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October 12, 2022

Jorge E. Navarrete  
Executive Officer and Clerk  
Supreme Court of the State of California  
350 McAllister Street  
San Francisco, CA 94102-4797

RE: *People v. Brown*  
Supreme Court of the State of California, Case No. S257631  
California Court of Appeal, Third Appellate District, Case No. C085998

Dear Mr. Navarrete:

The Court has asked the parties to address the following questions:

(1) Did the instructions in this case fail to convey to the jury that, to prove first degree poison murder, the prosecution had to show that defendant acted with malice in administering the poison; that is, that she must have either poisoned with intent to kill or “deliberately administered the poison” with “full knowledge that [her] conduct endangered the life of decedent,” and with “conscious disregard for that life”? (*People v. Mattison* (1971) 4 Cal.3d 177, 183-184.)

(2) Is there “a reasonable likelihood that the jury misunderstood or misapplied the instruction[s]” in a manner that allowed a conviction of first degree poison murder based on a finding that defendant acted with malice in her conduct other than feeding the victim her breastmilk, along with a finding that poisoned breastmilk was a substantial factor in causing the victim’s death; in other words, without finding that defendant acted with malice when she fed the victim her breastmilk? (*People v. Covarrubias* (2016) 1 Cal.5th 838, 906.)

(3) If the first degree murder conviction were reversed based on error in the poison murder instruction, may the prosecution accept a reduction to second degree murder in lieu of retrying the first degree murder charge? (*People v. Chiu* (2014) 59 Cal.4th 155, 168.)

As detailed below, the jury was correctly instructed that, to return a first degree murder verdict, it was required to find that Brown acted with malice in administering poison—here, breastmilk tainted with heroin and methamphetamine. Especially in light of the arguments of counsel, there is no reasonable likelihood that the jury would have understood that it could reach a first degree murder verdict without making that finding. In any event, even if there were instructional error, reversal is not required because the error was harmless beyond a reasonable doubt. The only theory of first degree murder tried to the jury required a finding of malice in the administration of poison. If, however, the Court were to disagree and reverse the judgment, the People would be entitled, on remand, to accept a reduction to second degree murder, or alternatively, to elect to retry Brown for first degree murder, because any instructional error affected only the theory of first degree murder.

**I. THE JURY INSTRUCTIONS CORRECTLY CONVEYED THAT A FIRST DEGREE MURDER VERDICT UNDER A POISONING THEORY REQUIRED MALICE IN ADMINISTERING THE POISON**

The jury instructions correctly explained that a first degree murder verdict under a murder-by-poison theory requires a finding of malice in administering the poison, which includes deliberately administering the poison with full knowledge that the conduct endangered the life of decedent, and with conscious disregard for that life.

The jury was instructed under CALCRIM No. 521 defining murder by poison. The instruction identifies a specific type of act—the administration of poison to another person—that elevates a murder to first degree murder. The instruction provides in part:

The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison. Poison is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.

(2RT 945; see 3CT 621.) CALCRIM No. 521 by its terms requires that the defendant “murdered” another person by administering to that person a substance that is inherently deadly. To be found guilty of first degree murder by poison, CALCRIM No. 521 also requires that the elements of murder set out in CALCRIM No. 520 be satisfied. (2RT 945 [“The requirements for second degree murder based on express or implied malice are explained in CALCRIM No. 520, first or second degree murder with malice aforethought. That’s the instruction I just read to you.”].)

There is no dispute that CALCRIM No. 520 correctly set out the definition of malice for purposes of murder, including that Brown acted with implied malice if: “she intentional[ly] committed an act”; “the natural and probable consequences of the act were dangerous to human life”; “at the time she acted, she knew her act was dangerous to human life”; and “she deliberately acted with conscious disregard for human life.” (2RT 944; see 3CT 619.) The instruction further explained: “If you decide that the defendant committed murder, it is murder

of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521.” (2RT 945; see 3CT 620.)

When read together with CALCRIM No. 520, then, CALCRIM No. 521 required the prosecution to establish that Brown acted with malice in performing the act of administering the poison. This is most clearly seen by substituting “administered poison” for the general term “act” in CALCRIM No. 520 as it was provided to the jury.

To prove that the defendant is guilty of [murder], the People must prove that:

1. The defendant ~~committed an act~~ [administered poison] that caused the death of another person;
2. When the defendant ~~acted~~ [administered the poison], she had a state of mind called malice aforethought;

AND

3. She killed without lawful excuse.

...

The defendant acted with implied malice if:

1. She intentionally ~~committed an act~~ [administered poison];
2. The natural and probable consequences of ~~the act~~ [administering poison] were dangerous to human life;
3. At the time she ~~acted~~ [administered poison], she knew her act was dangerous to human life;

AND

4. She deliberately ~~acted~~ [administered poison] with conscious disregard for human life.

(3CT 619; see 2RT 943-944, alterations added.)

The instructions thus explained that, to be guilty of first degree murder, Brown needed to have *murdered by using poison*, meaning that she must have administered the drug-tainted breastmilk with at least implied malice. The cross-referenced instructions together conveyed that, when considering first degree poison murder under CALCRIM No. 521, the relevant “act”

for purposes of malice as described in CALCRIM No. 520 was “using poison.” There was no error in the instructions as they were read to the jury.

**II. THERE IS NO REASONABLE LIKELIHOOD THAT THE JURY UNDERSTOOD THE INSTRUCTIONS TO PERMIT A FIRST DEGREE MURDER VERDICT WITHOUT FINDING THAT BROWN ADMINISTERED THE POISON WITH MALICE**

Even if there were some ambiguity in the instructions, as read, there is no reasonable likelihood that the jury misunderstood the instructions to permit a guilty verdict for first degree murder in the absence of a finding that Brown acted with malice in administering the poison. In combination with the instructions read to the jury, the arguments of counsel unambiguously and correctly conveyed the elements required for first degree murder by poison.

If a jury instruction is ambiguous, a reviewing court asks whether there is a reasonable likelihood that “the jury could have applied the challenged instruction in an impermissible manner.” (*People v. Holmes, McClain and Newborn* (2022) 12 Cal.5th 719, 790; *People v. Smithey* (1999) 20 Cal.4th 936, 963.) “A single instruction is not viewed in isolation, and the ultimate decision on whether a specific jury instruction is correct and adequate is determined by consideration of the entire instructions given to the jury.” (*People v. Covarrubias* (2016) 1 Cal.5th 838, 906.) A “reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury.” (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

In closing argument, the prosecutor disclaimed reliance on express malice and told the jury that, to be guilty of first degree murder, Brown did not have to act with an intent to kill but “[w]hat she needs to have done is poisoned with implied malice. Acting with a conscious disregard for human life and she knows this is dangerous.” (2RT 994.)

In addition, the prosecutor argued that Brown “could absolutely love her daughter, have no ill will toward her daughter, not hate her daughter and still act with a conscious disregard for human life and still act with implied malice and that’s absolutely what she did in this case.” (2RT 987-988.) The prosecutor observed that Brown’s decision to breastfeed “because she believe[d] that this would ease the withdrawal symptoms” was an “intentional act done more than once.” (2RT 988.) Pointing to CALCRIM No. 521, the prosecutor stated that “the only difference between first degree and second degree is that first degree requires that additional was poisoned—did the People prove that the murder was done by using poison.” (2RT 992.) She argued that by feeding her baby heroin and methamphetamine via her breastmilk, thereby repeatedly exposing her baby to poison until she died, Brown “poisoned her daughter to death.” (2RT 992-994.) The prosecutor explained that, to return a first degree murder verdict, the jury needed to conclude that Brown poisoned her baby with implied malice, elaborating that even Brown’s “own statements” disclosed “that she knows this is dangerous and she repeats doing this to her daughter.” (2RT 994.)

The prosecutor contrasted that theory of first degree murder with a second degree murder theory based on more general evidence of implied malice, acknowledging the possibility that the jury might find that the poisoning was not “a substantial enough factor in causing death” to support a first degree murder verdict. (2RT 994.) In such a case, the prosecutor argued, Brown’s other acts, such as failing to seek medical care for her newborn child, supplied the requisite implied malice that would support a second degree murder verdict. (2RT 994; see also 2RT 987-991 [discussing facts supporting implied malice generally].)

Defense counsel’s argument reinforced the first degree murder requirement that the poisoning be done with malice. (2RT 1010-1021.) Defense counsel underscored the correct legal standard, stating, “to find Heather Brown guilty of first degree murder, you would have to believe she intentionally introduced a poison into the body of her daughter and did so, not caring whether it killed her daughter or not. Reckless disregard for human life. And it’s ridiculous to believe that that’s true. [¶] This is not a first degree murder by poison.” (2RT 1018.) Defense counsel argued that the evidence showed that Brown did not “perceive the risk” and therefore could not have acted “in conscious disregard of human life.” (2RT 1018-1020.) Similar to the prosecutor, defense counsel contrasted the poison murder theory with an implied malice theory that would support a second degree murder verdict, arguing that Brown’s acts in general surrounding the birth of her daughter did not show that Brown “recognized the danger and acted in a reckless disregard of that danger in performing an act.” (2RT 1018-1021.)

The prosecutor in rebuttal countered that the evidence showed that Brown appreciated the danger associated with administering the breastmilk tainted with heroin and methamphetamine. (2RT 1022-1023.) She argued that ample circumstantial evidence, including Brown’s concealment of her drug use, internet research, and recognition of her baby’s withdrawal symptoms, allowed the jury to infer that Brown acted with implied malice. (2RT 1025-1027.) The prosecutor concluded by stating that Brown could love her baby and yet still perform an act “knowing the consequences are dangerous to human life,” and that Brown did so “by introducing poison into her daughter’s system. Repeatedly for five days . . .” (2RT 1028.)

Based on the instructions and the arguments of counsel applying the legal principles to the facts of the case, there is no reasonable likelihood that the jury thought it could return a first degree murder verdict without finding that Brown administered poison with malice. The only theory of first degree murder presented to the jury was that Brown committed poison murder by repeatedly feeding breastmilk to her newborn daughter in an attempt to treat withdrawal, knowing that it contained heroin and methamphetamine and knowing the danger that those drugs posed to human life. Nothing else that was presented to the jury would have misled it into believing that it could return a first degree murder verdict merely because Brown had acted with implied malice generally and the tainted breastmilk was a substantial factor in the baby’s death.

**III. IF PREJUDICIAL INSTRUCTIONAL ERROR OCCURRED, THE PEOPLE MAY ACCEPT A REDUCTION OF THE MURDER COUNT TO SECOND DEGREE MURDER OR MAY ELECT TO RETRY BROWN FOR FIRST DEGREE MURDER**

The Court should not reverse the judgment because any instructional error was harmless beyond a reasonable doubt. In the event of reversal, however, the People may accept a reduction of the murder count to second degree murder or may retry Brown for first degree murder.

Even if the instructions could have been understood as permitting a first degree murder verdict without a finding that Brown administered poison with malice, the error does not require reversal. “Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict.” (*People v. Chun* (2009) 45 Cal.4th 1172, 1201; see *Chapman v. California* (1967) 386 U.S. 18, 24.) “To say that an error did not contribute to the verdict is to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record.” (*People v. Flood* (1998) 18 Cal.4th 470, 494, quoting *Yates v. Evatt* (1991) 500 U.S. 391, 403.) If, after reviewing the record, a court can “conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error,” it is proper to affirm. (*Neder v. United States* (1999) 527 U.S. 1, 19; accord, *People v. Mil* (2012) 53 Cal.4th 400, 417.)

This case was not tried to the jury on a theory that Brown acted with implied malice generally and that, separately, the drugs in her breastmilk were a substantial factor in the baby's death. (See *People v. Brown* (2012) 210 Cal.App.4th 1, 13 [even though instructions may have permitted conviction on improper basis, the error was harmless beyond a reasonable doubt because “the case was simply not tried on alternate grounds that included this legally inadequate theory”].) The main focus of the evidence was on Brown's feeding her baby drug-tainted breastmilk in spite of knowing the danger to her baby's life. (See 1RT 403-409, 502-504, 518-519, 539-540, 547-554, 558-559, 653-661, 746, 748, 754; 2RT 800-811, 865-867; 2CT 415, 423-424, 429-430, 441-442, 479, 490-491, 496-500, 505.) While there was other evidence showing that appellant had acted with implied malice more generally, by failing to follow advice to go to a hospital (see 1RT 333-334, 359, 363-365, 371, 626-627, 630-631, 690-693, 742; 2CT 379-380, 416, 420, 437-438, 490-491, 531-532), both counsel in argument contrasted the general implied malice theory that would support only a second degree murder verdict with the first degree murder theory requiring the administration of poison with malice. (See 2RT 994, 1018-1021.) Additionally, as noted, both counsel emphasized in argument that the jury could return a first degree murder verdict only if it concluded that Brown administered poison with implied malice. (See 2RT 994, 1018.) That the presentation of the case to the jury, factually and legally, centered on a correct first-degree poison murder theory, as contrasted with the more general implied malice second degree murder theory, leaves no reasonable doubt that the outcome of the case would have been the same even had the jury been given different instructions.

Nevertheless, should the Court reverse for instructional error, the People would be entitled, on remand, to accept a reduction to second degree murder or to retry Brown for first degree murder. When “the effect of the instructional error” touches “only the degree” of the murder, then the appropriate remedy is to allow “the People to accept a reduction of the conviction to second degree murder or to retry the greater offense.” (*People v. Chiu* (2014) 59 Cal.4th 155, 168, superseded by statute on other grounds as stated in *People v. Lewis* (2021) 11 Cal.5th 952, 959, fn. 3.) If prejudicial instructional error occurred with respect to the murder by poison instruction, then the error was limited only to the jury’s decision as to the degree of murder.

The poison murder instruction given to the jury, CALCRIM No. 521, stated the People’s only theory of first degree murder, murder by means of poison, and this was the only instruction that provided a path to a first degree murder verdict, as confirmed by the arguments of counsel. (2RT 945, 987, 994, 1018; see 3CT 621.) Brown does not dispute the propriety of the remaining instructions, including the instruction on implied malice, and the jury must have found, at a minimum, implied malice in reaching its first degree murder verdict. Thus, even if the murder by poison instruction was prejudicially erroneous by failing to adequately link malice to the administration of poison, Brown remains properly convicted of second degree murder.

Sincerely,

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*/s/ Cameron M. Goodman*

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**DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S.  
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Case Name:       **People v. Brown**  
No.:               **S257631 / C085998**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collecting and processing electronic and physical correspondence. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On October 12, 2022, I electronically served the attached **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF** by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on October 12, 2022, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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Court of Appeal  
Third Appellate District  
**Via TrueFiling**

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct and that this declaration was executed on October 12, 2022, at Sacramento, California.

*/s/ D. Boggess*

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Declarant

STATE OF CALIFORNIA  
Supreme Court of California

**PROOF OF SERVICE**

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Supreme Court of California

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

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/s/Diane Boggess

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Goodman, Cameron (322216)

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