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.	

Third Appellate District No. C085998
Shasta County Superior Court No. 15F2440
The Honorable Stephen H. Baker, Judge

REPLY TO ANSWER TO PETITION FOR REVIEW

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Pursuant to this court's order of October 15, 2019, petitioner **HEATHER ROSE BROWN** hereby submits this reply to the People's answer to her petition for review. The answer was filed on October 28, 2019. In it, the People contend Ms. Brown's petition fails to establish that her case meets the criteria for review set forth in rule 8.500(b) of the California Rules of Court. For the reasons set forth in the petition and below, Ms. Brown maintains that it does.

ARGUMENT

I.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT D.R.'S EXPOSURE TO DRUGS CAUSED HER DEATH

Regarding Ms. Brown's challenge to the sufficiency of the evidence that drug exposure caused D.R.'s death, the People argue that, as a factual claim limited to her specific case, it does not present an issue that would secure uniformity of law or answer an important question as required by rule 8.500(b). (Answer, at pp. 7-8.) Ms. Brown disagrees.

On its face, the People seem to be implying that a sufficiency challenge is never an appropriate consideration for this court because, as it writes, such claims simply reflect "a disagreement with the Court of Appeal's analysis" of the issue. (Answer, at p. 8.) Of course, at the heart of every case in which this court reviews a decision of the Court of Appeal is a disagreement by some party with the lower court's analysis of some issue. Moreover, this court has repeatedly granted review in cases challenging a Court of Appeal's analysis of the sufficiency of the evidence. In fact, there are numerous recent examples of Supreme Court decisions doing just that. (See, e.g., *People v. Hubbard* (2016) 63 Cal.4th 378, 391-397; *People v. Banks* (2015) 61 Cal.4th 788, 804-811; *People v. Dowl* (2013) 57 Cal.4th 1079, 1089-1094.)

Respondent also appears to suggest that the *Brown* opinion's status as unpublished should shield it from review. (See Answer, at p. 8 [emphasizing that opinion was "unpublished"].) Respondent cites no authority for such a proposition, and Ms. Brown has not found any. That, of course, makes sense. Protecting intermediate court decisions from scrutiny simply by virtue of their status as unpublished is antithetical to the purpose of the appellate process.

The decision whether to publish a Court of Appeal opinion lies, in the first instance, with the Court of Appeal. (Cal. Rules of Ct., rule 8.1105(b) ["an opinion of a Court of Appeal . . . is published in the Official Reports if a majority of the rendering court certifies the opinion for publication before the decision is final in that court"].) No doubt the Court of Appeal in this case believed that its application of the facts to the law was correct in all respects and that its opinion did not meet the standards of certification for publication. (See Cal. Rules of Ct., rule 8.1105(c).) However, appellate courts should not be the final arbiter of whether their own opinions are correct or deserving of further review. It is well settled that the state has no interest in preserving erroneous judgments. (*People v. Hanson* (2000) 23 Cal.4th 355, 365; *People v. Henderson* (1963) 60 Cal.2d 482, 497.) Concomitantly, it has no interest in foreclosing review of those judgments by imposing unreasonable conditions to review. (See *Hanson*, at p. 365; *Henderson*, at p. 497.) Respondent's apparent desire to shield

unpublished decisions from review would necessarily constitute such an unreasonable barrier.

Moreover, an opinion's status as unpublished has not been applied as a shield by this court in the past. This court has granted review of unpublished decisions. (See, e.g., *Hubbard, supra,* 63 Cal.4th 378; *Banks, supra,* 61 Cal.4th 788.) In fact, it has rejected the same argument advanced by respondent. In *Tavaglione v. Billings* (1993) 4 Cal.4th 1150, the court granted review in a case over the objection of one dissenting justice who believed the unpublished nature of the opinion rendered its statewide significance minimal:

> [W]e should not have granted review of this case. The California Rules of Court give us the discretionary authority to grant review only when "it appears necessary to secure uniformity of decision or the settlement of important questions of law . . .." [Citation.] This case meets neither criterion. Indeed, though I concede its importance to the parties, its public significance is minimal. As the majority opinion illustrates, whatever errors of law the Court of Appeal may have committed in its unpublished opinion, there are both statutes and published case law on point.

(*Id.* at p. 1160, dis. opn. by Mosk, J.) Respondent makes the same argument: "While the resolution of [Ms. Brown's] claim may be important to petitioner, it does not present an issue that would secure uniformity of law or answer a question of statewide importance." (Answer, at p. 8.) The argument should be rejected here just as it was by the majority in *Tavaglione*.

Next, in defending the Court of Appeal's ruling, respondent mischaracterizes Ms. Brown's position. Respondent contends Ms. Brown is incorrect that "neither drug on its own could cause the baby's death" because Dr. Ogan testified either drug "could cause death in an infant." (Answer, at p. 9.) Respondent further contends Ms. Brown is "simply wrong" to the extent she contends "neither one of the drugs either together or separately could cause death" because, again, Dr. Ogan said they "can." (Answer, at p. 10.)

Despite the way respondent couches it, Ms. Brown's position is not ambiguous. She argued *not* that there was no evidence the drugs "could" kill *but rather* that Dr. Ogan's testimony that they "could"—that the drugs were merely "capable of killing and potentially fatal"—was not enough to prove they were "'a substantial factor in producing'" the baby's death, as required. (Pet. for Review [PR], at pp. 11-12, citing *People v. Canizalez* (2011) 197 Cal.App.4th 832, 845.) Nowhere in its answer does respondent address what is required to prove causation.

Respondent's analysis also does not address how the evidence establishes the "substantial factor" element. Respondent merely repeats the doctor's ultimate conclusion that polypharmacy was the cause of death, makes a blanket reference to "the entirety of Dr. Ogan's testimony and other evidence at trial" without identifying anything but the doctor's conclusion, and simply asserts "it is clear that substantial evidence supports

the verdict." (Answer, at pp. 9-10.) Like respondent, Ms. Brown acknowledged in her petition Dr. Ogan's ultimate conclusion. (PR, at p. 12 ["The only expert to opine affirmatively that drug exposure—namely, the exposure to heroin and methamphetamine—caused D.R.'s death was Dr. Ogan. (1RT 404.)"].) However, as she further explained, an expert's conclusion about causation is insufficient if based on speculation (PR, at pp. 11-12), which she demonstrated that Dr. Ogan's testimony was (PR, at pp. 12-18). Respondent has not shown otherwise.

Respondent further defends the Court of Appeal's reliance on Dr. Ogan's credentials in upholding Ms. Brown's conviction because they were "well-established" and the court's consideration of them was "unremarkable." (Answer, at p. 11.) However, as explained in the petition, it was remarkable, and contrary to the law, that the Court of Appeal declared Dr. Ogan's conclusion about causation was necessarily substantial because of his credentials, making it unnecessary to assess the reasons for and evidence supporting that conclusion. (PR, at pp. 13-14.) Respondent fails to address that argument.

Additionally, respondent defends the Court of Appeal's reliance on the unsafe nature of illicit drugs for an infant.[1] (Answer, at p. 11.) The

[1] Respondent seems to suggest that Ms. Brown mischaracterized the Court of Appeal's reliance on the unsafe character of the drugs by "isolate[ing] this fact" rather than viewing it "along with all the other evidence in the record." (RB, at p. 11.) Ms. Brown is confused by this

entirety of its analysis, though, consists of disputing that civil cases concerning the meaning of proximate causation in the employment context have any bearing in this context. Respondent writes,

> Petitioner's administration of illicit drugs to an infant with the full knowledge of the harm it can cause, was not a "condition," still less a "working condition." It was a crime. Petitioner's civil cases are completely inapposite.

(Answer, at p. 11.) First, respondent's assumption about Ms. Brown's knowledge ("with full knowledge of the harm it can cause") was not supported by citation to the record or reference to any evidence and thus is meaningless.

Second, respondent's contention that the civil cases are inapposite is not supported by any authority and should be disregarded as well. Simply asserting "[i]t's a crime" is not a legal analysis that warrants consideration. It may be a crime to expose an infant to illicit drugs, but that is not the issue. The issue is whether the prosecution proved such exposure was the proximate cause of the child's death as required to support a conviction for first degree murder. Respondent's appeal to emotion does not aid that inquiry. It certainly says nothing about the relevance of the authorities on which Ms. Brown relies.

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suggestion. In her petition, she reviewed, and challenged the significance of, each fact on which the Court of Appeal relied and not simply this one. Thus, respondent's suggestion makes no sense.

Notably, legal precedent shows the authorities are relevant. "The principles of causation apply to crimes as well as torts." (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46; accord, *People v. Dawson* (2009) 172 Cal.App.4th 1073, 1093; *People v. Brady* (2005) 129 Cal.App.4th 1314, 1324.) In both contexts, liability extends only to those whose acts are the proximate cause of the injury, death or other harm in question. (*Dawson*, at pp. 1093-1094; *Brady*, at p. 1324; *Schmies*, at pp. 46-47.) Furthermore, proximate cause is defined the same in both contexts. (See *Canizalez, supra,* 197 Cal.App.4th at p. 845 [proximate cause for purposes of murder is an act that "was a substantial factor in producing the result"]; *Greenfield v. Insurance Inc.* (1971) 19 Cal.App.3d 803, 810 [civil case applying same definition of proximate cause]; see also *People v. Scola* (1976) 56 Cal.App.3d 723, 726 [citing civil law authorities to define proximate cause in a criminal context].)

Regarding Dr. Ogan's conclusions ruling out of other causes of death, respondent again mischaracterizes Ms. Brown's argument. Respondent writes that Ms. Brown merely challenged the doctor's conclusion as "meaningless," which respondent contends simply reflects a disagreement with those conclusions and constitutes an unreviewable effort to reweigh the evidence. (Answer, at p. 11.) In fact, Ms. Brown wrote that Dr. Ogan's conclusions ruling other possible causes were "meaningless *without examining the reasons underlying them*." (PR, at p. 15, emphasis

added.) Ms. Brown then devoted two pages to addressing the reasons underlying them and why they were speculative. Respondent ignores that analysis.

Finally, respondent accuses Ms. Brown of distorting the record by mischaracterizing Dr. Ogan's testimony. (Answer, at p. 11.) In her petition, Ms. Brown wrote,

> Notably, Dr. Ogan made a finding that pointed to another cause of death and which he did not rule out. Dr. Ogan testified that the pooling of blood in the child's body indicated D.R. was lying face down in bed when discovered. (1RT 398.) In fact, he concluded that, from the nature of the lividity, D.R. was face down when she died and remained face down for a period of time thereafter. (1RT 417-418.) Dr. Crawford-Jakubiak concluded likewise. (2RT 801.)

Respondent writes, "Dr. Ogan made no such finding." (Answer, at p. 11.) Respondent is mistaken. After explaining that lividity is the post-mortem pooling of blood, Dr. Ogan's testimony proceeded as follows:

> Q. Now, did you sir, notice anything about the lividity of [D.R.]?
> A. Yes.
> Q. What did you notice?
> A. It was on the anterior of the body, indicating she had been face down at discovery.

(1RT 398.) Shortly thereafter, the doctor was asked if anterior lividity indicates "that at her death or shortly after her death, she was lying face downward," and the doctor responded, "That is what that indicates, yes." (1RT 399.) Later, the doctor was questioned about lividity again and testified as follows:

> Q. Now, in your discussion of lividity earlier, you indicated that your observations led you to believe that the child was found face down; is that true?
> A. Yes.
> Q. Can you explain that further? What was it that you saw that made you believe that the child was face down when found?
> A. The blanching of the skin on the areas of the abdomen, the knees would indicate the baby being face downward.
> Q. . . . [T]hat would require that the child be face down when it died and for some period thereafter, would it not?
> A. That is what it means to me, yes.

(1RT 417-418.) Ms. Brown submits she accurately characterized Dr. Ogan's testimony.

Moreover, Ms. Brown correctly observed that Dr. Ogan never expressly ruled out lying face down as a potential cause of death, and respondent has not cited any testimony in which he did. Respondent merely contends that he did so implicitly "by finding that she died of polypharmacy." (Answer, at p. 11.) However, when combined with the Court of Appeal's reliance on Dr. Ogan ruling out other causes of death, that logic becomes circular. It amounts to arguing that polypharmacy was the cause of death because there were no other causes of death, such as lying face down, and lying face down could not be the cause of death because the cause was polypharmacy. Such logic is not substantial evidence that drugs were the proximate cause of D.R.'s death.

The Court of Appeal's analysis of the evidence's sufficiency constitutes a misapplication of settled legal principles. The lower court

relied exclusively on the conclusions of one doctor based on his credentials without considering the reasons underlying those conclusions despite settled authority that an expert opinion based on speculation is not substantial. (PR, at pp. 11-12.) Moreover, the doctor's conclusions amount to no more than a belief that drugs "could" or were capable of causing the child's death despite legal authority requiring more than mere possibilities as to causation but instead evidence that the drugs were a substantial factor in the result. (PR, at pp. 11, 13.) The Court of Appeal would clearly benefit from this court's guidance as it is likely the lower court will again encounter criminal cases in which an expert gives an opinion regarding causation. Moreover, if the Third Appellate District lacks an understanding of how to properly assess the substantial nature of such conclusions, it stands to reason that other courts suffer from the same misconception. Accordingly, review is necessary to secure uniformity of decision and settle this important question within the meaning of rule 8.500(b) of the California Rules of Court.

II.

THE PROSECUTION PRESENTED INSUFFICIENT EVIDENCE THAT MS. BROWN WILLFULLY, DELIBERATELY AND WITH PREMEDITATION ADMINISTERED "POISON" TO HER DAUGHTER FOR PURPOSES OF FIRST DEGREE MURDER BY POISON

Respondent contends there is no basis to review Ms. Brown's argument regarding proof of the mental state for murder by poison, the first degree murder theory upon which her conviction was based. (Answer, at pp. 12-16.) Respondent first disputes Ms. Brown's contention that murder by poison requires proof that she willfully, deliberately and with premeditation administered poison to her daughter. (Answer, at pp. 15-16.) Alternatively, respondent contends that, even if Ms. Brown is correct about the legal requirement, there was sufficient evidence she had that mental state. (Answer, at p. 16.) Respondent is mistaken on both points.

With respect to the legal requirement, respondent argues that Ms. Brown's contention "is flatly inconsistent with case law, including this Court's opinion in [*People v.*] *Jennings* [(2010) 50 Cal.4th 616]." (Answer, at p. 12.) Respondent characterizes the holding in *Jennings* as follows:

> For a conviction of first-degree murder by poison, the prosecution must establish only that the defendant administered the poison with the knowledge that doing so was dangerous to human life and with a conscious disregard for that fact. (*Jennings*, *supra*, 50 Cal.4th at pp. 639-640.) In other words, implied malice is sufficient. (*Ibid.*)

(Answer, at p. 15.) In doing so, respondent simply repeats the Court of Appeal's reference to *Jennings*. (Opn., at pp. 13-14.)

However, respondent ignores the more than two pages from the petition devoted to explaining why the Court of Appeal was incorrect and how *Jennings* is not incompatible with Ms. Brown's position. (PR, at pp. 23-26.) Without repeating all of that analysis, Ms. Brown notes that *Jennings*'s holding was not as narrow as respondent (or the Court of Appeal) contends and even contains language supportive of her claim. As noted in the petition, this court held that poison-murder requires the jury to find that the defendant "*deliberately administered* the poison with conscious disregard for" the life of the child. (*Jennings*, at p. 640, emphasis added, internal quotation marks omitted; PR, at p. 25.)

Respondent's assertion that Ms. Brown's position is inconsistent with "case law, including . . . *Jennings*" implies there is other case law that undermines her position. However, respondent does not cite any. Instead, respondent simply claims Ms. Brown "has not and cannot cite to any legal authority that supports the proposition." (Answer, at p. 15.) That is inaccurate. Ms. Brown cited numerous cases supportive of her position, including *People v. Wiley* (1976) 18 Cal.3d 162 and *People v. Steger* (1976) 16 Cal.3d 539. There are others as well. For instance, *Jennings* was not the first case to hold that, to be guilty of murder by poison, the

defendant must *deliberately administer* the poison to the victim. (See also *People v. Blair* (2005) 36 Cal.4th 686, 745; *People v. Mattison* (1971) 4 Cal.3d 177, 183-184.)

In *Mattison*, this court directly addressed the mental state for poison murder. It wrote, "'[I]t is not enough to show that a poison was administered and that a death resulted.'" (*Mattison, supra,* 4 Cal.3d at p. 183.) It explained that administering poison "innocently"—under the belief "that no serious results would follow"—does not constitute murder. (*Mattison,* at p. 183.) Instead, it held the poison must be administered "for an evil purpose" and went on to conclude therefrom that the deliberate administration of the poison was a necessary element. (*Id.* at pp. 183-184.) That the administration of poison must be deliberate, for an evil purpose, and without the belief that no harm would result is similar to it being willful, deliberate and premeditated.

Respondent is correct, however, that Ms. Brown has not cited any authority that directly addresses whether, in addition to the deliberate administration of poison, the willful and premeditated administration of the poison is required. And respondent and the Court of Appeal did not either. The reason for that is simple; the issue is one of first impression. In an apparent effort to dissuade this court from considering the issue, respondent disagrees with that point and contends that Ms. Brown's position is merely "one that no court has adopted." (Answer, at p. 6.) That would imply there

are courts that have considered but rejected it. However, respondent does not cite any, which is because there are none. It is thus an issue of first impression as contended.

Respondent's alternative argument that the evidence shows she willfully, deliberately and with premeditation administered the drugs to her baby is also without merit. Respondent reasons the evidence showed she knew the drugs had mixed with her breast milk and that she fed the baby her tainted breast milk to treat the child's withdrawal symptoms. (Answer, at p. 16.) Ms. Brown contends that is not enough to establish first degree poison murder.

"Willful" means intentional; "deliberate" means arrived at as a result of careful thought and weighing of considerations for and against; and "premeditated" means considered beforehand. *(People v. Perez* (1992) 2 Cal.4th 1117, 1123.) The willful, deliberate and premeditated administration of poison means the defendant intended to give the victim poison after careful thought and prior consideration. The evidence cited by respondent does not show that.

Admittedly, Ms. Brown did make statements to police indicating that she was aware the drugs she ingested could taint her breast milk, which could then pass to the baby. (2CT 422.) Ms. Brown also told police that she suspected D.R. was suffering from withdrawals based on symptoms about which she had read on the Internet. (2CT 422-423.) She also explained that

she gave D.R. breast milk in part because she heard "[y]ou give them your breast milk" to ease symptoms of withdrawal. (2CT 430.) However, she was also asked if she intended to give D.R. drugs to help the baby "take the edge off" the withdrawals, and Ms. Brown responded, "Absolutely not. I never had that thought even come across my mind." (2CT 500-501.) Thus, based on her statement, upon which respondent relies, her purpose was not to pass along the drugs but rather the milk itself.

Ms. Brown referenced having read about infant withdrawal on the Internet (see 2CT 429), and respondent referenced evidence of Internet searches Ms. Brown conducted (Answer, at p. 16, citing 2RT 865-866). However, there was no evidence what information those Internet searches conveyed other than her statement that the milk itself was beneficial. Thus, it is pure speculation to assume that she believed administering drugs to her baby was encouraged.

In short, this case presents an issue of first impression. Moreover, the cases cited above, while not directly on point, support Ms. Brown's position and run counter to the Court of Appeal's interpretation of the elements of first degree murder by poison. Accordingly, the lower court and other courts could benefit from this court's guidance on the issue, which would likewise benefit Ms. Brown as well as others who find themselves in her situation.

III.

THE TRIAL COURT PREJUDICIALLY ERRED BY FAILING TO INSTRUCT THE JURY SUA SPONTE THAT FIRST DEGREE MURDER BY POISON REQUIRES PROOF THAT THE DEFENDANT WILLFULLY, DELIBERATELY AND WITH PREMEDITATION ADMINISTERED POISON TO THE VICTIM

Relying on its and the Court of Appeal's analysis that first degree murder by poison does not require the willful, deliberate and premeditated administration of the poison, respondent disputes Ms. Brown's contention that the trial court erred by failing to instruct the jury on that mental state. (Answer, at pp. 17-20.) Respondent contends Ms. Brown is asking this court to change the law of first degree murder, something that is reserved for the Legislature. (Answer, at p. 18.) Ms. Brown has shown above and in her petition (see PR, at pp. 20-25) that, pursuant to settled principles of statutory construction, the Legislature intended first degree murder by poison as defined by Penal Code section 189 to require the mental state in question. Respondent has not shown otherwise.

CONCLUSION

For the reasons stated above and in the petition for review, Ms. Brown asks this court to review the decision of the Court of Appeal and reverse the judgment.

Dated: November 2, 2019.

Respectfully submitted,

/s/ DAVID L. POLSKY
David L. Polsky
Attorney for Heather Rose Brown

CERTIFICATE OF WORD COUNT

I, David L. Polsky, counsel for appellant, hereby certify pursuant to rule 8.504 of the California Rules of Court that appellant's reply to the answer to the petition for review in the above-referenced case consists of 3,830 words, excluding tables, 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 November 2, 2019, at Ashford, Connecticut.

/s/ DAVID L. POLSKY
David L. Polsky

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I, David L. Polsky, certify:

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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 November 2, 2019, at Ashford, Connecticut.

/s/ DAVID L. POLSKY
David L. Polsky, Declarant

STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S257631**
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