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October 21, 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:

As authorized by this Court's September 9, 2022 order, the People submit this response to Brown's supplemental letter brief (BSLB).

I. READ IN CONTEXT, THE INSTRUCTIONS ADEQUATELY CONVEYED THAT THE ADMINISTRATION OF POISON HAD TO BE DONE WITH MALICE

Brown argues that the instructions allowed the jury to return a first degree murder verdict without finding that she administered poison with express or implied malice, so long as the poisoning occurred at the same time as some other malicious act. (BSLB 2-6.) She faults the instructions for failing to "explicitly relate[] malice to the act of administering a poisonous substance" (BSLB 2) or, in other words, to "make . . . plain" that a "causal rather than temporal" relationship is required between act and intent (BSLB 4-5).

Brown's argument for the most part improperly views the two central murder instructions—CALCRIM Nos. 520 and 521—in artificial isolation rather than in context, criticizing each one in turn as insufficiently clear. (See *People v. Lemcke* (2021) 11 Cal.5th 644, 655 [instructions may not be judged in artificial isolation but must be considered in the context of the instructions as a whole and the trial record].) But as explained in the People's letter brief, a reasonable juror would necessarily read CALCRIM No. 521 together with CALCRIM No. 520 when determining the requirements for first degree poison murder. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 926 ["'It is fundamental that jurors are presumed to be intelligent and capable of understanding and applying the court's instructions.'"].) CALCRIM No. 521 instructed the jury that Brown was "guilty of first degree murder if the People have proved that the defendant *murdered* by using poison." (2RT 945; see 3CT 621, italics added.) The instruction expressly cross-referenced CALCRIM No. 520, which correctly described that for

purposes of murder, the relevant "act"—here, the administration of poison—must have been done with malice and also correctly defined the concept of malice. (2RT 943-945; see 3CT 619-620; Pen. Code, §§ 187, subd. (a), 188). By requiring the People to prove that Brown "murdered by using poison," CALCRIM No. 521, together with CALCRIM No. 520, explained that, to be guilty of first degree murder, Brown's "act" of "using poison" had to be done with express or implied malice.

Brown acknowledges that, "[t]o the extent jurors would understand CALCRIM 520 to have defined murder as the commission of a *malicious act* that 'caused the death,' the phrase in CALCRIM 521 would arguably imply first degree murder required proof that *that malicious and fatal act* was the use of poison." (BSLB 3.) Ultimately, she "does not contend that the instructions are necessarily inaccurate or incorrect but merely argues that they are open to potential misrepresentation" because, in a situation "where a defendant commits acts that could be found to be with malice but death results from some other contemporaneous, nonmalicious act, the instructional ambiguity could lead jurors to misapply the law." (BSLB 6.)[1] Yet even if the pattern instructions on poison murder could be improved to make the requirement of a causal link between act and mental state even more plain, as Brown contends, that does not mean that the instructions in their current form are erroneous. (See *People v. Lemcke*, *supra*, 11 Cal.5th at pp. 666-669 [eyewitness certainty instruction could be improved because it might confuse jurors, but it was not erroneous].) As Brown seems to admit, the instructions correctly stated the law of first degree poison murder.

II. THE ARGUMENTS OF COUNSEL ENSURED THAT THE JURY WAS NOT REASONABLY LIKELY TO HAVE MISUNDERSTOOD THE INSTRUCTIONS TO PERMIT A FIRST DEGREE MURDER VERDICT WITHOUT A FINDING THAT BROWN ADMINISTERED POISON WITH MALICE

In arguing that the jury was reasonably likely to have misunderstood the instructions, Brown observes that the evidence in the case would have supported a conviction on the incorrect theory that she acted with implied malice generally, though not in administering the poison. (BSLB 7-9.) She "does not dispute that jurors could rationally infer from her police statements and conduct towards her daughter that feeding her child drug-tainted breastmilk satisfied both elements of implied malice," but she contends that "the evidence was just as strong that it did

[1] To the extent Brown now contends that the pattern jury instructions needed modification to suit the unique facts of her case, the claim is forfeited. (See *People v. Castaneda* (2011) 51 Cal.4th 1292, 1348 ["Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."], abrogated on other grounds as recognized in *People v. Hardy* (2018) 5 Cal.5th 56, 100; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.) At trial, Brown requested neither modification of the first degree murder by poison instruction nor a pinpoint instruction. (See 2RT 910-915, 919-920.)

not." (BSLB 8.) While the evidence at trial focused mainly on Brown's feeding her baby drug-tainted breastmilk, it is true that the evidence alone would not necessarily have led the jury to rely on a proper legal theory of first degree poison murder. But as explained in the People's letter brief, the arguments of counsel unequivocally conveyed the correct poison murder legal theory based on the evidence and did not suggest any incorrect theory to the jury.

The only theory of first degree murder argued to the jury, by both counsel, was that Brown introduced poison into her baby's body with implied malice. (2RT 988, 992-994, 1018.) The prosecutor explained that "the only difference between first degree and second degree is that first degree requires that . . . the murder was done by using poison." (2RT 992.) Additionally, the prosecutor told the jury that this required that Brown "poisoned with implied malice. Acting with a conscious disregard for human life and she knows this is dangerous." (2RT 994.) Defense counsel similarly argued that, "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." (2RT 1018.) Importantly, both counsel contrasted the first degree poison murder theory with a second degree murder theory based on evidence of implied malice other than the administration of poison through Brown's breastmilk. (2RT 994, 1018-1021.) Thus, while Brown points to the prosecutor's argument about more general evidence of implied malice (BSLB 9-10), that argument, and the evidence it cited, was directed to the second degree murder theory, while the prosecutor's more specific argument about the administration of poison through breastfeeding was directed to the first degree poison murder theory. (See People's Letter Brief 4-5.) Counsels' arguments about the applicable legal standards eliminated any reasonable probability that the jury might have misunderstood the instructions and believed that it could return a first degree murder verdict without finding that Brown administered poison with malice.

III. AS ANY PREJUDICIAL INSTRUCTIONAL ERROR AFFECTS ONLY THE DEGREE OF MURDER, THE PEOPLE MAY ACCEPT A REDUCTION TO SECOND DEGREE MURDER

Brown argues that, should the Court conclude that the first degree murder instructions were prejudicially erroneous, it would be inappropriate to reduce her conviction to second degree murder because "it cannot be said that the jury would have necessarily found the conduct of hers that proximately caused D.R.'s death was done with malice." (BSLB 12.) But the jury *actually* made that finding. The instructional error posited by the Court is only that the jury might not have made a finding that Brown administered the poison with malice. There can be no dispute that the instructions at the very least required the jury to find that Brown proximately caused a death while acting with some type of malice before returning a murder verdict.

Brown contends that her conviction should instead be reduced to involuntary manslaughter. (BSLB 12-13.) But the involuntary manslaughter theory that was presented to the jury only reinforces that it concluded Brown acted with malice. The relevant instruction explained that "[w]hen a person commits an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary manslaughter."

(2RT 945-946; see 3CT 622.) The instruction reminded the jury that "to prove murder, the People have the burden of proving beyond a reasonable doubt that [Brown] acted with intent to kill or with conscious disregard for human life" and that if the People failed to carry either of these burdens, then the jury was required to find that Brown was "not guilty of murder." (2RT 948; see 3CT 623.) By returning a murder verdict, the jury necessarily found, at a minimum, that Brown acted with some form of malice in proximately causing her baby's death, making her guilty of at least second degree murder.

As explained in the People's letter brief, instructional error that affects only the degree of murder does not require retrial to sustain a murder conviction. Instead, when instructional error affects "only the degree" of the offense, "the People [may] accept a reduction of the conviction to second degree murder" or may elect "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; accord, *People v. Gentile* (2020) 10 Cal.5th 830, 841 [recognizing prosecution's election to accept reduction to second degree murder].) That is the case here.

Sincerely,

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DECLARATION OF ELECTRONIC SERVICE AND SERVICE BY U.S. MAIL

Case Name: **People v. Brown**
No.: **S257631**

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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 21, 2022, at Sacramento, California.

/s/ *D. Boggess*
Declarant

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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**

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/s/Diane Boggess
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