013); *see also United States v. Hendrix*, 719 F.3d 918, 920 (8th Cir. 2013) (*per curiam*) ("[D]efendant's

arguments demonstrate that a different sentence clearly would have been reasonable. They do not, however, demonstrate that the sentence imposed is unreasonable.")

Accordingly, review of a sentence for substantive reasonableness is "highly deferential" and conducted only for abuse of discretion. *United States v. Roberts*, 747 F.3d 990, 992 (8th Cir. 2014). "A district court abuses its discretion and imposes an unreasonable sentence when it fails to consider a relevant and significant factor, gives significant weight to an irrelevant or improper factor, or considers the appropriate factors but commits a clear error of judgment in weighing those factors." *United States v. Robison*, 759 F.3d 947, 950-51 (8th Cir. 2014) (quoting *United States v. Kreitinger*, 576 F.3d 500, 503 (8th Cir. 2009)).

In light of this "narrow and deferential" review, only an "unusual case" will justify the finding of a substantively unreasonable sentence. *United States v. Shuler*, 598 F.3d 444, 447 (8th Cir. 2010) (quoting *Feemster*, 572 F.3d at 464). A sentence within the advisory guidelines range generally is accorded a presumption of reasonableness on appeal. *United States v. Ray*, 772 F.3d 824, 825 (8th Cir. 2014); *United States v. Jenkins*, 758 F.3d 1046, 1050 (8th Cir. 2014); *United States v. Pappas*, 715 F.3d 225, 230 (8th Cir. 2013).

Nevertheless, substantive reasonableness review is not a "hollow gesture." *United States v. Kane*, 639 F.3d 1121, 1135 (8th Cir. 2011); *see also United States v.*

Dautovic, 763 F.3d 927, 934-35 (8th Cir. 2014) (finding 20-month sentence substantively unreasonable in light of defendant's egregious offense conduct, perjury, and lack of remorse). An extreme sentence that reflects an "unreasonable weighing" of the relevant sentencing factors remains subject to correction on appeal. *Id*.

"A defendant need not object to preserve an attack on the length of the sentence imposed if he alleges only that the district court erred in weighing the § 3553(a) factors." *United States v. Miller*, 557 F.3d 910, 916 (8th Cir. 2009).

Merits: Defendant's advisory guidelines range was 360 - life. (PSR p. 28; Sent. Tr. 30). His conviction for second degree murder permitted a life sentence, *see* 18 U.S.C. §1111(b), and indeed such a sentence was within the applicable guidelines range for second degree murder in defendant's circumstances. The basis for the court's choice of sentence, however, was not grounded in the circumstances of a second degree murder offense, but upon the court's finding that defendant was guilty of *first degree* murder:

> The trial evidence and the unobjected-to portions of the Presentence Report, as well as the evidence and arguments produced throughout this case, establishes in my mind by a preponderance of the evidence that, in fact, this was Murder in the First Degree as to both Gordon Lasley Sr. and Kim Lasley. Perhaps there's an argument that the murder of Gordon Lasley Sr. was not premeditated, but when you think of the trial evidence and the way he was

> attacked from behind and the number of blows and the evidence that suggests that he was trying to escape from the front door - - or to the front door, I think Murder in the First Degree was established by the evidence. Not found by the jury, but established by a preponderance of the evidence in my mind.
>
> Clearly, the murder of Kim Lasley was premeditated. She watched the defendant attack her husband with the machete. She saw him collapse, and as he bled to death, with horror, the defendant turned on her, and the defendant even remarked after the incident that his mother just stood there and she didn't do anything; she didn't call the police. Rather, she ran down the stairs, was likely attacked on the stairs, and there is indication that she was struggling, hoping to get out the basement door. We know that the starting point for Murder in the First Degree is a life sentence.

(Sent. Tr. pp. 35-36).

Even if the law permits a sentencing judge to consider acquitted conduct, as this court and others have held, *see, e.g.*, *United States v. Watts*, 519 U.S. 148, 157, 117 S. Ct. 633, 638, 136 L. Ed. 2d 554 (1997) (per curiam); *United States v. Martin*, 777 F.3d 984, 997-98 (8th Cir. 2015); *United States v. Stroud*, 673 F.3d 854, 862-63 (8th Cir. 2012); *United States v. Waltower*, 643 F.3d 572, 577-78 (7th Cir. 2011) (collecting cases); *but see United States v. Canania*, 532 F.3d 764, 777 (8th Cir. 2008) (Bright, J., dissenting) (condemning practice as unconstitutional and "uniquely malevolent"); *United States v. Faust*, 456 F.3d 1342, 1353 (11th Cir. 2006) (Barkett, J., concurring) (condemning practice as unconstitutional and a

"cruel and perverse result"), that does not mean that such use of acquitted conduct cannot result in an unreasonable sentence in a given case. *See United States v. Grubbs*, 585 F.3d 793, 799 (4th Cir. 2009) (noting that "[a] defendant can challenge the district court's factual findings as well as the extent of the district court's reliance on those findings as part of his appeal of the reasonableness of the sentence imposed.").

This case involved a lengthy and vigorously contested trial, that reflected "[v]ery, very high quality lawyering. . . ." (Trial Tr. p. 1663). After lengthy deliberations (DCD 97 and 98) the jury rejected the charge of first degree murder, which meant that it believed defendant did not act with deliberation and premeditation. (DCD 100, pp. 15-20).

It's okay to disagree with that verdict, but it was not reasonable here to impose a sentence substantially based on that disagreement. The court's rejection of the jury's verdict effectively made a life sentence "the starting point" for the court's choice of sentence (Sent. Tr. p. 36), but a rule that permits simple consideration of acquitted conduct is not the same as a rule permitting wholesale substitution of the applicable sentence for the acquitted crime.

The reasonableness of the sentence turns in part here on what the facts show about deliberation, premeditation, and defendant's state of mind generally. The

parties presented mounds of evidence on both sides of this matter, and they made equally valid, good faith arguments in support of their respective positions. The jury no doubt tested and debated it all, and ultimately rejected premeditation and deliberation. The district court saw it differently. Who was right? The government? The defense? The jury? The judge?

It really isn't fair to say on this record. The evidence simply did not preponderate in favor of one side or the other on the issue of premeditation and deliberation. The sentence here, heavily weighted on that rejected charge of premeditation and deliberation, was therefore unreasonable. *See United States v. Dautovic*, 763 F.3d 927, 934 (8th Cir. 2014) (emphasizing that the substantive review of sentences is a safeguard against the "unreasonable weighing" of the sentencing factors in a given case).

CONCLUSION

For the reasons stated in Issue I, defendant-appellant respectfully requests that this court reverse his conviction and remand for new trial. If said relief is denied, defendant-appellant respectfully requests, for the reasons stated in Issue II, that his sentence be reversed and the matter remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 29, 2015, I electronically filed the foregoing brief and the addendum with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the CM/ECF system. The brief and addendum were scanned for viruses using Symantec Endpoint Protection 12.1.4013.4013. I also certify that after receipt of notice that the brief and addendum are filed, I will serve a paper copy of this brief on defendant-appellant by mailing him a copy at USP Terre Haute, P.O. Box 33, Terre Haute, IN 47808. I further certify that after receipt of notice that the brief and addendum are filed, I will transmit 10 paper copies of this brief to the Clerk of Court and 1 paper copy to the appellee as noted below.

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Fed. R. App. P. 32(a)(7) & 8th Cir. Rule 28A(c) Certification

I certify that the foregoing brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7). The brief uses a proportional space, 14 point New Times Roman font. Based on a line count under WordPerfect Version 16.0.0.318, the brief contains 543 lines and 5,794 words, excluding the table of contents, table of authorities, any addendum, and certificates of counsel.

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