In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **AMALIA CATHERINE BRYANT,** **Defendant and Appellant.**

S196365

Case No. S196365

Fourth Appellate District, Division One, Case No. D057570
Riverside County Superior Court, Case No. SWF014495
The Honorable Timothy F. Freer, Judge

RESPONDENT'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

As respondent argued in the Opening Brief on the Merits, the court in *Bryant* exceeded its judicial authority and relied on dicta in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*) to create a third theory of voluntary manslaughter--an unintentional killing without malice in the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter--that is not grounded in statutory authority. The court in *Bryant* then imposed a sua sponte duty on the trial court to instruct on a theory that was neither developed law nor supported by evidence. This judicial overindulgence should be reversed and Bryant's murder conviction reinstated.

Bryant responds that the courts in *Garcia* and *Bryant* erroneously relied on the assumption that assault with a deadly weapon is an inherently dangerous felony. She asks this Court to conduct a proper analysis of the offense and determine it is a noninherently dangerous felony, and when committed without due caution and circumspection, is involuntary manslaughter. In the alternative, Bryant accepts the reasoning of *Garcia* and its application in the *Bryant* opinion requiring an instruction on voluntary manslaughter.

Bryant's suggestion that an unlawful killing committed without malice in the course of a noninherently dangerous assaultive felony is involuntary manslaughter is incorrect. Assault with a deadly weapon or force likely to produce great bodily injury is clearly a dangerous felony, if not life-threatening, and therefore falls outside the limitations of involuntary manslaughter. Even if this Court were to find assault with a deadly weapon or force likely to produce great bodily injury is a noninherently dangerous felony, such active assaultive crimes cannot be committed with criminal negligence and therefore cannot form the basis for involuntary manslaughter. To recognize such a crime would necessitate

further expansion of the law on manslaughter, which would require legislative input and infringe on prosecutorial charging discretion. In sum, this Court should find an unintentional killing without malice in the course of an active assaultive felony, whether inherently dangerous or not, does not fall within any currently recognized definition of manslaughter and the court in *Bryant* imposed an unnecessary and unrealistic duty to sua sponte instruct accordingly.

I. AN UNINTENTIONAL KILLING WITHOUT MALICE IN THE COURSE OF AN ACTIVE ASSAULTIVE FELONY, WHETHER INHERENTLY DANGEROUS OR NOT, IS NOT MANSLAUGHTER AS DEFINED BY THE PENAL CODE

The Penal Code defines manslaughter as the "unlawful killing of a human being without malice." (§ 192.) Thereafter, it specifies the voluntary, involuntary, and vehicular forms of manslaughter. (§ 192, subds. (a) through (c).) As readily apparent here, an unlawful and unintentional killing committed without malice, whether in the course of an inherently dangerous assaultive felony or not, does not squarely fall within the statutory definitions provided in the Penal Code or judicial interpretations for voluntary or involuntary manslaughter. However, the court in *Bryant* found this offense to be voluntary manslaughter by relying on the *Garcia* rationale, and Bryant now argues it is involuntary manslaughter. As respondent has shown, voluntary manslaughter has been limited to situations in which malice is negated. In addition, respondent will demonstrate active assaultive felonies cannot be the basis of involuntary manslaughter because they cannot be committed by mere negligence. Rather, it is respondent's position that any further specification for the offense requires input from the Legislature.

A. An Unintentional Killing Without Malice in the Course of an Inherently Dangerous Assaultive Felony is Not Voluntary Manslaughter and the Court of Appeal Abused its Judicial Authority when Imposing a Duty on the Trial Court to Instruct on this Novel Theory

Bryant's answering brief advances the position that an instruction on involuntary manslaughter should have been provided, and spends relatively limited time responding to respondent's arguments. (DBM 36-46.) However, Bryant's brief response does not undermine respondent's position that the Court of Appeal exceeded its judicial authority in this matter.

Contrary to Bryant's argument, the *Anderson* decision further assists respondent's position on this matter. (DBM 38-40.) *Anderson* held that duress cannot negate malice, and thus, does not come within the current statutory scheme for manslaughter. (*People v. Anderson* (2002) 28 Cal.4th 767, 781-784.) This reaffirms respondent's position that voluntary manslaughter requires the negation of malice and currently cannot simply be based on a nonmalicious killing. Similarly, here, *Garcia* voluntary manslaughter does not include the process of negating malice that is required to reach voluntary manslaughter in its current statutory form. The *Anderson* opinion further clarified that any policy arguments in favor of a new form of manslaughter were to be directed to the Legislature. (*Id.* at pp. 783-384.) Moreover, Bryant has not advanced any policy arguments in favor of expanding the current statutory scheme for voluntary or involuntary manslaughter.

Respondent has also demonstrated that expanding the Penal Code to create a new form of voluntary manslaughter is unnecessary. If the presence of malice is called into question, the prosecution has alternative charging options such as assault with a deadly weapon or force likely to produce great bodily injury and corresponding enhancements.

> The prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from the 'complex considerations necessary for the effective and efficient administration of law enforcement.'

(*People v. Birks* (1998) 19 Cal.4th 108, 134, quoting *People v. Keenan* (1988) 46 Cal.3d 478, 506.) "The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch." (*People v. Birks, supra*, at p. 134.) If such charging alternatives are insufficient, then the Legislature can enact a new crime, as it did with the child homicide statute.

Bryant asserts a *Garcia* instruction on voluntary manslaughter was necessary because, as the Court of Appeal found, this was a case in which there may have existed doubt as to whether Bryant acted in conscious disregard for Golden's life when she stabbed him to death. (DBM 43-44.) What Bryant and the Court of Appeal fail to recognize is that any reasonable doubt would have resulted in an acquittal. The solution under the circumstances is not to engage in judicial excess. As this Court has recognized, the separation of powers prescribed by the California Constitution limits judicial activism rewriting the Penal Code. (See *Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal. 4th 607, 673 (conc. opn. of Mosk, J.).) Also, the charging alternatives presented above alleviate any concern that Bryant or similarly situated defendants would be convicted of a crime that was not commensurate with their guilt.

Finally, contrary to Bryant's position (DBM 44-45), the trial court did not have a sua sponte duty to instruct the jury on *Garcia* voluntary manslaughter or *Burroughs*[1] involuntary manslaughter. The dicta in *Garcia* stating an unlawful killing without malice in the course of an inherently

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[1] *People v. Burroughs* (1984) 35 Cal.3d 824.

dangerous assaultive felony is *at least* voluntary manslaughter was insufficient to establish a new theory of voluntary manslaughter requiring instruction. Also, as respondent will more thoroughly explain in the next argument, an involuntary manslaughter instruction was not required under the facts of this case because assault with a deadly weapon or force likely to produce great bodily injury is an active assaultive crime and such conduct cannot be based on criminal negligence.

B. Felony Assault with a Deadly Weapon or Force Likely to Produce Great Bodily Injury Cannot be the Basis for Involuntary Manslaughter

Bryant does not dispute that at the very least she committed felony assault with a deadly weapon or force likely to produce great bodily injury. However, she faults the courts in *Garcia* and *Bryant* for making the assumption that assault with a deadly weapon is an inherently dangerous felony. (DBM at 8.) She then asks this Court to find the offense is a noninherently dangerous felony so it can be the basis for involuntary manslaughter under *Burroughs*. (DBM at 8-35.) However, it is unnecessary for this Court to determine whether assault with a deadly weapon or force likely to produce great bodily injury is an inherently dangerous felony. The limited dicta of *Burroughs* does not apply to intentionally violent crimes such as assault with a deadly weapon or force likely to produce great bodily injury. Regardless whether assault with a deadly weapon or force likely to produce great bodily injury is a noninherently dangerous felony, it is certainly dangerous and often life-threatening, and significantly more serious than the nonassaultive crimes contemplated in *Burroughs*. Furthermore, Bryant's proposed legal analysis to determine that assault with a deadly weapon or force likely to produce great bodily injury is not an inherently dangerous felony is superfluous because irrespective of how the crime is characterized, as an inherently

dangerous felony or not, it cannot be committed with mere criminal negligence and therefore, does not fall within the *Burroughs* definition of involuntary manslaughter.

1. *Burroughs's* limited expansion of involuntary manslaughter does not apply to assaultive crimes

Penal Code section 192, subdivision (b), defines involuntary manslaughter as

> the unlawful killing of a human being without malice ... in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.

In addition to the statutorily defined means of committing involuntary manslaughter, this Court has defined a nonstatutory form of the offense based on the predicate act of a noninherently dangerous felony committed without due caution and circumspection. (*People v. Burroughs*, *supra*, 35 Cal.3d at pp. 835–836, disapproved on other grounds in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.)

In *Burroughs*, a young man diagnosed as having terminal leukemia died after unorthodox treatment, including deep abdominal massages, at the hands of the defendant, Burroughs, "a self-styled healer." (*Burroughs, supra*, 35 Cal.3d at pp. 826-828.) This Court reversed his conviction of second degree felony murder, holding that its predicate felony of the unlicensed practice of medicine did not, in its abstract elements, constitute a felony inherently dangerous to human life for purposes of the second degree felony murder rule. (*Id.* at pp. 828-833.) In reaching that conclusion, the Court analogized a great bodily harm element of that offense to the serious bodily injury element of battery, which required significant or substantial injury but not necessarily injury that was inherently life-threatening. (*Id.* at p. 831.)

In the event of a retrial and to provide guidance to the trial court, the Court in *Burroughs* considered, in dictum, whether Burroughs could be charged and convicted of involuntary manslaughter. (*Burroughs, supra*, 35 Cal.3d at pp. 833-834.) The Court in *Burroughs* immediately pointed out that there was "*no allegation made, nor was there any evidence adduced at trial, that Burroughs at any time harbored any intent even to harm [the victim] in the slightest fashion.*" (*Id.* at p. 834, italics added.) Despite the fact "there was no evidence to suggest [the victim]'s demise was the intended consequence of Burroughs' treatment of the decedent," the Court relied on evidence that the death had directly resulted from the "deep abdominal massages" performed "without due caution and circumspection" causing massive hemorrhaging. (*Id.* at p. 834 & fn. 8) Citing the lack of intent to harm, the Court stated: "Thus, while Burroughs may be criminally responsible for the death . . ., he is not subject to a conviction for voluntary manslaughter-'a willful act, characterized by the presence of an intent to kill . . . .'" (*Ibid.*)[2]

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[2] *Burroughs* was decided before the decisions in *People v. Lasko* (2000) 23 Cal.4th 101, 108, and *Blakeley, supra*, 23 Cal.4th at pages 88-89, held that an intent to kill is not a necessary element of voluntary manslaughter. *Burroughs* stated that voluntary manslaughter is "characterized by the presence of an intent to kill" and concluded the defendant in that case was not subject to a conviction for voluntary manslaughter because there was no evidence he intended to harm the victim. (*Burroughs, supra*, 35 Cal.3d 824, 834, fn. 8.) Thus, *Burroughs*, and pre-*Blakeley* cases applying its holding that an unintentional homicide committed in the course of a noninherently dangerous felony may be involuntary manslaughter when committed without due caution and circumspection, did not consider voluntary manslaughter to be an option for an unintentional homicide under any circumstances. Although *Burroughs* has not been disapproved on the point that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, it was disapproved in

(continued...)

The Court in *Burroughs* noted that Penal Code section 192 described involuntary manslaughter as a killing, without malice, in the commission of either an unlawful act not amounting to a felony or a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection. (*Burroughs, supra*, 35 Cal.3d at p. 835.) "While a killing in the course of commission of a noninherently dangerous felony does not appear to be precisely within one of these descriptions," the Court acknowledged that *People v. Morales* (1975) 49 Cal.App.3d 134, had allowed the noninherently dangerous felony of grand theft to support an involuntary manslaughter conviction, when committed without due caution and circumspection. (*Burroughs, supra,* at p. 835.) *Burroughs* extrapolated from this and reasoned that if the jury found that Burroughs's acts in committing felonious unlicensed practice of medicine proximately caused the death and "were committed 'without due caution and circumspection,'[] the jury could properly have convicted Burroughs of involuntary manslaughter." (*Ibid.*)

The rationale of the Court in *Burroughs* was that the Legislature must have meant for "*felons situated as Burroughs is here*" to be convicted under the statute; otherwise, two anomalies resulted: First, there would be no criminal responsibility for an unlawful act that caused death; and second, "while one who killed in the course of a lawful act without due caution and

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(...continued)
Blakeley on the point that intent to kill is a necessary element of voluntary manslaughter. (*Blakeley, supra*, 23 Cal.4th at p. 89.)

Also, the Court in *Burroughs* did not consider the conscious-disregard theory, which requires no intent to kill or to harm, only "an intentional act, the natural consequences of which are dangerous to life, . . . deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life." (CALJIC No. 8.40.)

circumspection" would be guilty of involuntary manslaughter, one who killed "while committing a noninherently dangerous felony, [would be] guilty only, perhaps, of a battery." (*Burroughs, supra*, at pp. 835-836, italics added.) One "certainly ought not benefit," the Court reasoned, from the fact that his unlawful acts "were felonious, rather than lawful," and so "an unintentional homicide committed in the course of a noninherently dangerous felony (which might, nevertheless, produce death if committed without due caution and circumspection) ought be punishable under section 192 as well." (*Id.* at p. 836.)

The *Burroughs* opinion specifically limited its directive on retrial and discussion of involuntary manslaughter to homicides resulting from felonies where the defendant acted without due caution and circumspection. (*Burroughs, supra*, 35 Cal.3d at p. 836, fn. 11.) The Court even provided the example that, "a person who steals a woman's unattended purse while the 'victim' stands across the street is not criminally responsible for the death of the woman resulting from her tripping and suffering a severe fall in pursuit of the theft." (*Ibid.*)

By limiting involuntary manslaughter to crimes that could be committed with criminal negligence, the Court in *Burroughs* did not contemplate this would include assaultive conduct that is completed with the intent to commit a violent injury to the victim. For instance, the *Burroughs* opinion addressed the offense of felony unlicensed practice of medicine, and repeatedly pointed out there was no allegation that Burroughs ever intended to harm the victim. (*People v. Burroughs, supra*, 35 Cal.3d at p. 834.) There was evidence adduced that a "reasonably prudent physician would have known that administering 'deep abdominal massage' to a leukemia victim such as Swatsenbarg would render the likelihood of hemorrhage very high." (*Id.* at p. 835, fn. 9.) "Burroughs' . . . apparent indifference to, or lack of awareness of this common medical

knowledge, is at the core of activity performed 'without due caution and circumspection.'" (*People v. Burroughs, supra*, 35 Cal.3d at p. 835, fn. 9.)

Similarly, in *Morales*, on which *Burroughs* relied, the Court of Appeal applied a criminal negligence standard to the crime of felony grand theft from the person, another nonassaultive offense. (*People v. Morales, supra*, 49 Cal.App.3d at pp. 144-145.) In *Morales*, the defendant was convicted of robbery and first degree murder after approaching the victim from behind, grabbing her purse, and fleeing. (*Id.* at p. 137.) The 79-year-old victim fell to the ground and suffered a dislocation and fracture of her elbow. (*Ibid.*) She developed a blood clot caused by her physical inactivity while recuperating from her minor elbow surgery, and died suddenly a few weeks later. (*Id.* at p. 138.)

A single witness testified the defendant pushed the victim while grabbing her purse. (*People v. Morales, supra*, 49 Cal.App.3d at pp. 137-139.) However, the court in *Morales* questioned the reliability of this witness's testimony, and found there was evidence from which the jury may have entertained a reasonable doubt sufficient force was used to constitute robbery. (*Id.* at pp. 138, 140.) The key difference between robbery and grand theft being robbery requires the taking be accomplished by means of force or fear. (*Id.* at p. 139.) "Grand theft is committed . . . [w]hen the property is taken from the person of another." (*Id.* at p. 139, fn. 1; Cal. Pen. Code, § 457.) "The alleged use of force by defendant served not merely to raise the theft offense to a robbery; it was also the sole basis for imputing to defendant the implied malice for first degree murder." (*Id.* at p. 141.) Finding the jury should have been instructed on the lesser included offense of grand theft, the court in *Morales* further held grand theft was not an inherently dangerous felony that would support the felony murder doctrine. (*Id.* at pp. 141-143.)

The court in *Morales* went on to recognize that even if the defendant only committed grand theft, his unlawful act was still the proximate cause for the victim's death. (*People v. Morales, supra*, 49 Cal.App.3d at p. 144.) Expounding upon the definition of criminal negligence, the court held "assuming the defendant did not commit a robbery, he could properly be convicted of involuntary manslaughter if his conduct is found to have been criminally negligent." (*Ibid.*)

> As stated in *Burroughs*, this Court's
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> analysis of precedent in this area reveals that the few times we have found an underlying felony inherently dangerous (so that it would support a conviction of felony murder), *the offense has been tinged with malevolence totally absent from the facts of this case.*

(*People v. Burroughs, supra*, 35 Cal.3d at p. 832, italics added.) For instance, in *People v. Nichols* (1970) 3 Cal.3d 150, it was held that "the burning of a motor vehicle [Cal. Pen. Code, § 449a], which usually contains gasoline and which is usually found in close proximity to people, is inherently dangerous to human life." (*Nichols, supra,* 3 Cal.3d at p. 163.) This Court has also held that poisoning food, drink or medicine with intent to injure was inherently dangerous. (*People v. Mattison* (1971) 4 Cal.3d 177; see also *People v. Pearch* (1991) 229 Cal.App.3d 1282, 1299 [simple kidnapping inherently dangerous].)

Significant in *Burroughs* is the fact the Court pointed out that crimes found to be inherently dangerous included the presence of "malevolence" that was not present in *Burroughs*. (*Burroughs, supra*, at pp. 832-833.) That is, the statutes included an element of intent that came within the ambit of wickedness that is commensurate with malice, which is not apparent in the unlicensed practice of medicine, a crime generally synonymous with the attempt to act to assist rather than harm. Assault with a deadly weapon or force likely to produce great bodily injury on the other

hand, does not include the possibility of benevolence as it requires willful and active conduct to commit a violent injury and great bodily harm to the victim. Not only is it an "active" assaultive offense, it cannot be committed without the intent to commit a violent act on the victim. The element of "malevolence" absent from *Burroughs* is present in such a crime.

This element of malevolence is significant. Similar to those crimes that the Legislature has statutorily defined as constituting predicate felonies for first degree murder, for example burglary and robbery (Cal. Pen. Code, § 189), it is all too predictable that a malevolent act of assault will either directly endanger human life, or such danger will result when the victim (or a bystander) attempts to defend him or herself. (See e.g., *People v. Cervantes* (2001) 26 Cal. 4th 860, 867 [discussing the potentially lethal response of a victim and outcome when a perpetrator instigates a life-threatening crime in the context of the provocative act murder doctrine].)

In fact, as the Court in *Ireland* observed, the great majority of homicides result from felonious assaults with a deadly weapon or with force likely to produce great bodily injury. (*People v. Ireland* (1969) 70 Cal.2d 522, 539.) Indeed, it would be the rare case where a jury would find that the defendant had committed a dangerous assault against the victim without also finding the defendant acted with malice. That an assault with a deadly weapon or force likely to produce great bodily injury cannot support a second degree felony murder conviction under the merger doctrine does not undermine the severity of the criminal conduct. Nor does it suggest that the felony should be downgraded to a form of involuntary manslaughter. To the contrary, commission of a willful felony assault with a deadly weapon or force likely to produce great bodily injury resulting in death is inconsistent with, and more egregious than, the criminal conduct contemplated by the involuntary manslaughter statute, namely criminal negligence. (See *People v. Hayden* (1994) 22 Cal.App.4th 48, 58.)

In *Burroughs* the underlying felony encompassed conduct that was not violent in nature. For instance, a person can obviously commit the felony of practicing medicine without a license, as *Burroughs* recognized, without presenting a danger to life. (*Burroughs, supra*, at p. 830.) The unlicensed person might adequately perform, as would a licensed physician, without hurting his patient at all and might even cure the patient. Or, on the other hand, the unlicensed defendant might practice medicine on a patient that neither harms nor betters the condition of the patient. Thus in the abstract, practicing medicine without a license does not necessarily present a threat to the health of the patient, let alone to the life of the patient. But, assault with a deadly weapon or force likely to produce great bodily injury by nature cannot be committed without posing the risk of great bodily injury to the victim.

The dictum in *Burroughs* applied solely to nonassaultive crimes that were committed without the intent to harm, but with criminal negligence, such as the unlicensed practice of medicine at issue in that case. Indeed, this Court specifically pointed out that there was "no allegation made, nor was there any evidence adduced at trial, that Burroughs at any time harbored any intent even to harm [the victim] in the slightest fashion." (*Burroughs*, supra, at p. 834.) Similarly, the Court in *Morales* distinguished the commission of grand theft from robbery because it did not require the use of force or fear, thus allowing the possibility the defendant acted with criminal negligence. (*People v. Morales, supra*, 49 Cal.App.3d at pp. 139-141.) Thus, *Burroughs* should not be read to include assaultive felonies, even if they are not inherently dangerous for purposes of the felony murder rule.

Bryant urges this Court to determine whether the offense of assault with a deadly weapon or force likely to produce great bodily injury is an inherently dangerous felony for the purpose of qualifying it for involuntary

manslaughter under *Burroughs*. She points out that no court has analyzed assault with a deadly weapon or force likely to produce great bodily injury under the current "inherently dangerous felony" test used in applying the second degree felony murder doctrine, and maintains the ensuing result is that assault with a deadly weapon is a noninherently dangerous felony. (DBM 17-35.) This Court need not decide whether the offense is categorically an inherently dangerous felony or not because it cannot be the basis for the second degree felony murder rule and embraces intentional violent and very dangerous conduct surpassing that contemplated in *Burroughs*.

Quite possibly, this analysis has not been conducted on the offense of assault with a deadly weapon or force likely to produce great bodily injury because it would be needless under the merger doctrine recognized in *People v. Ireland, supra,* 70 Cal.2d 522, which precludes application of the second degree felony murder rule to a killing that occurs during the commission of an assaultive felony that is an integral part of the homicide. (See e.g., *People v. Smith* (1984) 35 Cal.3d 798, 808 [Court declines to determine if felony child abuse is a felony inherently dangerous to human life because *Ireland* compelled application of the merger rule].) Furthermore, the direction provided in the *Burroughs* dictum was limited to nonassaultive felonies.

In addition, as respondent will later demonstrate, active assaultive crimes cannot be committed by mere criminal negligence and therefore also cannot constitute involuntary manslaughter under *Burroughs*. This renders assault with a deadly weapon or force likely to produce great bodily injury lingering somewhere in the abyss between second degree felony murder and involuntary manslaughter. That is because whether or not it is determined to be an inherently dangerous felony, it does not categorically

fit under either proffered theory of homicide. Thus, conducting such an analysis is merely a red herring and completely unnecessary in this matter.

Distinct from other crimes, the crime of assault with a deadly weapon or force likely to produce great bodily injury is fraught with violence and requires the actual use of a weapon or instrument that is "deadly" or at the very least physical force that is likely to produce great bodily injury to the victim. The use of violent physical force against another is by its nature dangerous and life-threatening to the intended victim and on account of the unpredictable reaction when one's life is under threat.

Burroughs is not support for the proposition that assault with a deadly weapon is a noninherently dangerous felony capable of supporting involuntary manslaughter. The former felony of practicing medicine without a license at issue in *Burroughs* and grand theft in *Morales*, unlike assault with a deadly weapon or force likely to produce great bodily injury, are not active assaultive felonies and can be committed without malevolence and potential violence towards the victim. Therefore, the *Burroughs* expansion of involuntary manslaughter should not include dangerous and malevolent crimes such as assault with a deadly weapon or force likely to produce great bodily injury.

2. An active assaultive crime requires more than mere criminal negligence

The *Burroughs* opinion expanded statutory involuntary manslaughter to include "unintentional homicide committed in the course of a noninherently dangerous felony . . . if that felony is committed without due caution and circumspection." (*People v. Burroughs, supra*, 35 Cal.3d at p. 835.) Gleaning from *Burroughs* a broad rule that involuntary manslaughter is supported by any noninherently dangerous felony committed without due caution and circumspection, Bryant asserts that the crime of felony assault with a deadly weapon or force likely to produce great bodily injury

supported such instruction here. (DBM 34-35.) The argument is a non sequitur. The fact a felony may be noninherently dangerous for purposes of second degree felony murder, does not establish that it will support an involuntary manslaughter instruction under *Burroughs*. This is particularly true in the case of felony assault with a deadly weapon or force likely to produce great bodily injury because criminal negligence cannot be the basis for active assaultive crimes.

In dictum, *Burroughs* ruled that involuntary manslaughter can be based on the commission of certain noninherently dangerous felonies when they are committed without due caution and circumspection. (*People v. Burroughs, supra*, 35 Cal.3d at p. 835.)

> The words 'without due caution and circumspection' refer to criminal negligence--unintentional conduct which is gross or reckless, amounting to a disregard of human life or an indifference to the consequences.

(*People v. Evers* (1992) 10 Cal.App.4th 588, 596; *People v. Penny* (1955) 44 Cal.2d 861, 879; *People v. Rios* (2000) 23 Cal.4th 450, 458.) "If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence." (*People v. Evers*, *supra*, 10 Cal.App.4th at p. 596.) Whereas, a defendant's actions that are "plainly deliberate" are not criminally negligent conduct. (*People v. Huynh* (2002) 99 Cal.App.4th 662, 679; *People v. Hayden*, *supra*, 22 Cal.App.4th at p. 58 ["If defendant intentionally shot at Woods, he would have been guilty of something greater than involuntary manslaughter."]; *People v. Evers, supra*, 10 Cal.App.4th at pp. 597-598 [intentional use of violent force precludes finding of criminal negligence]; *People v. Wright* (1976) 60 Cal.App.3d 6, 12-13 [deliberate infliction of violence precluded instructing the jury on involuntary manslaughter criminal negligence theory], disapproved on another point in *People v. Wells* (1996) 12 Cal.4th 979, 988.)

"Assault is defined as 'an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.'" (Cal. Pen. Code, § 240; *People v. Licas* (2007) 41 Cal.4th 362, 366.) A deadly weapon is defined as an instrument that is either "inherently deadly or dangerous" or is used in such a "manner likely to produce death or great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.)

The offense of assault with a deadly weapon requires proof that the defendant willfully did an act with a deadly weapon that by its nature would directly and probably result in the application of force to a person. (*People v. Colantuono* (1994) 7 Cal.4th 206, 214-215, 217-218; *People v. Williams* (2001) 26 Cal.4th 779, 790.) In *Williams*, this Court clarified that "a defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known." (*Id.* at p. 788.) On this standard, "mere recklessness" or "criminal negligence" is not sufficient to establish the crime of assault "because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know [citation]." (*Ibid;* see also *People v. Colantuono, supra,* 7 Cal.4th at p. 219; *People v. Carmen* (1951) 36 Cal.2d 768; *People v. Rocha* (1971) 3 Cal.3d 893, 898.)

> It is hornbook law that recklessness transcends negligence. It requires that the defendant subjectively appreciate the dangerousness of the circumstances. [Citation.] It follows that criminal negligence is not sufficient to establish an assault, an element of the offense of assault with a deadly weapon.

(*People v. Smith* (1997) 57 Cal.App.4th 1470, 1480.)

In *People v. Valdez* (2002) 27 Cal.4th 778, this Court considered the mens rea of general intent and criminal negligence in the context of Penal Code section 273a, subdivision (a), felony child endangerment. *Valdez* acknowledged, felony child endangerment "'is an omnibus statute that

proscribes essentially four branches of conduct.'" (*Valdez, supra*, at p. 783, quoting *People v. Sargent* (1999) 19 Cal.4th 1206, 1215.) These four branches are:

> Any person who, under circumstances or conditions likely to produce great bodily harm or death, [1] willfully causes or permits any child to suffer, or [2] inflicts thereon unjustifiable physical pain or mental suffering, or [3] having the care or custody of any child, willfully causes or permits the person or health of that child to be injured, or [4] willfully causes or permits that child to be placed in a situation where his or her person or health is endangered ....

(*People v. Valdez, supra*, 27 Cal.4th at p. 783; § 273a, subd. (a).)

The Court in *Valdez* described the second category as "direct infliction" and the first, third and fourth categories as "indirect infliction." (*Valdez, supra*, 27 Cal.4th at p. 786.) That is, the felony abuse statute "'broadly includes both active and passive conduct, i.e., child abuse by direct assault and child endangerment by extreme neglect.'" (*Id.* at p. 784, quoting *People v. Smith, supra*, 35 Cal.3d at p. 806.)

The Court in *Valdez* recognized that in *Sargent*, a violent shaken baby case, the proper mens rea for the second category of direct infliction is general criminal intent, similar to battery or assault with a deadly weapon. (*Sargent, supra*, 19 Cal.4th at p. 1220.) The Court in *Sargent* in part based this conclusion on the similarities between the direct infliction of unjustifiable pain or suffering to assault and assault with a deadly weapon. (*Id.* at p. 1220.) In particular, the elements of assault with a deadly weapon were strikingly similar, apart from being committed on a child. (*Ibid.*) And furthermore, the Legislature chose to create a reasonable person standard as the felony child abuse statute "which proscribes assault resulting in a child's death, expressly refers to assault 'by means of force *that to a reasonable person* would be likely to produce great bodily injury." (*Ibid.*)

Relying on this Court's conclusions in *Sargent*, *Valdez* distinguished the general intent standard appropriate when a "statute criminalizes commission of a battery, or direct infliction of unjustifiable pain and suffering" and held the necessary mens rea for the other three categories of indirect infliction is criminal negligence. (*Valdez, supra*, at p. 789.) The Court in *Valdez* recognized,

> criminal negligence is the appropriate standard when the act is intrinsically lawful ... but warrants criminal liability because the surrounding circumstances present a high risk of serious injury. Criminal negligence is not a 'lesser state of mind'; it is a standard for determining when an act ... is such a departure from what would be the conduct of an ordinarily prudent or careful person under the same circumstances."

(*Id.* at pp. 789-790.)

When a defendant commits a killing with criminal negligence, the defendant is presumed to have had an awareness of, and conscious indifference to, the risk to life, regardless of the defendant's actual belief. (See *Walker v. Superior Court* (1988) 47 Cal.3d 112, 136-137; *People v. Watson* (1981) 30 Cal.3d 290, 296; *People v. Butler* (2010) 187 Cal.App.4th 998, 1007.) Whereas, the crime of assault requires "an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of force against another." (*People v. Williams, supra*, 26 Cal.4th at p. 790.) Since an active assault, such as assault with a deadly weapon or force likely to produce great bodily injury, necessitates subjective awareness, it cannot be based solely on criminal negligence. As a result, a criminal negligence test cannot be applied to assaultive crimes of this type because it would be factually impossible to commit an active felonious assault solely based on criminal negligence. Therefore, involuntary manslaughter cannot apply to felony assaultive crimes that are active rather than passive in nature, even if they are not inherently dangerous.

C. This Court Should Not Expand Involuntary Manslaughter to Include Active Felony Assaults

Granting Bryant's request and making a blanket conclusion that assault with a deadly weapon or force likely to produce great bodily injury is a noninherently dangerous felony and warrants an involuntary manslaughter instruction runs counter to public policy based on the fact that "assault with a deadly weapon is inherently dangerous due to the nature of the weapon or the degree of force [used]." (*People v. Cameron* (1994) 30 Cal.App.4th 591, 603; *People v. Ireland, supra*, 70 Cal.2d at pp. 538-539.) Bryant's proposed expansion of involuntary manslaughter equating felony assault with a deadly weapon or force likely to produce great bodily injury with involuntary manslaughter blurs the distinction between murder and manslaughter and creates a category of involuntary manslaughter more serious than that contemplated by the statute and this Court's precedent.

Further, including felony assault with a deadly weapon as a predicate felony for involuntary manslaughter would effectively remove the question of implied malice from the jury. By expressly instructing the jury that commission of an assault committed with a deadly weapon or force likely to produce great bodily injury which results in death, constitutes involuntary manslaughter, the jury, upon finding the underlying felony, would be compelled to return an involuntary manslaughter verdict. Such instruction would effectively preclude a finding of second degree murder; a result contrary to the holding of *Ireland*. (*People v. Ireland, supra*, 70 Cal.2d at p. 539.) The jury must be forced to grapple with the question of whether the defendant's conduct constituted malice, either express or implied, or not at all.

Bryant's proposed expansion to include assault with a deadly weapon or force likely to produce great bodily injury as a basis for involuntary manslaughter is essentially an attempt to circumvent the rule in *Birks* by

transforming the offense into a de facto lesser included offense of murder. (See *People v. Sanchez* (2001) 24 Cal.4th 983, 988 [assault with a deadly weapon is not a lesser included offense of murder]; *People v. Birks* (1998) 19 Ca1.4th 108, 136 [defendant is not entitled to instructions on lesser related offenses].) But a lesser included offense under the circumstances is not warranted. Unlike the circumstances in *Burroughs*, there is no lacuna in the statutory scheme that necessitates expansion to prevent anomalous results. As respondent has argued, an additional theory of manslaughter is unnecessary because the prosecutor may charge the defendant alternatively with murder and felony assault under Penal Code section 245. Although not a homicide offense, felony assault with a deadly weapon or force likely to produce great bodily injury actually carries a higher sentence than involuntary manslaughter if charged in conjunction with an enhancement for personal infliction of great bodily injury, or if charged with aggravating circumstances such as use of varying weapons. (See, e.g., Pen. Code, § 245, subd. (a)(3) & (b).) Thus, if a defendant, such as Bryant, kills in the course of committing at least assault with a deadly weapon or force likely to produce great bodily injury, additional charging options ensure criminal responsibility for the death of another that is commensurate with the seriousness of the conduct.

Bryant advocates treating manslaughter as a "catch-all" concept. However, this reliance on the common law concept completely ignores the current state of the Penal Code and this Court's past decisions that demonstrate both voluntary and involuntary manslaughter have a clear basis in statute and do not exist outside those statutory elements. (See *People v. Flannel*(1979) 25 Cal.3d 668, 677; *People v. Anderson*, *supra*, 28 Cal.4th at pp. 781-783.) The Legislature has refrained from creating a "catch-all" crime of manslaughter, and such Legislative intent should not be disregarded.

As respondent maintains, it is unnecessary to create another theory of manslaughter as the current Penal Code sufficiently covers criminal conduct of this nature. There is no need to judicially create additional theories of manslaughter when there are multiple charging options and the option of acquittal at hand. Moreover, Bryant's conduct did not support an additional instruction based on the *Garcia* dicta or criminal negligence. Bryant's own testimony that she intentionally thrusted the knife at Golden to scare him foreclosed these theories. Even if supported by evidence, a trial court is under no duty to instruct on novel theories that are neither presented by the parties nor well-developed in law.

CONCLUSION

For the foregoing reasons and those stated in Respondent's Brief on the Merits, respondent respectfully requests that this Court reverse the judgment of the Court of Appeal.

Dated: May 16, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S REPLY BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 6336 words.

Dated: May 16, 2012

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