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October 21, 2022

Hon. Tani Gorre Cantil-Sakauye, Chief Justice,
and Hon. Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: **Appellant's Supplemental Reply Brief**
People v. Brown
Supreme Court No. S257631
Court of Appeal No. C085998

Dear Justice Cantil-Sakauye and Associate Justices:

Pursuant to the court's order of September 9, 2022, Ms. Brown submits this supplemental brief replying to the People's brief filed on October 12, 2022.

A. Poison Murder Instructions

Respondent contends that CALCRIM 520 and 521, taken together, adequately informed the jury that "the relevant 'act'" that must be committed with malice for purposes of first degree murder was the administration of a poisonous substance. (Respondent's Supplemental Letter Brief [RSLB], at pp. 2-5.) Respondent attempts to demonstrate the clarity of the instructions in that regard by substituting variations of the phrase "administered poison" for CALCRIM 520's use of the generic term "act." (RSLB, at p. 3.) Admittedly, in doing so, respondent provides *a* reasonable interpretation of the instructions. However, it is not *the only* reasonable interpretation.

To the extent the jury believed the administration of a poisonous substance was a substantial factor in, and thus a cause

of, D.R.'s death, it should have understood the first part of CALCRIM 520 as respondent suggests:

> 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.

(RSLB, at p. 3; see 3CT 619 [CALCRIM 520].) Respondent takes the same approach with respect to CALCRIM 520's definition of implied malice, replacing references to a generic "act" with specific references to administering poison. But therein lies the flaw in respondent's logic.

Respondent's approach suggests that the instruction must be read to require that the dangerous act the defendant consciously disregarded for purposes of establishing implied malice was the one that caused the death. It need not be read that way though. The portion of CALCRIM 520 quoted in modified form above requires only that Ms. Brown "had" malice "[w]hen" she administered the poison, meaning the mental state and act must overlap in time. Thus, as explained in her prior supplemental brief, it can be logically read as describing a mere temporal relationship between the act of poisoning and malice.

Given that reading, the references to a generic "act" in CALCRIM 520's definition of implied malice do not necessarily refer to the same act mentioned in the modified portion above. They can refer to any other act that the defendant knew was dangerous and committed without regard for that danger as long as it occurred contemporaneously with the administration of the poison. For example, Ms. Brown's failure to provide her daughter with professional medical care could arguably constitute the act referenced in that definition. If so, the instruction could be read as follows:

> The defendant acted with implied malice if:
>
> 1. She intentionally ~~committed an act~~ [withheld professional medical care];

2. The natural and probable consequences of ~~the act~~ [withholding such care] were dangerous to human life;
3. At the time she ~~acted~~ [withheld such care], she knew her act was dangerous to human life;
AND
4. She deliberately ~~acted~~ [withheld such care] with conscious disregard for human life.

(3CT 619 [CALCRIM 520], alterations added.)

Thus, taken together, CALCRIM 520 and 521 could be read as permitting the jury to find Ms. Brown guilty of first degree poison murder if it believed: (1) she administered poison to D.R.; (2) the administration of the poison caused D.R.'s death; and (3) at the time she administered the poison, she also withheld medical care from her daughter. Such an interpretation does not require that the jury find the administration of the poison was malicious or that withholding medical care, from which malice could be implied, caused D.R.'s death.

This is not a farfetched interpretation of the instructions. CALCRIM 520 told the jury that, as a parent, Ms. Brown had "a legal duty to provide care, obtain medical attention and protect [her] child" and that her failure "to perform that duty"—i.e., "her failure to act"—"is the same as doing a negligent or injurious act." (2CT 619-620 [CALRIM 520].)

The inclusion of the legal duty provision in the instruction is odd.[1] CALCRIM 520 is written so that the definition of a legal duty would typically be accompanied by a provision requiring the prosecutor to prove, as an element of murder, that "[t]he defendant had a legal duty" of care or some other legal duty to another "and the defendant failed to perform that duty and that failure caused the death of" the other person. (Judicial Council of Cal., Crim. Jury Instns. (2021) CALCRIM No. 520 [listed as

[1] The prosecutor requested the legal duty language without clearly articulating its relevance but instead relying on references to three cases: *Walker v. Superior Court* (1988) 47 Cal.3d 112, *People v. Latham* (2012) 203 Cal.App.4th 319, and *People v. Burden* (1977) 72 Cal.App.3d 603. (2RT 919.) And her request was granted without any significant discussion. (2RT 919.)

alternative element "1B."]; Judicial Council of Cal., Crim. Jury Instns. (2021) Bench Notes to CALCRIM No. 520 ["If the prosecution's theory of the case is that the defendant committed murder based on his or her failure to perform a legal duty, the court may give element 1B"].) That provision was not given in this case. Without it, the definition of a parent's legal duty was not directly connected to any elements of the offense. Thus it was left to the jury to decide how it relates.

On its face, the definition plainly treats the omission of a legally-imposed duty as an "act" capable of causing harm. Thus, the failure to seek medical attention for D.R. throughout the pregnancy and during the child's short life up to and including the morning of her death—or the failure to perform any other mandatory parental act—could qualify as the conduct on which the jury could base an implied malice finding.

Taken together, CALCRIM 520 and 521 did not, as respondent contends, clearly explain that the administration of poison had to be done maliciously for the crime to be first degree murder. Reasonably understood, the instructions permitted the jury to imply malice from a different act or omission that may not have played any role in D.R.'s death. Such an interpretation is legally incorrect.

B. Jury Understanding of Prosecutor's Burden

Respondent disputes that it is reasonably likely "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." (RSLB, at pp. 4-5.) Ms. Brown maintains that likelihood exists.

As support for its position, respondent relies on the arguments of the attorneys, particularly the prosecutor's arguments. (RSLB, at pp. 4-5.) But some of the prosecutor's comments that respondent cites merely reflect the People's view that drug exposure—i.e., poisoning—was the cause of death. (See, e.g., RSLB, at p. 4 [citing argument that "Brown 'poisoned her daughter to death'"].) Other claims by the prosecutor respondent cites merely suggest that the jury *could* imply malice from the administration of a poisonous substance for purposes of proving first degree murder. (See, e.g., RSLB, at p. 4 [citing argument,

arguably referring to poisoning, that "'she knows this is dangers and she repeats doing this to her daughter'"].) Neither of those propositions conveyed to the jury the principle that, for first degree murder, it *must* find the poisoning was both malicious and fatal.

The closest the prosecutor came was when she argued that, for first degree murder, Ms. Brown did not "need to have intended to kill her daughter" and then said, "What 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, emphasis added.) Respondent logically cites that argument. (RSLB, at p. 4.) But Ms. Brown submits that argument still does not clearly convey the mandatory nature of the relationship between poisoning and malice for first degree murder.

As discussed in her prior supplemental brief, telling the jury that the fatal act (poisoning) and mental state (malice) must occur "with" one another leaves "open the possibility that a mere temporal connection is enough." (Appellant's Supp. Letter Brf. [ASLB], at pp. 3-4 [discussing CALCRIM 252].) The sentence that follows does not help. To the extent the word "[a]cting" refers to poisoning, it merely is a rephrasing of the preceding principle—that the poisoning and malice must occur "with" one another. And the statement that Ms. Brown knew "this" act was dangerous seems to be an argument that the jury *can* and *should* infer malice from the poisoning. But again, it does not convey the principle that the law *requires* such a finding for first degree poison murder.

Of all the prosecutorial comments respondent cites, none clearly conveys the legally-required relationship between poisoning and malice. The prosecutor's arguments regarding poisoning suggest *a way* of arriving at a first degree murder verdict without making clear to the jury that it is the *only way*.

At one point, defense counsel arguably did a better job of connecting the administration of poison to malice, as respondent observes. (RSLB, at p. 5.) Counsel told the jury,

> [T]o 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.

(2RT 1018.) Despite this one comment, though, the focus of defense counsel's argument was not on the relationship between poisoning and malice. Defense counsel primarily argued that the prosecutor failed to prove the cause of D.R.'s death (2RT 1010-1018) and failed to prove any of Ms. Brown's conduct was dangerous or that she was aware it was dangerous (2RT 1018-1021). That focus likely would have undermined the significance of the quoted argument above to the jury.

To the extent the attorneys used language in their arguments that may have implied or suggested the requisite relationship, the jury was unlikely to follow it in any event. The jury was instructed that where "the attorneys' comments on the law conflict" with the instructions, it must follow the instructions. (3CT 588 [CALCRIM 200].) Implicit in that instruction is the warning that, on the issue of law, the attorneys' comments should be viewed with caution. That makes sense as they are both advocates for a particular outcome rather than neutral expositors of the law.

Nothing on the record necessarily undermined the interpretation of the instructions as permitting a first degree murder verdict based on the nonmalicious use of poison coupled with a different act that was malicious. And considering the evidence and arguments before the jury, as discussed in Ms. Brown's previous supplemental brief (ASLB, at pp. 6-11), it is reasonably likely—more than a mere possibility—the jury understood the instructions as authorizing such a verdict.

C. Remedy for Instructional Error

Next, respondent contends that there is no reasonable possibility the jury found Ms. Brown guilty of first degree murder without concluding that the administration of poison was malicious. (RSLB, at p. 6.) Alternatively, respondent contends that, even if such a possibility exists, "the jury must have found, at a minimum, implied malice" based on some other conduct. (RSLB, at p. 7.) Thus, according to respondent, any error in the instructions affected only the degree of murder, and assuming reversal, the prosecutor should be given the option of accepting a

reduction to second degree murder or retrying her for the greater crime. (RSLB, at p. 7.)

Ms. Brown does not dispute that it is possible the jury found the requisite connection between the act of poisoning and implied malice. However, for the reasons discussed above and in her previously filed supplemental brief, she disputes that it is a certainty. And while she concedes the jury necessarily implied malice from some act if not poisoning, that does not mean the instructional error affected only the degree of murder to which she is liable. Implying malice from an act that was not a proximate cause of death is not enough for murder, even in the second degree.

Ms. Brown acknowledges the prosecutor made statements suggesting murder requires, at a minimum, that the act that is done maliciously also cause the victim's death. For example, in discussing "all the acts" that the prosecutor believed reflected malice, she told the jury "[t]here may be others." (2RT 986-987.) She then said, "There may be ones that you believe are significant and they can fit those elements *if you believe that they resulted or caused the death of [D.R.]*" (2RT 987, emphasis added.) But again, when it comes to the law, jurors are bound to view the attorneys' statements with caution, as it was implicitly instructed to do. Absent a clear indication in the record the jury found that any malicious act Ms. Brown committed was also a cause of her death, it would be inappropriate to give the prosecutor the option of accepting a reduction to second degree murder. (See ASLB, at pp. 11-13.)

Sincerely,

/s/ DAVID L. POLSKY

David Polsky

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.520 of the California Rules of Court that the attached supplemental letter brief consists of 2,220 words as indicated by the software program used to prepare the document.

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

Executed on October 21, 2022, at Ashford, Connecticut.

/s/ David L. Polsky
David L. Polsky

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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 October 21, 2022, I served a copy of the attached **Appellant's Supplemental Reply Brief** 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:

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

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California Court of Appeal
Third Appellate District

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/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**

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