LIU, J.

SUPREME COURT NO.: **S196365**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. AMALIA CATHERINE BRYANT, Defendant and Appellant.	Court of Appeal No.: D057570 Superior Court No.: SWF014495

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY

Honorable Timothy F. Freer, Judge Presiding

APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW

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Attorney for Appellant
Amalia Catherine Bryant

By Appointment of the
Court of Appeal under the
Appellate Defenders, Inc.
independent case system

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SUPREME COURT NO.: **S196365**

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APPELLANT'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW

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

Appellant Amalia Catherine Bryant submits the following Answer to Respondent's Petition for Review following the published opinion of the Court of Appeal, Fourth Appellate District, Division One, reversing with directions the judgment of the Superior Court of Riverside County.

The Opinion of the Court of Appeal was filed on August 9, 2011. Respondent's Petition for Review was filed on September 13, 2011.

Pursuant to California Rules of Court, rule 8.500, subdivision (c)(1), review should be denied because respondent is seeking review of claims respondent did not raise in the Court of Appeal.

ISSUES PRESENTED FOR REVIEW

1. According to respondent's Petition for Review, respondent seeks review of the following issues: "Did the appellate court abuse its authority by fashioning a new form of voluntary manslaughter – death resulting from an inherently dangerous felonious assault without intent to kill – and imposing a duty on the trial court to sua sponte instruct on this novel theory?" (Pet. Rev. p. 1.)

STATEMENT OF CASE AND FACTS

Appellant adopts the procedural and factual background as set forth in the Court of Appeal's Opinion. (Appendix A pp. 1-8.)

ARGUMENT

I

REVIEW SHOULD BE DENIED PURSUANT TO CALIFORNIA RULES OF COURT, RULE 8.500, SUBDIVISION (C)(1), BECAUSE RESPONDENT IS SEEKING REVIEW ON ISSUES THAT RESPONDENT FAILED TO TIMELY RAISE IN THE COURT OF APPEAL

Respondent urges "review is necessary to settle an important question of law as to whether an appellate court can create a new theory of voluntary manslaughter and impose a duty on the trial court to sua sponte instruct on

that theory retroactively." (Pet. Rvw. p. 9.) Respondent contends in its Petition for Review that the Court of Appeal in this case misunderstood the holding of *People v. Garcia* (2008) 162 Cal.App.4th 18 ("*Garcia*"), and impermissibly relied on dicta from that decision to create a new theory of voluntary manslaughter out of whole cloth, in violation of Penal Code section 6 and the separation of powers, and imposed an impossible duty upon the trial court to have anticipated this judicial discovery. (Pet. Rvw. pp. 9-13.)

The Petition for Review should be denied because respondent never raised any of these claims in the Court of Appeal.

California Rules of Court, rule 8.500, subdivision (c)(1), provides:

"As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal."

On May 10, 2011, the Court of Appeal expressly asked both appellant and respondent to submit a supplemental letter brief addressing the following question: "Did the trial court commit reversible error by not instructing the jury sua sponte that an unintentional killing without malice during the course of inherently dangerous assaultive felony constitutes voluntary manslaughter? (See *People v. Garcia* (2008) 162 Cal.App.4th 18.)" (See Appendix A [Court of Appeal request for supplemental briefing].)

In response, appellant argued that consistent with the Court of Appeal's prior decision in *Garcia*, it was prejudicial error to fail to sua sponte instruct appellant's jury that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. (See Appendix B [appellant's letter brief].)

On the other hand, respondent argued that "[t]he trial court had no duty to instruct on this alternative theory of manslaughter because there was no evidentiary support that appellant did not subjectively appreciate that her deliberate conduct endangered the life of Golden. Even if the omission were error, it was harmless." (See Appendix C p. 1 [respondent's letter brief].) Respondent argued "the trial court would only have a sua sponte duty to instruct on the *Garcia* theory of voluntary manslaughter if there were substantial evidence that appellant did not subjectively appreciate that her conduct endangered Golden's life." (Appendix C p. 4.) Respondent further argued that assuming there was sufficient evidence to require an instruction pursuant to *Garcia*, the error was harmless in this case. (Appendix C pp. 5-6.)

Respondent never argued that requiring an instruction on the theory of voluntary manslaughter recognized in *Garcia* would be improper for any reason when supported by substantial evidence. (Appendix C.)

On August 9, 2011, after an Oral Argument in July addressing the same issues, the Court of Appeal issued its Opinion finding that the trial court had erred in not instructing on the theory of voluntary manslaughter recognized in *Garcia* because there was substantial evidence to support such an instruction, and further found the instructional error was prejudicial.

Respondent did not file a Petition for Rehearing in the Court of Appeal on this or any other basis.

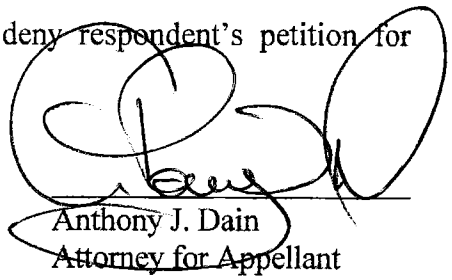
Now, for the very first time in its Petition for Review, respondent completely shifts gears and argues in this Court that requiring an instruction on the theory of voluntary manslaughter recognized in *Garcia* would create a new theory of voluntary manslaughter out of whole cloth, in violation of Penal Code section 6 and the separation of powers, and impose an impossible duty upon the trial court to have anticipated this judicial discovery. (Pet. Rvw.)

Because respondent never raised any of these arguments in the Court of Appeal, it is unnecessary to consider the merits of these contentions for the first time in this Court and respondent's Petition for Review should be denied. (Cal. Rules of Court, rule 8.500, subd. (c)(1).)

CONCLUSION

For all the reasons set forth above, and in the interests of justice, appellant respectfully requests this Court deny respondent's petition for review.

Dated: September 29, 2011

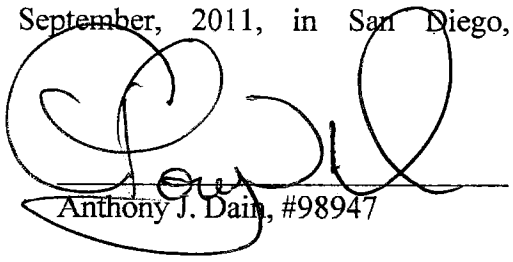


Anthony J. Dain
Attorney for Appellant
Amalia Catherine Bryant

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court rule 8.504, subdivision (d)(1) I, Anthony J. Dain, hereby certify that according to the Microsoft Word computer program used to prepare this document, appellant's Answer to the Petition for Review contains a total of 1,171 words.

Executed this 29 day of September, 2011, in San Diego, California.



Anthony J. Dain, #98947

APPENDIX A

Court of Appeal
State of California
FOURTH APPELLATE DISTRICT
Division One
750 B Street, Suite 300
San Diego, CA 92101-8196
www.courtinfo.ca.gov/courts/courtsofappeal
(619) 645-2760

May 10, 2011

RE: THE PEOPLE,
Plaintiff and Respondent,
v.
AMALIA CATHERINE BRYANT,
Defendant and Appellant.
D057570
Super. Ct. No. SWF014495

Dear Counsel:

The Court requests that the parties submit simultaneous letter briefs, no longer than six pages, addressing the following question:

> Did the trial court commit reversible error by not instructing the jury sua sponte that an unintentional killing without malice during the course of inherently dangerous assaultive felony constitutes voluntary manslaughter? (See *People v. Garcia* (2008) 162 Cal.App.4th 18.)

For purposes of answering this question, assume that the People are correct that there is substantial evidence that appellant committed, at a minimum, a felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)). (See Respondent's Brief at pages 14-15.)

All briefs shall be filed, and served, by May 17, 2011.

STEPHEN M. KELLY, CLERK

BY: Deputy Clerk

cc: All Parties

APPENDIX B

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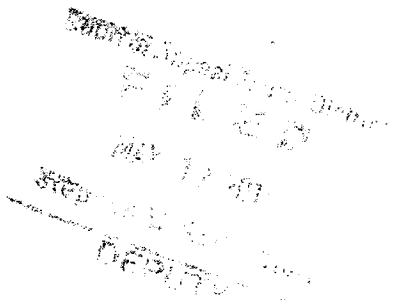


May 17, 2011

The Honorable Judith D. McConnell, Administrative Presiding Justice,
and Honorable Associate Justices
Court of Appeal
Fourth Appellate District, Division One
750 "B" Street, #300
San Diego, CA 92101-8189

Re: *People v. Bryant*
Court of Appeal No.: D057570
(Superior Court No.: SWF014495)
Supplemental Letter Brief

Dear Administrative Presiding Justice McConnell and Honorable Associate Justices:

Pursuant to this Court's Request dated May 10, 2011, appellant Amalia Bryant submits the following Supplemental Letter Brief.

Question presented: "Did the trial court commit reversible error by not instructing the jury sua sponte that an unintentional killing without malice during the course of inherently dangerous assaultive felony constitutes voluntary manslaughter? (See *People v. Garcia* (2008) 162 Cal.App.4th 18.)"

Pursuant to *People v. Garcia, supra,* 162 Cal.App.4th 18 ("*Garcia*"), the trial court did commit reversible error by not instructing the jury sua sponte that an unintentional killing without malice committed during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter.

The trial court's sua sponte instructional duties are well-established. The trial court must instruct on the general principles of law that are commonly or closely and openly connected with the facts before the court

and that are necessary for the jury's understanding of the case. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) This includes the duty to instruct on all lesser included offenses that are supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Requiring instruction on lesser included offenses "encourages 'a verdict ... no harsher *or more lenient* than the evidence merits' [citation] and thus protects the jury's 'truth-ascertainment function' [citation]. 'These policies reflect concern [not only] for the rights of persons accused of crimes [but also] for the overall administration of justice.' [Citation]." (*Id.* at p. 155, emphasis in original.)

This rule is not satisfied "once the jury has *some* lesser offense option, so that the court may limit its sua sponte instructions to those offenses or theories which seem strongest on the evidence, or on which the parties have openly relied. On the contrary, as we have expressly indicated, the rule seeks the most accurate possible judgment by 'ensur[ing] that the jury will consider the *full range of possible verdicts*' included in the charge, regardless of the parties' wishes or tactics. [Citation.] The inference is that *every* lesser included offense, or theory thereof, which is supported by the evidence must be presented to the jury." (*People v. Breverman, supra,* 19 Cal.4th at p. 155, emphasis in original.)

Voluntary manslaughter is a lesser included offense of murder, and the "distinguishing feature is that murder includes, but manslaughter lacks, the element of malice." (*People v. Rios* (2000) 23 Cal.4th 450, 460.)

In *Garcia*, the Court of Appeal considered the question of what crime is committed when a defendant commits an "unintentional killing, without malice, during the commission of [an inherently dangerous assaultive] felony that is not murder as defined by Penal Code section 187, subdivision (a), and does not fall within the statutory definition of either voluntary or involuntary manslaughter." (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 22, 28.) Upon conducting an extremely thorough review of the law of homicide, including the distinctions between murder, voluntary manslaughter, and involuntary manslaughter, as well as the *Ireland*[1] merger doctrine applicable to inherently dangerous assaultive felonies, the Court of Appeal concluded that the answer is voluntary manslaughter. (*Id.* at pp. 24-33.)

---

[1] *People v. Ireland* (1969) 70 Cal.2d 522.

The *Garcia* Court first reasoned that an unintentional killing without malice during the commission of a felony cannot, by definition, be murder as defined in Penal Code section 187, subdivision (a). The Court then reasoned that, where the underlying felony is an aggravated assault, the felony cannot serve as the basis for a second degree felony murder conviction under the *Ireland* merger doctrine. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 27-29; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1200 [subsequently reaffirming that under the *Ireland* merger doctrine, an assaultive felony may not form the basis of a second degree felony murder conviction].). The Court next determined that a killing in the commission of a felonious assault cannot serve as the basis for an involuntary manslaughter conviction because involuntary manslaughter is limited to lawful acts with criminal negligence, misdemeanors, and non-inherently dangerous felonies. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 29-30).The *Garcia* Court confronted the final option, voluntary manslaughter. Drawing from the California Supreme Court's determination that specific intent to kill is not an element of the crime of voluntary manlaughter (*People v. Blakely* (2000) 23 Cal.4th 82, 89), the *Garcia* Court concluded that that an unintentional killing without malice, in the commission of an inherently dangerous felony such as assault with a deadly weapon, constitutes the crime of voluntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 30-31.)

As set forth in Appellant's Opening Brief, the evidence in this case was similar to that in *Garcia*. The evidence in *Garcia* disclosed that the defendant struck the victim in the face with the butt of a shotgun, causing the victim to fall, hit his head on the sidewalk and die. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 22.) The defendant told police after his arrest and testified at trial that he was intoxicated at the time, and explained that the victim lunged toward him and said he thought the victim was going to try to fight him and was concerned the victim would take the gun. The defendant said he "just reacted" and insisted he had jabbed or swung at the victim to back him up. He did not intend to hit the victim in the face and "never intended to kill him or for him to die." (*Id.* at p. 25.) The Court of Appeal held that this evidence, which indisputably constituted the crime of assault with a deadly weapon/firearm, would therefore support instruction on voluntary, but not involuntary, manslaughter. (*Id.* at p. 33.)

Appellant told police after her arrest and testified at trial that the victim

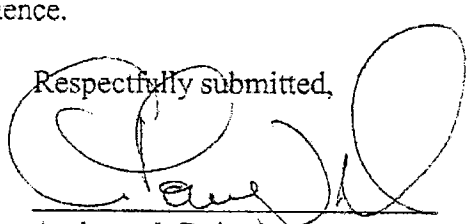
Appellant told police after her arrest and testified at trial that the victim came toward her, there was a physical struggle, the victim tried to take the knife from her, and bit her thumb. Appellant said she thrust the knife towards the victim to back him up. Appellant did not intend to stab the victim, and never intended to kill him or for him to die. (See 2 C.T. pp. 507-519; 3 C.T. pp. 569-579, 589, 593, 597; 7 R.T. pp. 1297-1304, 1310-1311; 9 R.T. p. 1522; 10 R.T. p. 1844.) In addition, after the stabbing, appellant immediately sought help for the victim, who was appellant's husband and the father of her children, and stayed by his side crying hysterically until police arrived. (See 3 R.T. p. 426; 7 R.T. pp. 1304-1306.)

In Appellant's Opening Brief, appellant argued that based on this evidence the trial court erred in not sua sponte instructing her jury on the lesser included offense of involuntary manslaughter based both on a misdemeanor brandishing theory and on a lawful act committed with criminal negligence theory. (AOB pp. 26-38.) The People countered that no such instruction was required because the evidence established that appellant committed, at a minimum, the crime of felony assault with a deadly weapon. (Resp. Brief pp. 13-15.) Assuming the People are correct, then the trial court erred in not instructing appellant's jury that an unintentional killing without malice during the course of an inherently dangerous assaultive felony, such as assault with a deadly weapon, constitutes voluntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 24-33.)

Moreover, for the same reasons set forth in Appellant's Opening Brief as to why the failure to give involuntary manslaughter instructions, if required, was prejudicial, the failure to instruct on this theory of voluntary manslaughter was also prejudicial. (See AOB pp. 38-43.) In sum, there was substantial evidence that appellant lacked malice aforethought, the lesser included manslaughter instructions that were given to the jury did not fit well within the facts and were all highly problematic from an evidentiary and legal standpoint, the lesser included manslaughter instructions that were not given were strongly supported by the evidence, and based on the totality of the evidence including the history of this abusive relationship and appellant's immediate and profound remorse upon discovering that she had actually stabbed her husband, this was a case in which it is reasonably likely the jury would have had some sympathy for appellant and been willing to exercise a

degree of leniency had they been given lesser included offense instructions that were strongly supported by the evidence.

Respectfully submitted,



Anthony J. Dain
Attorney for ~~Defendant~~ and
Appellant Amalia Bryant

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330 J Street, # 609
San Diego, CA 92101

Court of Appeal No.: D057570
Superior Court No.: SWF014495

DECLARATION OF SERVICE BY MAIL

I, Anthony J. Dain, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609 San Diego, California, 92101.

I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 17th day of May, 2011, I caused to be served the following document(s):

SUPPLEMENTAL LETTER BRIEF

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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555 West Beech St., Suite 300
San Diego, CA 92101

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Amalia Bryant, #WA4130
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Chowchilla, CA 93610

Superior Court of Riverside County
4100 Main Street
Riverside, CA 92501-3626
(Attn: Hon. Timothy F. Freer)

Office of the District Attorney
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Riverside, CA 92501
(Attn: DDA Kaloustian)

Office of the Public Defender
30755-D Auld Road, Suite 2233
Murietta, CA 92563
(Attn: DPD E. Johnson)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on May 17, 2011, at San Diego, California.

Anthony J. Dain

APPENDIX C

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

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May 17, 2011

Stephen M. Kelly, Court Administrator
Court of Appeal of the State of California
Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

RE: *People v. Bryant*
Fourth Appellate District, Division One Case No. D057570
Riverside Superior Court, Case No. SWF014495

Dear Mr. Kelly:

Pursuant to the May 10, 2011, order of this Court respondent files this letter brief in the above-entitled matter addressing whether the trial court committed reversible error by failing to instruct the jury sua sponte that an unintentional killing without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. The trial court had no duty to instruct on this alternative theory of manslaughter because there was no evidentiary support that appellant did not subjectively appreciate that her deliberate conduct endangered the life of Golden. Even if the omission were error, it was harmless.

Here, the trial court instructed the jury on the concepts of murder and manslaughter. It described the necessary elements of murder. (See CALCRIM Nos. 500, 520, 521; 3 CT 629-631; 10 RT 1904-1907.) It also described the necessary elements of manslaughter based on heat of passion (See CALCRIM No. 570; 3 CT 632-633; 10 RT 1907-1908), and imperfect self-defense (See CALCRIM No. 571; 3 CT 634; 10 RT 1908-1909).

The prosecutor maintained appellant acted with express malice when she lunged and plunged the knife at least four inches into Golden's chest. (10 RT 1925.) He also argued that at the very least, she acted with implied malice when she lunged at him a

second time with the knife and stabbed him in the chest knowing the act was dangerous to human life. (10 RT 1925-1926.) Defense counsel argued appellant killed Golden in self-defense. (10 RT 1977-1982.) She further argued the manner of killing did not support a finding of intent to kill (10 RT 1982), and addressed both theories of voluntary manslaughter (10 RT 1984-1987). The jury returned a verdict of second degree murder.

"[E]ven in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence." (*People v. St. Martin* (1970) 1 Cal.3d 524, 531.) A trial court in a criminal case has a duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Valdez* (2004) 32 Cal.4th 73, 115, internal quotations omitted.) This obligation includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense are present. (*Ibid.*; *People v. Breverman* (1998) 19 Cal.4th 142, 154.)

A claim that a court failed to properly instruct on the applicable principles of law is reviewed de novo to determine whether the record contains substantial evidence to warrant the instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 581, 584; *People v. Cruz* (2008) 44 Cal.4th 636, 664; *People v. Berryman* (1993) 6 Cal.4th 1048, 1089, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.) "Substantial evidence" means """evidence from which a jury composed of reasonable [persons] could ... conclude [ ]""" that the particular facts underlying the instruction did exist. (*People v. Cruz, supra,* 44 Cal.4th at p. 664; see also *People v. Wilson* (2008) 43 Cal.4th 1, 16 ["[t]here was no substantial evidence, that is, evidence that a reasonable jury would find persuasive," to warrant lesser included offense instruction].) In conducting this review, the reviewing court must first ascertain the relevant law and then "determine the meaning of the instructions in this regard." (*People v. Kelly* (1992) 1 Cal.4th 495, 525.)

The proper test for judging the adequacy of instructions is to decide whether the trial court "fully and fairly instructed on the applicable law...." (*People v. Partlow* (1978) 84 Cal.App.3d 540, 558.) "'In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole ... [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given. [Citation.]'" (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonable susceptible to such interpretation." (*People v. Laskiewicz* (1986) 176 Cal.App.3d 1254, 1258; see also *People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.)

This Court's order asks the parties to assume appellant committed, at a minimum, a felony assault with a deadly weapon (Pen. Code, § 245, subd. (a)(1)), and address whether the trial court had a sua sponte duty to instruct the jury that if it found appellant unintentionally killed Golden without malice during the commission of an assault with force likely to produce great bodily injury, it could return a verdict of voluntary manslaughter according to *People v. Garcia* (2008) 162 Cal.App.4th 18. There was no factual basis for this instruction because appellant necessarily killed Golden with malice. Moreover, this was in direct conflict with the defense theory that appellant acted with justification in light of Golden's physical abuse of appellant.

In *People v. Garcia,* the defendant struck the victim in the face with the butt of a shotgun, causing him to fall to the sidewalk and hit his head, resulting in his death. (*People v. Garcia, supra*, 162 Cal.App.4th at p. 24.) The defendant was convicted of voluntary manslaughter and asserted on appeal that the trial court erred in failing to instruct on involuntary manslaughter. (*Id.* at p. 24.) The cout in *Garcia* rejected that argument, holding that because the defendant caused the victim's death in the commission of an inherently dangerous felony rather than a dangerous misdemeanor, and because it was not the result of criminal negligence, it did not fall within the definition of involuntary manslaughter. (*Id.* at p. 32.)

However, after reviewing the case law predating and following *People v. Cameron* (1994) 30 Cal.App.4th 591, 602, the *Garcia* opinion judicially constructed an expanded theory of voluntary manslaughter and concluded "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter." (*People v. Garcia, supra*, 162 Cal.App.4th at p. 31.) The court reasoned that absent proof of malice, whether because of provocation or unreasonable self-defense "or because of an absence of proof that 'the circumstances attending the killing show[ed] an abandoned and malignant heart,'" the defendant in that case committed some form of manslaughter. (*Id.* at p. 32.) Moreover, because the defendant had caused the victim's death in the commission of an inherently dangerous felony rather than a dangerous misdemeanor, and because it was not the result of criminal negligence, the killing was properly classified as voluntary manslaughter. (*Id.* at p. 33.)

The *Garcia* theory of voluntary manslaughter differs from implied malice murder in that the defendant did not subjectively appreciate the lethality of his or her conduct. The linchpin of implied malice murder is that before a defendant can be convicted of that crime, there must be evidence that the defendant appreciated that his deliberate conduct endangered the life of another and that the defendant acted with conscious disregard for life. (See *People v. Knoller* (2007) 41 Cal.4th 139, 157; *People v. Blakely* (2000) 23 Cal.4th 82, 87.) "[A] conviction for second degree murder, based on a theory of implied

malice, requires proof that a defendant acted with conscious disregard of the danger to human life." (*People v. Knoller, supra*, 41 Cal.4th at p. 156.) "In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another – no more, and no less." (*Id.* at p. 143.)

Accordingly, the trial court would only have a sua sponte duty to instruct on the *Garcia* theory of voluntary manslaughter if there were substantial evidence that appellant did not subjectively appreciate that her conduct endangered Golden's life. Appellant's testimony defied any possibility that she acted without implied malice when she killed Golden.

Appellant testified that during their argument in the bedroom she grabbed the steak knife out of the desk drawer that she used for cutting and threatened Golden by telling him, "if he didn't let me leave, I was going to kill him." (7 RT 1291-1292.) Golden knocked the knife out of her hands before leaving the room, and appellant looked for the knife but could not find it. (7 RT 1293.) Appellant hit Golden on the head with the phone, but it did not do anything. (7 RT 1297.) Then she grabbed the knife from the kitchen table in her right hand, approached Golden and thrusted the knife at him and pulled it back. (7 RT 1297-1299, 1302; 8 RT 1424.) The entire time saying, "Let me leave." (7 RT 1299.) Golden tried to disarm appellant and she switched the knife into her left hand. (7 RT 1300-1302.) Appellant then testified that, [Golden] "came at me, and I thrust the knife at him." (7 RT 1301.) Appellant acknowledged that she knew the knife was sharp. (8 RT 1427.) Appellant also testified that although she was not thinking about it at the time, she knew that the knife was dangerous. (8 RT 1429.)

By appellant's own admission, there was no evidentiary support for the *Garcia* theory of voluntary manslaughter. A conclusion that appellant did not appreciate that her deliberate conduct of wielding the knife endangered the life of Golden cannot be reconciled with the fact moments earlier she threatened to kill Golden while holding a knife in the bedroom. Also, she grabbed the knife after hitting him over the head with the telephone proved to be ineffective and she needed to escalate her mode of force. Finally, appellant acknowledged that she had a history with cutting herself and was aware that knives were dangerous objects. This was easily implied by the use of a knife while threatening to kill Golden if he did not let her leave. Appellant's version of events demonstrate that when she stabbed Golden, she did not do so in self-defense or by accident but with implied malice because she necessarily appreciated the lethal force she had in her hand. Therefore, the trial court did not have a sua sponte duty to instruct on the *Garcia* theory of voluntary manslaughter.

However, assuming there was a possible version of the facts which supported the instruction, appellant was not prejudiced by its omission. To assess prejudice, the record must be examined to determine whether, absent the alleged instructional error, it is reasonably probable that appellant would have obtained a more favorable outcome. (See *People v. Blakeley, supra*, 23 Cal.4th at p. 93 [failure to instruct sua sponte or failure to properly instruct on lesser included offense governed by *Watson*[1] harmless error standard]; *People v. Breverman, supra*, 19 Cal.4th at p. 178 [same].)" It is not reasonably probable the jury would have found appellant acted without implied malice.

Appellant and Golden had a history of violence. Substantial evidence was presented at trial painting a picture of a young, immature couple that was mutually abusive with each other. (7 RT 1234-1265, 1312.) Appellant also had a history of inflicting physical abuse on herself by "cutting," and for this very purpose kept a steak knife in a bedroom drawer. (6 RT 931; 7 RT 1291-1292.) Appellant memorialized her ever growing feelings of jealousy, hatred, and resentment of Golden in numerous pages of journal entries. (6 RT 974-987.) There was no denying that appellant harbored strong and complex negative feelings toward Golden. The evening of Golden's death was unfortunately a snapshot of appellant's volatility.

Although appellant admitted to instigating a fight with Golden that evening after he rejected her (7 RT 1274,-1279), she claimed her conduct was justified (10 RT 1977-1982). Appellant testified Golden hit her with the phone and choked her when she refused to tell him whom she was calling. (7 RT 1282-1285.) Even if this were true, the events that followed, even by appellant's version shows appellant was the aggressor and Golden was merely trying to diffuse the situation.

Most telling is appellant's statement to Golden that if he did not let her leave she would kill him. (7 RT 1291-1292.) The fact she made this statement while holding a knife shows appellant must have appreciated the potential lethal force. She then thrusted the knife not once, but twice at Golden. (7 RT 1297-1301.) Even going so far as to switch hands to maintain control of the knife rather than abandoning her effort after she thrusted the knife forward the first time and he tried to disarm her. (7 RT 1300-1302.) Instead, she fought to keep hold of the knife and thrusted at Golden a second time. (7 RT 1301.) Only this time, she plunged the knife into his chest with such force that it caused a four to five-inch-deep wound that passed through bone, his pericardium, and penetrated the right ventricle of his heart. (4 RT 583-590.) As the coroner opined, such a wound would require a significant amount of force beyond Golden walking into the knife. (4 RT 589, 599.) Golden's manner of death and appellant's mental state was not such that a jury could have reasonably found appellant acted without implied malice.

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[1] *People v. Watson* (1956) 46 Cal.2d 818, 836.

In addition, the relatively short deliberation demonstrates the confidence in the jury's verdict. On December 8, 2009, the jury retired at 3:52 to deliberate and broke for the evening at 4:10. (3 CT 599-600.) Deliberations resumed the next day at 9:15 a.m. (3 CT 648.) At 11:36, the jury requested a read back of appellant's "testimony concerning her statement on the night of the incident that she was going to kill him." (3 CT 663.) The jury broke for lunch at 12:02 and resumed at 1:35. (3 CT 648-649.) The read back was conducted between 1:42 and 2:32. (3 CT 649.) At 3:13, the jury indicated it had a verdict. (3 CT 649.) That is, any doubt the jury was having in regards to the verdict was resolved upon rehearing appellant's version of the events that took place that evening. Thus, it is highly likely the jury concluded that appellant's own statements foreclosed any option but implied malice.

Therefore, because the evidence did not support a finding that appellant acted with anything but implied malice, the trial court did not have a sua sponte duty to instruct on the *Garcia* theory of voluntary manslaughter. Even assuming a duty to instruct did exist, it is not reasonably probable that had the jury been instructed it would have returned a more favorable verdict.

Sincerely,

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Deputy Attorney General
State Bar No. 225152

For Kamala D. Harris
Attorney General

KKC:sam

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

Case Name: *People v. Bryant*
No.: **D057570**

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 collection and processing of correspondence for mailing with the United States Postal Service. 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 that same day in the ordinary course of business.

On **May 17, 2011**, I served the attached **LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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330 J Street, #609
San Diego, CA 92101
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(2 copies)

Clerk of the Court
Criminal Division
Riverside County Superior Court
4100 Main St.
Riverside, CA 92501-3626

The Honorable Paul E. Zellerbach
District Attorney
Riverside County District Attorney's Office
3960 Orange Street
Riverside, CA 92501

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **May 17, 2011**, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **May 17, 2011**, at San Diego, California.

S. McBrearty
Declarant

S. M^cBrearty
Signature

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Anthony J. Dain, #98947
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San Diego, CA 92101

Court of Appeal No.: D057570
Superior Court No.: SWF014495

DECLARATION OF SERVICE BY MAIL

I, Anthony J. Dain, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609 San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

On this 29th day of September, 2011, I caused to be served the following document(s):

ANSWER TO PETITION FOR REVIEW

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on September 29, 2011, at San Diego, California.

Anthony J. Dain