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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

**THE PEOPLE OF THE STATE OF CALIFORNIA,**

Plaintiff and Respondent,

S257631

v.

**HEATHER ROSE BROWN,**

Defendant and Appellant.

**MOTION TO EXPAND THE SCOPE OF REVIEW TO  
CONSIDER ASSEMBLY BILL NOS. 124 AND 518 OR TO  
REMAND TO THE COURT OF APPEAL FOR  
CONSIDERATION OF THOSE NEW LAWS**

TO THE HONORABLE TANI GORRE CANTIL-SAKAUYE,  
CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE STATE OF  
CALIFORNIA:

Pursuant to rule 8.516 of the California Rules of Court,  
appellant **HEATHER ROSE BROWN**, through her appointed  
counsel, respectfully requests that, as potential remedies for the  
pending instructional issues on review, this court either (1)  
expand the scope of review to consider remanding the case to the

trial court for resentencing in light of Assembly Bill Nos. 124 and 518, or (2) to remand the case to the Court of Appeal for it to consider the applicability of those bills to this case. This motion is based upon the accompanying memorandum of points and authorities and declaration of appellant's counsel.

Dated: July 23, 2022.

Respectfully submitted,

/s/ David L. Polsky

David L. Polsky  
Attorney for Ms. Brown

## MEMORANDUM OF POINTS AND AUTHORITIES

In 2017, Ms. Brown was convicted of, *inter alia*, first degree murder by poison (Pen. Code, § 187, subd. (a); count one) and child abuse (Pen. Code, § 273a, subd. (a); count two), both resulting from the death of her newborn child from exposure to illegal drugs. (OBM, at pp. 5-7; 3CT 686, 689.) The jury also found her guilty of possessing heroin for sale (Health & Saf. Code, § 11351; count three). (3CT 690.) The court sentenced her to state prison for the 3-year middle term for the drug charge plus a consecutive term of 25 years to life for the murder. (1SCT 1-2.) It also imposed the 4-year middle term for the child abuse plus an enhancement of 4 years (Pen. Code, § 12022.95) but stayed execution of that sentence under Penal Code section 654. (1SCT 1-2.) This court granted review to decide whether the trial court erred in instructing the jury on the elements of first degree murder by poison and whether any instructional error was prejudicial. (OBM, at p. 5.)

Rule 8.516 of the California Rules of Court gives this court plenary discretion over the scope of review, granting it the authority to define the issues to be briefed, to order argument on fewer or additional issues, and to consider issues that are “fairly” and even “not fairly” included in the original petition for review. As discussed more fully below, on January 1, 2022, long after this court defined the issues for review and briefing was completed (Decl. of David L. Polsky), Assembly Bill Nos. 124 and 518 took effect, amending a trial court’s sentencing discretion. Ms. Brown contends those changes apply to her case and requests this court expand the scope of review to consider their applicability or,

alternatively and at the appropriate time, remand the case to the Court of Appeal to consider that issue.

***A. Assembly Bill No. 518***

At the time of Ms. Brown’s sentencing hearing, section 654 provided that, when an act or omission can be punished by different provisions of law, the defendant must serve the punishment “under the provision that provides for the longest potential term of imprisonment.” (Former § 654.) However, in 2021, the Legislature enacted Assembly Bill No. 518 (AB518), which amended section 654, effective January 1, 2022. (Stats. 2021, ch. 441.) As amended, section 654, subdivision (a) now provides that an act or omission that is punishable in different ways by two different provisions of the law can be punished under either provision; the longest term of imprisonment is no longer mandated. Thus, with respect to the sentence in counts one and two, the trial court would now have the discretion to stay execution of the longer term—for the murder—and require instead the defendant to serve the shorter term—for the child abuse.

***B. Assembly Bill No. 124***

Assembly Bill 124 (AB124) also became effective January 1, 2022 and amended Penal Code section 1170 so as to affect trial court sentencing discretion. (Stats. 2021, ch. 695, § 5.3.) Among other things, AB124 sets a presumption that the trial court will impose the *lower term* under enumerated circumstances, such as

where an offender’s “youth” was a contributing factor in the offense. (Pen. Code, § 1170, subd. (b)(6).) A “youth” under section 1170 includes any person under 26 years of age when the offense was committed. (Pen. Code, § 1016.7, subd. (b).) Ms. Brown was 21 years old at the time of the offenses. (1CT 5 [July 16, 1993 birthdate]; 2CT 317-318 [November 3, 2014 date of offenses].) Under the circumstances, she may be entitled to imposition of the lower term in counts two and three.

### ***C. Retroactivity***

Ms. Brown contends both AB518 and AB124 apply retroactively to her case. Ameliorative criminal statutes apply retroactively to nonfinal cases in the absence of a contrary legislative intent. (*In re Estrada* (1965) 63 Cal.2d 740, 744-745.) It has been uniformly held that both new laws apply to nonfinal cases. (See, e.g., *People v. Banner* (2022) 77 Cal.App.5th 226, 240 [AB124]; *People v. Sek* (2022) 74 Cal.App.5th 657, 673-674 [AB518]; *People v. Mani* (2022) 74 Cal.App.5th 343, 379-380 [AB518].) For purposes of determining retroactivity, a judgment is not final until the time for petitioning for a writ of certiorari has passed. (*People v. Vieira* (2005) 35 Cal.4th 264, 306.) As Ms. Brown’s appeal is still pending, it is not final, and she is thus entitled to the ameliorative benefits of both new laws.

### ***D. Remedy***

Ms. Brown acknowledges that a favorable decision regarding the issues on review—i.e., that a new trial is required

on count one because prejudicial instructional error occurred—would render the application of AB518 moot. However, if this court issues an adverse or less favorable ruling—i.e., decides that there was no error, that any error was harmless, or that prejudicial error merely requires a reduction of count one to a lesser included offense—Ms. Brown contends she would be entitled to a new sentencing hearing to allow the trial court to exercise its newfound discretion under section 654 to stay execution of the sentence in count one rather than count two.

On the other hand, this court's decision on the instructional question related to count one will not affect the applicability of AB124 with respect to the determinate terms imposed in counts two and three. Ms. Brown submits that even under a favorable ruling, remand for resentencing on those counts is required to account for her age at the time of the offenses.

Accordingly, as potential remedies for the instructional issues on review, she respectfully requests that this court (1) expand the scope of review to consider remanding the case to the trial court for resentencing in light of AB124 and AB518, or (2) remand to the Court of Appeal for it to consider the applicability of AB124 and AB518 to this case.

## DECLARATION OF DAVID L. POLSKY

I, David L. Polsky, declare as follows:

1. On November 13, 2019, this court granted Ms. Brown's petition for review to decide whether the trial court erred in instructing the jury on the elements of first degree murder by poison and whether any instructional error was prejudicial.

2. On December 3, 2019, the court appointed me to represent Ms. Brown.

3. On February 5, 2020, I filed an opening brief on the merits. On June 3, 2020, the People filed an answer brief on the merits. On June 23, 2020, I filed a reply brief for Ms. Brown.

4. On January 1, 2022, Assembly Bill Nos. 124 and 518 took effect, amending Penal Code sections 1170 and 654 respectively to change the scope of a trial court's sentencing discretion, as described more fully in this motion.

5. Ms. Brown's appeal is still pending. The case has not yet been set for oral argument, and no opinion has been issued by this court.

6. Ms. Brown contends that she is entitled to the ameliorative benefits of AB124 and AB518 and seeks to have this court consider their application in fashioning an appropriate remedy.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that I signed this declaration on July 23, 2022, at Ashford, Connecticut.

/s/ David L. Polsky  
David L. Polsky

## **PROOF OF SERVICE**

I declare that:

I am employed in Windham County, Connecticut; I am over the age of 18 years and not a party to the within entitled cause; my business address is P.O. Box 118, Ashford, CT 06278. On July 23, 2022, I served a copy of the attached **MOTION TO EXPAND THE SCOPE OF REVIEW TO CONSIDER ASSEMBLY BILL NOS. 124 AND 518 OR TO REMAND TO THE COURT OF APPEAL FOR CONSIDERATION OF THOSE NEW LAWS** in said cause on all parties in said cause, by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail, at Ashford, Connecticut, addressed as follows:

Heather Rose Brown  
c/o Theresa Brown  
16193 Anderson Road  
Sonora, CA 95370

Sarah Murphy, Deputy D.A.  
Office of the District Attorney  
1355 West Street  
Redding, CA 96001-1632

Hon. Stephen H. Baker, Judge  
Shasta County Superior Court  
1500 Court Street  
Redding, CA 96001

In addition, I electronically served the attached brief to the following parties via the TrueFiling electronic service system:

Office of the Attorney General  
  
Central Calif. Appellate Program

California Court of Appeal  
Third Appellate District

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on July 23, 2022, at Ashford, Connecticut.

/s/ David L. Polsky  
David L. Polsky



STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

STATE OF CALIFORNIA  
Supreme Court of California

Case Name: **PEOPLE v. BROWN**  
Case Number: **S257631**  
Lower Court Case Number: **C085998**

1. At the time of service I was at least 18 years of age and not a party to this legal action.
2. My email address used to e-serve: **polsky183235@gmail.com**
3. I served by email a copy of the following document(s) indicated below:

Title(s) of papers e-served:

Filing Type	Document Title
MOTION	S257631_MOT_Brown

Service Recipients:

Person Served	Email Address	Type	Date / Time
Attorney Attorney General - Sacramento Office A. Kay Lauterbach, Deputy Attorney General 186053	kay.lauterbach@doj.ca.gov	e-Serve	7/23/2022 3:22:02 PM
David Polsky Attorney at Law 183235	polsky183235@gmail.com	e-Serve	7/23/2022 3:22:02 PM
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Central California Appellate Program CCAP-0001	eservice@capcentral.org	e-Serve	7/23/2022 3:22:02 PM

This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

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

7/23/2022

Date

/s/David Polsky

Signature

Polsky, David (183235)

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Last Name, First Name (PNum)

Law Office of David L. Polsky

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Law Firm