

SUPREME COURT COPY



DAVID L. POLSKY
ATTORNEY AT LAW
P.O. BOX 118, ASHFORD, CT 06278

CA BAR NO. 183235
(860) 429-5556

February 13, 2020

California Supreme Court
350 McAllister Street
San Francisco, CA 94102

SUPREME COURT
FILED

FEB 18 2020

Re: **Errata Letter**
People v. Brown
Supreme Court No. S257631

Jorge Navarrete Clerk

Deputy

Dear Justices:

Appellant Heather Rose Brown, through her attorney, submits this letter to correct two errors contained in her opening brief on the merits filed on February 5, 2020. An original and eight copies of the affected pages are submitted with this letter.

On page 20, the last sentence in the first full paragraph preceding the block quote provides,

The court observed that, when murder is committed by one of the “means” listed, no proof to bring about a particular result is required:

It should read,

The court observed that, when murder is committed by one of the “means” listed, no proof of an intent to bring about death is required:

On page 21, the third sentence of the last full paragraph reads as follows:

Therefore, under section 189, any murder committed by the enumerated "means" does not require proof of an intent to bring about a particular result because it carries with it conclusive proof that the killing was willful, deliberate and premeditated.

It should read as follows:

Therefore, under section 189, any murder committed by the enumerated "means" does not require proof of an intent to kill because it carries with it conclusive proof that the killing was willful, deliberate and premeditated.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "D. Polsky", with a long horizontal flourish extending to the right.

David L. Polsky
Attorney for Ms. Brown

PROOF OF SERVICE

I, David L. Polsky, certify:

I am an active member of the State Bar of California and am not a party to this cause. My electronic service address is polsky183235@gmail.com and my business address is P.O. Box 118, Ashford, Connecticut 06278. On February 13, 2020, I served the persons and/or entities listed below by the method checked. For those labeled "*Served electronically*," I transmitted a PDF version of the **Errata Letter** by TrueFiling electronic service. For those labeled "*Served by mail*," I deposited in a mailbox regularly maintained by the United States Postal Service at Ashford, Connecticut, a copy of the above document in a sealed envelope with postage fully prepaid, addressed as provided below.

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550
(Served electronically)

Central Cal. Appellate Prog.
2150 River Plaza Dr., Ste. 300
Sacramento, CA 95833
(Served electronically)

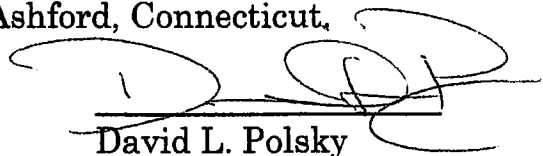
California Court of Appeal
Third Appellate District
914 Capital Mall
Sacramento, CA 95814
(Served electronically)

Heather R. Brown, WF9074
CCWF, 514-12-1U
P.O. Box 1508
Chowchilla, CA 93610
(Served by mail)

Sarah Murphy, Deputy D.A.
Office of the District Attorney
1355 West Street
Redding, CA 96001-1632
(Served by mail)

Hon. Stephen H. Baker, Judge
Shasta County Superior Court
1500 Court Street
Redding, CA 96001
(Served by mail)

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.
Executed on February 13, 2020, at Ashford, Connecticut,


David L. Polsky

A. Analysis of Section 189

The evidentiary requirements for proving first degree murder are detailed in section 189, which provides in relevant part as follows:

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, *poison*, lying in wait, torture, *or by any other kind of willful, deliberate, and premeditated killing*, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, . . . is murder of the first degree.

(Emphasis added.) Consequently, the precise requirements for proving murder *by means of poison* is an issue of statutory construction.

In construing a statute, the goal is to ascertain the intent of the Legislature and to interpret it in a way that best serves its purpose. (*People v. Leiva* (2013) 56 Cal.4th 498, 506.)

“When interpreting statutes, we begin with the plain, commonsense meaning of the language used by the Legislature. [Citation.] If the language is unambiguous, the plain meaning controls.” [Citation.] We consider first the words of the statute because ““the statutory language is generally the most reliable indicator of legislative intent.”” [Citation.] “[W]henver possible, significance must be given to every word [in a statute] in pursuing the legislative purpose, and the court should avoid a construction that makes some words surplusage.” [Citation.]

(*Ibid.*)

The Legislature first codified an enumerated list of “means” constituting first degree murder—“by means of poison, lying in wait, torture, or other kind of willful, deliberate, and premeditated killing”—in 1856 in a statutory predecessor to section 189. (*People v. Wiley* (1976) 18 Cal.3d 162, 169; *People v. Bealoba* (1861) 7 Cal. 389, 393.) This court construed it for the first time in *Bealoba, supra*, 17 Cal. 389. The court explained that the enumerated “means” constitute first degree murder because they “carry with them conclusive evidence of premeditation, and the jury would have no option but to find the prisoner guilty in the first degree, upon proof of the crime.” (*Id.* at p. 394; accord, *Wiley*, at p. 169.) The court observed that, when murder is committed by one of the “means” listed, no proof of an intent to bring about death is required:

In all these enumerated cases, the Legislature has declared the law, that the perpetrator shall be guilty of murder in the first degree *without further proof* that *the death* was the ultimate result, which the will, deliberation and premeditation of the party accused sought. And the same authority has declared the law that any other kind of killing which is sought by the will, deliberation, and premeditation of the party accused, shall also be murder in the first degree; but that as to this kind of killing, proof must be adduced to satisfy the mind that the death of the party slain was the ultimate result which the concurring will, deliberation, and premeditation of the party accused sought.

(*Id.* at p. 397, emphasis in original.)

The court revisited the scope of first degree willful, deliberate and premeditated murder in *People v. Sanchez* (1864)

24 Cal. 17. It held the Legislature intended such murders to receive greater punishment because of their “cruel and aggravated character.” (*Id.* at p. 29.) It wrote, “In order to constitute murder of the first degree there must be something more than a malicious or intentional killing.” (*Id.* at p. 28.) In addition to felony murder, the court explained,

There must be a killing by means of poison, lying in wait, or torture, or some other kind of killing different from that of poison, lying in wait, or torture, which is wilful, deliberate, and premeditated.

(*Ibid.*) It reiterated that, “[w]here the killing is perpetrated by means of poison, etc.,” “the *means* used is held to be conclusive evidence of premeditation.” (*Id.* at p. 29, emphasis in original.) In other words, a murder by one of those means is necessarily a “willful, deliberate, and premeditated” one. (*Ibid.*)

The list of enumerated “means” was incorporated into section 189, which was adopted by the Legislature in 1872. (*Wiley, supra*, 18 Cal.3d at p. 170.) This court held the prior construction of section 189’s predecessor applied to section 189 as well. (*Id.* at p. 171.) Therefore, under section 189, any murder committed by the enumerated “means” does not require proof of an intent to kill because it carries with it conclusive proof that the killing was willful, deliberate and premeditated. Such a crime thus constitutes more than a mere malicious killing and is the kind of cruel and aggravated killing warranting the greater punishment of first degree murder. That naturally begs the question what constitutes a killing committed by one of the enumerated “means”?

1. Torture Murder

In a series of cases, this court answered that question with respect to murder by torture. For instance, in *People v. Bender* (1945) 27 Cal.2d 164, 177, the court held that once a jury finds the defendant “acted with that ‘malice aforethought’ which constitutes the killing by murder,” “there remained for their determination the more difficult question of the class and degree of the homicide.” In that case, the defendant choked his victim to death, and the court held that mere choking does not constitute torture as a matter of law. (*Id.* at pp. 177-178.) It concluded that, to elevate the degree of murder, torture requires proof the defendant intended to cause his victim to suffer. (*Id.* at p. 177.) It explained,

The killer who, heedless of the suffering of his victim, in hot anger and with the specific intent of killing, inflicts the severe pain which may be assumed to attend strangulation, has not in contemplation of the law the same intent as one who strangles with the intention that his victim shall suffer.

(*Ibid.*) Equating torture-murder with murder by poison, the court then wrote that the “mode of killing” cannot elevate the degree of the crime “unless where, as in the case of poisoning, it carries with it an internal evidence of cool and deliberate malice.” (*Id.* at pp. 177-178.)

Later the same year, the court expanded upon the definition of torture-murder. (*People v. Heslen* (Cal. 1945) 163 P.2d 21, 27.) It held that torture for purposes of first degree murder required “an intent to cause pain and suffering in addition to death.” (*Ibid.*) It continued,