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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. HEATHER ROSE BROWN, Defendant and Appellant.	Case No. S257631

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

ANSWER BRIEF ON THE MERITS

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ISSUES PRESENTED

1. Did the trial court err in instructing the jury on the elements of first degree murder by poison (see *People v. Steger* (1976) 16 Cal.3d 539, 544-546; *People v. Mattison* (1971) 4 Cal.3d 177, 183-184, 186)?

2. Was any such instructional error prejudicial?

INTRODUCTION

During her pregnancy, Heather Rose Brown consumed heroin, methamphetamine, or marijuana on a daily basis. She knew that she was delivering these same drugs to her unborn child. After Dae-Lynn was born, Brown continued to use these drugs knowing that they were present in her breast milk. Once Dae-Lynn's constant crying and fussiness demonstrated to Brown that Dae-Lynn was withdrawing from these illicit drugs, Brown intentionally fed her drug-tainted breast milk to Dae-Lynn. Brown also knowingly refused to seek medical treatment for Dae-Lynn to avoid the consequences associated with her drug use.

Dae-Lynn died at five days old due to polypharmacy—a combination of illicit drugs and over-the-counter medications not suitable for newborns or children under two years of age. A jury found Brown had acted with implied malice and convicted her of first degree murder by poison, child abuse causing death, and possession of heroin and marijuana for sale.

Brown contends the jury was wrongly instructed. She proposes that in order to find her guilty of first degree murder by poison the jury should have been instructed that it must find that she willfully, deliberately, and with premeditation administered

poison to her daughter. Brown is mistaken. The jury was properly instructed that, if it found Brown committed murder, the murder was first degree murder if it also found she murdered by using poison.

Brown asks this Court to take on the Legislature's role by adding a new, unnecessary, and confusing element to first degree murder by poison—that the poison be administered willfully, deliberately, and with premeditation—an element that the Legislature omitted. She supports her position by relying almost entirely on the holdings in torture murder cases. There are important differences between torture murder and murder by poison. For one, the intent required in torture murder is the intent to cause extreme pain and suffering for the purpose of revenge, extortion, persuasion, or some other evil purpose. Indeed it is that cold-blooded mental state which is at the heart of torture murder, that places it in the same class as other willful, deliberate, and premeditated murders. Murder by poison, on the other hand, requires only that the murder was caused by the application of a substance either externally or internally to the body that could kill by its own inherent qualities. Other than malice, murder by poison requires no other mental state for it to be placed on the same footing as any other willful, deliberate, and premeditated murder.

Consequently, the jury instruction for murder by poison need not and should not be the same as the instruction for torture murder. The plain meaning of the statute, this Court's unanimous interpretation of it in *People v. Mattison*, and case law

that spans more than 150 years demonstrates that no additional intent, other than malice aforethought, is necessary for a conviction for murder by poison. Brown's proposed change to the law is not supported by case law and is both unnecessary and confusing.

STATEMENT OF THE CASE

Brown had "always" smoked marijuana. (2 Clerk's Transcript [CT] 408.) But after meeting Daylon Reed, a drug dealer who sold marijuana, heroin, and methamphetamine, she began using all three drugs. (1 Reporter's Transcript [RT] 302-305, 307-308, 628-629, 635, 639, 737.) Brown bragged about being "a high-class tweeker" who liked her "meth just as much as [she] liked her heroin." (2CT 551.) Brown was obsessed with Reed and would do anything for him. (1RT 299, 457, 625, 628-629, 2RT 888.) She provided him with transportation, money, cigarettes, and marijuana. (1RT 628.) She endured his mistreatment and, as a "bigger girl" in high school, she was proud of the fact that she had "settled" a "player." (1RT 628; 2CT 371, 405.) She supported him during his stints in custody, providing him money, emotional support, and comfort, when his own family could not. (1RT 629.) Brown became Reed's partner in drug dealing. (1RT 698-699.) Eventually, she became pregnant with his child. (2CT 371, 419.) She miscarried, but quickly became pregnant again with Reed's child. (1RT 629; 2CT 371.)

Brown knew that heroin and methamphetamine were harmful to human life and, in particular, to her unborn child. (1RT 631-632, 740, 2RT 865-866; 2CT 408-411, 413-415, 422-425,

432, 490, 531-532.) Nevertheless, she continued using drugs throughout her pregnancy, during her labor, after Dae-Lynn was born, and in the hours just before Dae-Lynn died. (1RT 341, 355-358, 362, 366-367, 372-373, 403, 414, 436, 630, 696, 706-707, 738, 743, 753, 755, 757; 2 RT 807, 847, 874-875; 2CT 408-411, 414, 419, 421, 428-430, 477-479, 480-481, 484.) She briefly contemplated abstaining from these drugs during her pregnancy because she knew how harmful they were. (1RT 630-631; 2CT 408-411, 413, 435.) Reed also knew drugs were bad for the baby and obtained methadone-like substances to help Brown withdraw from drugs during her pregnancy. (1RT 632-633, 2CT 406-409, 411, 419.) Ultimately, Brown resumed using heroin, methamphetamine, or marijuana on a daily basis. (*Ibid.*) She also used the substitute drugs Reed provided because she found the high from them was the same as methamphetamine and heroin. (1RT 740; 2CT 408-409, 411, 555.) Brown hid her continued drug use from the people near her who would have tried to stop her. (1RT 462-463, 689, 691-692, 704, 710-711.) Her mother kicked her out of the house after Brown refused to take a drug test. (1RT 689.) Her stepmother never knew until the trial that Brown was using drugs during her pregnancy. (1RT 462-463, 990.)

During her entire pregnancy, Brown went to only one medical appointment—to confirm her pregnancy. (2RT 796; 2CT 371-373, 420.) At that appointment, she tested positive for opiates and marijuana. (2RT 806.) Thereafter, she received no prenatal care. (1RT 352, 618, 2RT 809; 2CT 371-373, 420.) She

deceived both her mother and stepmother into believing that she was going to regular prenatal visits. (1RT 458, 690-691.)

Brown intentionally and surreptitiously delivered her baby in a hotel room, rather than a hospital, because she knew that if she delivered the baby in a hospital, her drug use would be discovered. (1RT 333-334, 340, 433, 445, 690-691, 744-745; 2CT 378.) She also knew that her child would be taken away from her by Child Protective Services. (1RT 630-631, 740; 2CT 420, 429.) In addition, because of Reed's outstanding arrest warrants, she and Reed were actively avoiding law enforcement personnel. (1RT 292, 505; 2CT 368.) Brown haphazardly made plans for the birth of her child. (1RT 333-336, 339, 350-352; 2CT 379.) At the last minute, she arranged for the services of an unlicensed midwife through a friend. (1RT 333-335, 339; 2CT 379.) But she was still using drugs and knew the midwife would disapprove, so in order to hide her drug use from the midwife, Brown smoked heroin and marijuana in the hotel bathroom prior to the midwife's arrival. (1RT 365-367, 743, 753, 2RT 376, 847.) The midwife saw that Brown was ill-prepared for the delivery. (1RT 355, 744.) She also noticed that Brown was unusually calm and relaxed. (1RT 341-342, 357.)

The midwife tried to persuade Brown to go to a hospital and detailed all of the risks involved in giving birth in the hotel room. (1RT 352-355.) Brown refused. (*Ibid.*) She was determined to have the baby in the hotel room with or without the midwife. (1RT 364-365.) Believing there was more risk to the mother and child without her assistance, the midwife stayed. (*Ibid.*) She left

the hotel room briefly to purchase supplies. (1RT 355.) When she returned, Brown, Reed, and a third person were in the bathroom smoking heroin. (1RT 355, 365-367.) Brown was now in active labor. (1RT 356.)

After the infant was born, Brown seemed to be "in a daze" and not very excited about the baby. (1RT 362-363.) And even though the baby was born "pink and chubby," the midwife told Brown that it was very important that both she and the baby be examined at a hospital immediately. (1RT 361, 363-364, 748.) The midwife told Brown what risks she was facing if she did not go to a doctor, including infection, sudden infant death syndrome, jaundice, lactation issues, and infant diseases. (1RT 369-370.) Because it was clear to the midwife that Brown was a drug user, she also told Brown that infants exposed to drugs during pregnancy "detox" after birth and can become "really sick" and "die." (1 RT 370-372.) She told Brown that if the hospital found drugs in the baby's system, "social workers would probably get involved and probably take the baby." (1RT 371.) But Brown already knew this because Reed's sister, also a drug user, had lost her newborn that very way a year earlier. (1RT 630-631; 2CT 437-438, 490-491, 531.)

Brown's own mother had told her more than once that she needed prenatal care and needed to deliver the baby in a hospital. (1RT 690-691.) Brown responded that she was concerned that the baby would test positive for drugs. (1RT 691.) Brown's mother also told her numerous times that she needed to take the baby to a doctor after it was born, but Brown refused for

the same reason—she knew the baby would be tested and reveal Brown's drug use. (1RT 691-693.) Instead, after spending less than 16 hours in the hotel room where she gave birth, Brown gathered up all the evidence of the birth and went to a different hotel. (1RT 744-745; 2CT 433.)

After Dae-Lynn was born, Brown continued to use marijuana, heroin, and methamphetamine. (1RT 616, 746; 2CT, 421-425, 428-429.) Brown knew that the drugs she was using were present in her breast milk. (1RT 746; 2CT 422, 428-431.) She intentionally administered these drugs to Dae-Lynn via her breast milk for the express purpose of addressing the baby's drug withdrawal symptoms—her constant crying, fidgeting, and fussiness—instead of taking Dae-Lynn to a doctor. (1RT 748, 754; 2CT 422-424, 428-429.) Brown's efforts at DIY infant drug withdrawal treatment failed. (2RT 807.)

Three days after Dae-Lynn was born, Brown and Reed took her to Sonora to meet Brown's father and stepmother, who had raised Brown. (1RT 449, 461, 468, 749; 2CT 388.) Upon seeing Dae-Lynn for the first time, both grandparents noticed that she was sick; she was wheezing, shivering, and cold to the touch. (1RT 452-453, 469, 754; 2CT 553.) Even though the house was already at 85 to 90 degrees, they put extra blankets on her and held her for an hour and a half to warm her up. (1RT 452-453, 469-471.) Concerned, Brown's parents told her that Dae-Lynn needed to be seen by a doctor. (1RT 454, 471-473.) Neither of them knew at that time that Brown had used drugs during her pregnancy and that she was still using. (1RT 463, 472-473.)

Brown seemed irritated and annoyed at their advice and cut the visit short. (1RT 454-455.) Brown packed up Dae-Lynn, and she and Reed drove the five hours back to Redding. (1RT 455; 2CT 389.)

The next day, Brown was awakened by hotel management and found Dae-Lynn in respiratory arrest. (1RT 617-618; 2CT 391.) Twenty to thirty minutes had passed since Brown had last seen Dae-Lynn breathing. (1RT 617-618; 2CT 357.) Brown called 911 for medical assistance, but it was too late—Dae-Lynn had died. (2CT 353; 1RT 617, 621.)

Brown never asked anyone how Dae-Lynn had died. (2RT 1021-1022; 2CT 453, 464, 469.) The prosecutor argued in closing that this was because she already knew. (2RT 1021-1022.) Indeed, Brown wrote a letter to Reed after Dae-Lynn's death admitting that the baby's death was her fault, and that her own drug use and the baby's withdrawal from drugs had caused the baby's death. (2RT 887-888.)

In a recorded jail conversation, Brown told her biological mother that the reason she had ignored her stepmother's advice was because her stepmother knew nothing about babies and that Brown's own "motherly instinct" was more valuable. (2CT 553.) Brown searched the Internet for several days after Dae-Lynn's birth to educate herself about the symptoms of drug withdrawal in newborns and how to treat them. (2RT 865-866; 2CT 384.) She researched such topics as: "Opiate withdrawal, causes, symptoms and diagnosis;" "How to help a newborn withdrawing breathe better;" "Will blowing heroin smoke in a baby's face help

with withdrawal;" "What to give a newborn for withdrawal;" "Home remedies for newborn withdrawal;" and "Is Benadryl safe for infants." (2RT 865-866.) Brown fed her baby store-bought formula for nourishment, but gave her drug-tainted breast milk for the express purpose of addressing Dae-Lynn's drug withdrawal symptoms. (2CT 383, 499-500; 1RT 702, 754.) She also gave Dae-Lynn over-the-counter medications not suitable for infants to address Dae-Lynn's fever. (1RT 454, 540, 542-543, 655-656, 668; 2RT 876; 2CT 397-398, 413.)

Brown knew she had other options. She knew that if she had delivered Dae-Lynn in a hospital or had taken her to a doctor after she was born, the state would have cared for her and given her the special medical attention she needed as a drug-addicted newborn. (1RT 630-631; 2CT 416, 420, 429, 474.) Even if Brown had lost custody of Dae-Lynn, Brown knew that would not have been the end of the matter. (2CT 416, 491.) Brown and Reed had talked about Reed's mother fostering the child. (2CT 437-438.) Brown told law enforcement that, if the hospital had taken Dae-Lynn, she would "do everything in her power to get her back;" she would have "fought" for her. (2CT 416, 491.) Instead, with conscious disregard for the danger to Dae-Lynn, Brown administered poison to her and she died.

Brown was charged and convicted of first degree murder by poison, child abuse, and possession of heroin and marijuana for sale. (3CT 686, 692.) The jury found true an allegation the child abuse involved the infliction of injury resulting in death. (Pen. Code, §§ 187, 273a, subd. (a), 12022.95; Health & Saf. Code, §§

11351, 11359, subd. (b).) The trial court sentenced Brown to an unstayed determinate term of three years in prison, followed by an indeterminate term of 25 years to life. (3CT 747-748, 751-756.)

Brown filed a timely appeal in the Court of Appeal. (3CT 759.) In the Court of Appeal, Brown claimed for the first time that the jury had been improperly instructed on first degree murder by poison. She contended that the jurors should have been instructed that, once they found her guilty of murder, they could find her guilty of first degree murder by poison only if she had administered the poison willfully, deliberately, and with premeditation. The Court of Appeal disagreed, holding that the trial court had properly instructed the jury that murder by poison is first degree murder under Penal Code section 189 if the murder is committed with implied malice and the mechanism of death is poison. No other mental state is required.

After the Court of Appeal issued its first decision affirming the judgment and sentence in full, Brown filed a petition for rehearing. The Court of Appeal granted the petition and issued a revised opinion in which it further explained why Brown's argument—that the elements of first degree murder by poison required a finding that the poison be administered willfully, deliberately, and with premeditation—was incorrect.

This Court granted review.

SUMMARY OF THE ARGUMENT

The trial court properly instructed the jury on the elements of first degree murder by poison. In this case, the jurors were

instructed that, if they found Brown had committed murder and that the substance or "mechanism" she used to commit the murder was poison, then the murder was in the first degree. This instruction was proper because the statute classifies murder by poison as first degree murder without requiring any further findings. Indeed, none of the murder mechanisms listed in the statute— i.e., destructive devices, explosives, weapons of mass destruction, metal and armor piercing ammunition, or poison—requires anything more than a finding of malice and the use of one of these devices or substances. It is only the different "methods" of murder listed in the statute—i.e., torture, lying-in-wait, and other willful, deliberate, and premeditated methods of murder—that require the jury to find the existence of additional specific mental states. In support of her argument, Brown relies primarily on torture-murder cases. Brown's reliance on torture-murder cases is misplaced because torture murder is an entirely different crime. First degree torture murder requires an unlawful killing with malice aforethought, but it also requires the intent to cause the victim to suffer severe and extreme pain for the purpose of revenge, persuasion, or extortion. In contrast, first degree murder by poison requires no additional objective or intent. First degree murder by poison requires only an unlawful killing with malice aforethought and the use of poison.

Nonetheless, should this Court find that first degree murder by poison requires the additional mental state of willful, deliberate premeditation, the error in this case was harmless. The evidence establishes beyond a reasonable doubt that Brown

willfully, deliberately, and with premeditation administered poison to her child.

ARGUMENT

I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ON THE ELEMENTS OF FIRST DEGREE MURDER BY POISON

Brown contends that, before she could be convicted of first degree murder by poison, the jury had to be instructed that she administered the poison willfully, deliberately, and with premeditation. (Opening Brief on the Merits [OBM] 18.) She does not challenge the finding of malice and she expressly concedes that the drugs were poison. (OBM 18, fn. 3.)

Instructing the jury as Brown proposes would have added an additional element to the crime of first degree murder by poison that neither case law nor the statute requires. The statute reflects the Legislature's determination that the use of poison—in and of itself—like certain other specified means of committing murder, elevates the crime of murder by poison to the first degree. Once the jury determined that Brown killed unlawfully and acted with implied malice, all it needed to determine was whether she killed by using poison. Thus, the jury was properly instructed, and there was no error.

A. The Law Governing the Crime of Murder

1. Murder is defined by statute

Murder is defined as the unlawful killing of a human being with malice aforethought. (Pen. Code,[1] § 187, subd. (a).) Malice aforethought is either express or implied. (§ 188, subd. (a).) When the evidence establishes an unlawful intent to kill, malice aforethought is express. (§ 188, subd. (a)(1).) When the circumstances surrounding the killing show it was committed with an abandoned and malignant heart, malice aforethought is implied. (§ 188, subd. (a)(2).) This Court has interpreted the phrase "abandoned and malignant heart" to encompass both a physical and a mental component. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) The physical component is an act, the natural consequence of which is dangerous to human life. (*Ibid.*) The mental component is a state of mind that reflects both the knowledge that the act is dangerous to human life and is committed with a conscious disregard for that fact. (*Ibid.*) The statute expressly states that other than express or implied malice, "no other mental state is required for murder." (§ 188, subd. (b).)

2. Degrees of murder are set by statute

Murder is classified by statute into two degrees, first and second. (§ 189, subds. (a) & (b).)[2] Within section 189, subdivision

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[1] Subsequent statutory references are to the Penal Code unless otherwise noted.

[2] "All murder which is perpetuated by means of a destructive device or explosive, a weapon of mass destruction,

(continued...)

(a), first degree murder is described in several ways. One Court of Appeal has described section 189, subdivision (a), as creating three categories of first degree murder. (*People v. Rodriquez* (1998) 66 Cal.App.4th 157, 163-164.) The first category consists of "various types of premeditated killings" and certain specific circumstances "*deemed the equivalent* of premeditation." (*Id*. at p. 163, italics added.) Thus, within the first category are murders "perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of armor or metal piercing ammunition, poison, lying in wait, torture or by any other kind of willful, deliberate and premediated killing." (§ 189, subd. (a).) The second category consists of murders that occur during the commission of specified felonies. (§ 189, subd. (a); *Rodriquez*, at pp. 163-164.) The third category consists of a single crime: shooting from a vehicle with intent to kill. (*Id*. at pp. 163-164.) All murders that are not classified as first degree murder are second degree murder. (§ 189, subd. (b).)

(…continued)
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, 287, 288 or 289, or former section 288a, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree." (§ 189, subds. (a) & (b).)

The degree of murder determines the severity of the punishment. First degree murder, without special circumstances, is punished by a sentence of 25 years to life. (§ 190, subd. (a).) Second degree murder is punished by a sentence of 15 years to life. (*Ibid.*)

3. The first category of first degree murder—the means by which the murder is committed

The first category of first degree murders includes murders that are committed by the use of a specified "means." (§ 189, subd. (a).) The "means" can be further divided into two subgroups—one involving a mechanism, the other a method.

A "mechanism" murder is nothing more than a murder committed by the use of a device or substance. The mechanism subgroup of first degree murder includes: (1) destructive devices; (2) explosives; (3) weapons of mass destruction; (4) armor and metal piercing ammunition; and (5) poison. (§ 189, subd. (a).)[3] Murder by poison occurs when the defendant maliciously places a harmful substance in or upon the body of the victim who dies as a result. (*Mattison*, *supra*, 4 Cal.3d at p. 184-186; *People v. Diaz* (1992) 3 Cal.4th 495, 530.) The defendant does not need to have the intent to kill, just the knowledge that the substance is harmful to human life and a conscious disregard for that fact. (*Mattison*, at p. 183-184, *Diaz*, at p. 568.) An explosive device

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[3] Crimes involving destructive devices were previously codified at Penal Code sections 12301 through 12316. (*People v. DeGuzman* (2003) 113 Cal.App.4th 538, 546.) They were recodified under the Deadly Weapons Recodification Act of 2010 found at sections 16000 et seq. of the Penal Code.

murder occurs when a pipe bomb, Molotov cocktail or some other type of device is placed somewhere where it can harm people and does. (See *People v. Morse* (1992) 2 Cal.App.4th 620, 655-656.) Here again, the defendant does not need to have the intent to kill because the use of the device in and of itself meets the criteria for first degree murder under the statute. (*Id.* at p. 652-653.) The many different types of devices whose use can result in first degree murder are set forth in section 16460 of the Penal Code and includes rockets, specific types of ammunition, breakable containers with flammable liquid, CO2 devices and the like.

A murder in the "method" subgroup is defined by the method or way in which the killing is accomplished. The method subgroup of first degree murders include: (1) lying in wait; (2) torture; and (3) any other willful, deliberate, and premeditated killing. (§ 189, subd. (a); *People v. Wiley* (1976) 18 Cal.3d 162, 172; *Steger*, *supra*, 16 Cal.3d at pp. 544, 555.) Each method murder requires both an additional mental state and additional conduct. For example, "Murder perpetrated by lying in wait requires an intentional murder 'committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage' . . . ." (*People v. Hardy* (1992) 2 Cal.4th 86, 163, quoting *People v. Morales* (1989) 48 Cal.3d 527, 557.) Torture murder requires an additional mental state—the intent to inflict extreme pain and suffering upon the victim for the purpose of achieving a certain objective: revenge, extortion,

persuasion, or some other sadistic purpose. (*Wiley*, at p. 168; *Steger*, at pp. 544, 546.) Likewise, a willful, deliberate, and premeditated killing requires just that: willfulness, deliberation, and premeditation, which can be shown by evidence of the defendant's actions before the killing, the relationship between the parties, and the motive or reason for the killing. (§ 189, subd. (a); *People v. Anderson* (1968) 70 Cal.2d 15, 24-27.)

None of the additional mental states making up the different methods of murder are set forth in the statute. (§ 189, subd. (a).) They were developed through case law, noted above, defining what was meant by torture, lying in wait, and willful, deliberate, and premeditated.

4. The second category—the felony-murder rule

The second category of first degree murder—which is based on the felony-murder rule—does not require the finding of any mental state beyond that required to commit the underlying felony. (§ 189, subd. (a); *People v. Cavitt* (2004) 33 Cal.4th 187, 197.) Thus, if a homicide occurs during the commission or attempted commission of an arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or certain sex offenses, it is murder in the first degree by virtue of that fact. (§ 189, subd. (a).) The purpose of the felony-murder rule is deterrence. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.) The rule achieves this objective by making felons strictly liable for any death that occurs during the commission of the felony, even if the death is accidental or negligent (*id.* at p. 1118-1119) or is the death of an accomplice. (*Cavitt*, at p. 202.) "Indeed, the felony-

murder rule is intended to eliminate the need to plumb the parties' peculiar intent with respect to a killing committed during the perpetration of the felony." (*Id.* at pp. 197-198.)

In *Milton*, the trial court refused to instruct the jury that it could return a verdict of first degree murder under the felony-murder rule only if it found that the defendant had the intent to kill. (*People v. Milton* (1904) 145 Cal. 169, 169-170.) This Court held that such an instruction would be erroneous when the murder occurred during the commission of a statutorily enumerated felony. (*Id.* at p. 170.) Such murders are murders in the first degree by virtue of the statute itself; no additional intent is required. (*Id.* at pp. 171-172.) This Court's opinion observed that even accidental killings during the commission of one of the enumerated felonies would result in a first-degree felony-murder conviction. (*Id.* at p. 171.)

5. The third category—drive-by shootings

The third category of first degree murder contains a single crime—drive-by shootings. (§ 189, subd. (a).) It is committed when someone inside a vehicle shoots at someone outside the vehicle with the intent to kill. (*Ibid.*) This type of first degree murder requires the jury to find express malice, i.e., an unlawful intent to kill, but not premeditation. (*People v. Chavez* (2004) 118 Cal.App.4th 379, 386-387.) While premeditation is unnecessary to establish first degree murder under this clause [§ 189, subd. (a)], a specific intent to kill is necessary. "[P]roof of an unlawful intent to kill is the functional equivalent of express malice." (*Ibid.*) Thus, there is no such crime as first degree murder by

drive-by shooting under an implied malice theory. (See *People v. Sanchez* (2001) 26 Cal.4th 834, 852-853.)

B. This Court Should Reject Brown's Invitation to Rewrite the Murder Statute to Require an Additional Mental State not Mandated by the Legislature

Brown contends that the trial court erred in instructing the jury on the elements of first degree murder by poison. (OBM 18.) She concedes that the methamphetamine and heroin she administered to Dae-Lynn were poisonous to an infant. (OBM 18, fn. 3.) She maintains, however, that the trial court should have instructed the jury sua sponte that the prosecutor had to prove she willfully, deliberately, and with premeditation administered drugs to Dae-Lynn. Brown also describes this standard as "purposefully poisoned her." (OBM 18.) Brown is mistaken about the mental state required to prove first degree murder by poison.

1. The murder-by-poison mechanism of first degree murder, like other mechanism murders, does not require any mental state beyond malice

When the crime in this case was committed—November 3, 2014—section 189, subdivision (a), defined first degree murder 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 [specified felonies], or any murder which is perpetrated by means of [drive-by shooting], is murder of the first degree.

(Stats. 2010, ch. 178, § 51.)[4]

Once a trier of fact finds that an unlawful killing was committed with malice aforethought, the degree of the murder is dictated by statute. (*People v. Jennings* (2010) 50 Cal.4th 616, 640; *People v. Catlin* (2001) 26 Cal.4th 81, 149-150; *People v. Diaz* (1992) 3 Cal.4th 495, 538; *Mattison*, *supra*, 4 Cal.3d at pp. 182.) In other words, if the murder is committed by the use of poison it is automatically—by operation of law—first degree murder. (*Mattison*, at p. 182.) No specific finding of willfulness, deliberation, or premeditation in the administration of the poison is required because the Legislature has determined that this mechanism of killing is, in and of itself, first degree murder deserving of the higher punishment. (See *Catlin*, at p. 159.) "[W]hen a murder is accomplished by means of poison, additional proof of premeditation and deliberation is not required to establish it as first degree murder." (*Diaz*, at p. 538.)

Consequently, the mental state required for first degree murder by poison is either express or implied malice—that is all. (§ 189, subd. (a); *Mattison*, *supra*, 4 Cal.3d at p. 182; *Diaz*, *supra*, 3 Cal.4th at p. 538; *Catlin*, *supra*, 26 Cal.4th at p. 149.) No other mental state is required. (§ 188.)

Poison is defined as "a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities." (CALCRIM No. 521; *People v. Van Deleer* (1878) 53

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[4] As the court below explained, the statute has since been amended slightly to reword the third category, drive-by shootings. (Opinion 13, fn. 5.)

Cal. 147, 148-149.) It is this quality that elevates implied malice murder to murder in the first degree. (§ 189, subd. (a); *Mattison*, *supra*, 4 Cal.3d at pp. 182-183, *Diaz*, *supra*, 3 Cal.3d at p. 538, *Catlin*, *supra*, 26 Cal.4th at p. 149.)

Accordingly, the jury in this case was given instructions based on CALCRIM Nos. 520 (murder) and 521 (murder-by-poison).

> To prove that the defendant is guilty of . . . [murder], the People must prove that:
>
> 1. The defendant committed an act that caused the death of another person;
>
> AND
>
> 2. When the defendant acted, she had a state of mind called malice aforethought;
>
> AND
>
> 3. She killed without lawful excuse.
>
> There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.
>
> The defendant acted with express malice if she unlawfully intended to kill.
>
> The defendant acted with implied malice if:
>
> 1. She intentionally committed an act;
>
> 2. The natural and probable consequences of the act were dangerous to human life;
>
> 3. At the time she acted, she knew her act was dangerous to human life;
>
> AND

4. She deliberately acted with conscious disregard for human life.

Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time.

An act causes death if the death is the direct, natural, and probable consequence of the act and the death would not have happened without the act. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence.

[. . .] An act causes death only if it is a substantial factor in causing the death. A substantial factor is more than a trivial or remote factor. However, it does not need to be the only factor that causes the death.

A parent has a legal duty to provide care for, obtain medical attention and protect a child. If you conclude that the defendant owed a duty to Dae-Lynn Gene Reed, and the defendant failed to perform that duty, her failure to act is the same as doing a negligent or injurious act.

If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CalCrim 521, [the murder-by-poison instruction].

The defendant is guilty of first degree murder if the People have proved that the defendant murdered by using poison.

Poison is a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities.

> The requirements for second degree murder based on express or implied malice are explained in [the previous instruction].

(3CT 619-621; see 2RT 943-945.)

This Court should affirm prior decisional law by holding that murder by poison requires only the concurrence of malice aforethought and the administration of poison. In other words, to convict a defendant of first degree murder by poison, a jury must find only that a defendant unlawfully caused the death of another person by using poison, that is, a substance was applied externally to the body or introduced into the body, that could kill by its own inherent qualities; and the defendant acted with express or implied malice.

As the Court of Appeal said, it is not enough that "the two methods of killing—by torture and by poison—are specifically classified as first degree murder within the same code section." (Opn. 15-16.) The requirement in torture murder cases—that the infliction of pain be willful, deliberate, and premeditated—is imposed because it is part of determining "whether there was 'torture' within the meaning of the statute." (*Steger*, *supra*, 16 Cal.3d at p. 546, fn. 2.) Murder by poison, on the other hand, is a mechanism of murder that, by definition, requires only the administration of poison and malice.

The administration of poison is different from the cold-blooded intent to inflict pain for personal gain or satisfaction. (*Steger*, *supra*, 16 Cal.3d at p. 546.) Poison, by definition, "can kill by its own inherent qualities." (CALCRIM No. 521.) Unlike the infliction of pain, most killings do not feature such inherently

deadly and surreptitious means. (Compare *Steger*, at p. 546 ["most killings involve significant pain"].)

Like the administration of poison, the other means of first degree murder—use of destructive devices, explosives, weapons of mass destruction, and armor penetrating ammunition—are *mechanisms* that employ the use of *inherently* dangerous items or substances. (*People v. Morse* (1992) 2 Cal.App.4th 620, 645.) Indeed, the use of these items or substances involve a "*high probability* of death." (*Ibid*, original italics.) In addition, these mechanisms are not readily available in most cases; their acquisition and use involves thought, planning, and preparation. Indeed, poisons (including pesticides and drugs), destructive devices, explosives and armor piercing ammunition are all regulated materials. (Health & Saf. Code, §§ 11054, 12301; Food & Agr. Code, § 14022; Penal Code, §§ 16460, 16510, 16660.) Additionally, the administration of poison rarely, if ever, occurs in the heat of passion or during an outburst of violence. (See *Steger*, *supra*, 16 Cal.3d at pp. 544, 546; *People v. Cole*, *supra*, 33 Cal.4th at p. 1214.) Moreover, the items and substances involved in mechanism murders can be easily hidden. A bomb, like poison, "is susceptible of fairly easy concealment." (*Morse*, at p. 646.) Thus, the use of a destructive device, explosive, weapon of mass destruction, or armor piercing ammunition are means of committing murder via mechanisms that, by their very nature, convey a willful, deliberate, and premeditated state of mind and require only their use to elevate murder to the first degree. This is because they are deemed the equivalent of premeditation. In

contrast, torture and lying in wait are methods of murder that require an additional mental state and additional conduct. These methods of murder are only capable of regulation when that additional mental state and conduct are clarified with a specific and precise definition of what constitutes "torture" or "lying in wait."

A person who intends to unlawfully kill (express malice) and uses poison or who knows that he or she is administering a poison and consciously disregards the danger to human life (implied malice) has committed a murder "of the same kind, class or nature" (*Ex Parte Williams* (Cal.Ct.App. 1906) 87 P. 565, 566) as "willful, deliberate, and premeditated killing" (§ 189, subd. (a)). If a killing is murder by means of poison, "the use of such means makes the killing first degree murder as a matter of law." (*Mattison*, *supra*, 4 Cal.3d at p. 182.) If a defendant administered poison "'for an evil purpose, so that malice aforethought is shown, it is no defense that he did not intend or expect the death of his victim.'" (*Id*. at p. 183, quoting *People v. Thomas*, (1953) 41 Cal.2d 470, 478.) Once a jury has found that a defendant has administered poison, as defined in Penal Code section 189, the murder is in the first degree by operation of law. (*Mattison*, at p. 183.)

The Court of Appeal here was also correct that "the Legislature could have concluded that an unlawful killing of a human being by poison, with malice aforethought, was more deplorable than second degree murder." (Opn. 16.) Like other forms of first degree murder, administering an inherently deadly

poison "is particularly repugnant and of aggravated character so as to justify harsher punishment" when it "results in murder." (*People v. Laws* (1993) 12 Cal.App.4th 786, 793.)

Finally, the proposed requirement that the administration of poison be willful, deliberate, and premeditated is not found in section 189 nor in any definition of administering poison. Instead, murder by poison is, by its very nature, when the poison is administered as section 189 requires, the functional equivalent of willfulness, deliberation, and premeditation because poison "can kill by its own inherent qualities." (CALCRIM No. 521; *People v. Van Deleer, supra,* 53 Cal. 147, at pp. 148-149.) Although lying in wait and torture are methods, rather than mechanisms, of murder, when each is proven in harmony with its definition expanded by case law, each

> acts as the functional equivalent of proof of premeditation, deliberation and intent to kill. (See *People v. Byrd* (1954) 42 Cal.2d 200, 208 ["If the killing was committed by lying in wait, it was murder of the first degree by force of the statute . . . and the question of premeditation was not further involved"]; *People v. Ward* (1972) 27 Cal.App.3d 218, 231 ["Such conduct . . . take[s] the place of direct proof" of premeditation and deliberation]; *People v. McNeal* (1958) 160 Cal.App.2d 446, 450-451 and cases cited; cf. *People v. Wiley* (1976) 18 Cal.3d 162, 168-169 [torture murder deemed "equated to . . . premeditation and deliberation"].) In view of the foregoing uniform interpretation of the lying-in-wait provision in section 189, imposition of a requirement of independent proof of premeditation, deliberation or intent to kill would be a matter for legislative consideration.

(*People v. Ruiz* (1988) 44 Cal.3d 589, 614; accord, *People v. Laws* (1993) 12 Cal.App.4th 786, 794-795 [declining to require an

intent to kill or injure for first degree murder committed by lying in wait].)

This Court's opinion in *Jennings, supra*, 50 Cal.4th 616 illustrates that the willfulness, deliberation, and premeditation inherent in a finding of torture need not and should not be imported to the other means identified in section 189.[5] In *Jennings*, the parents gave their five-year-old child over-the-counter sleeping pills from a box warning that those pills were not for children under 12 and also gave him Vicodin and Valium—prescription drugs that had not been prescribed for the child. (*Jennings*, at pp. 631, 633-634, 640-641.) Like Brown, the father in *Jennings* did not dispute that the drugs were a substantial factor in causing the child's death or that administering the drugs to a five-year-old child was dangerous to human life. (*Id.* at p. 640.)

This Court considered whether there was sufficient evidence to support Jennings's first degree murder conviction under three theories: murder by poison, murder by torture, and premeditated murder. (*Jennings*, *supra*, 50 Cal.4th at pp. 638-640.) This Court had no difficulty applying different standards for the three theories. For torture murder, this Court recognized that "The elements of first degree murder by torture are: '(1) acts causing death that involve a high degree of probability of the victim's

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[5] Brown does not mention this Court's opinion in *People v. Jennings* and states that "nothing significant has emerged since *Mattison* with respect to what constitutes first degree murder by poison." (OBM 35.)

death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose. [Citations.]' " (*Jennings*, at p. 643, quoting *People v. Cook* (2006) 39 Cal.4th 566, 602.)

For poison murder, on the other hand, this Court stated that "'[a] defendant acting with implied malice who kills his or her victim with poison is guilty of first degree murder even if the defendant lacks the intent to kill.'" (*Jennings*, *supra*, 50 Cal.4th at p. 640, quoting *People v. Diaz*, *supra*, 3 Cal.4th at p. 568.) The *only* mental state that this Court found necessary was malice. (*Jennings*, at pp. 639-640.)[6] Thus, the Court found the evidence sufficient "for a reasonable jury to find that defendant deliberately administered the drugs to [his five-year-old son], and directed [his wife] to do the same, with full knowledge that such conduct endangered [his son's] life and with conscious disregard for that life." (*Id*. at p. 641.)

This Court should not adopt Brown's proposal to amend the statute to require the additional mental state of the willful, deliberate, and premeditated administration of poison. The statute does not require it, and the case law interpreting torture murder does not justify it. A careful analysis of the statute demonstrates that first degree murder can be committed either

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[6] The *Jennings* Court found the evidence sufficient for first degree murder under all three theories. (*Jennings*, *supra*, 50 Cal.4th at p. 639.)

by a mechanism or a method. Poison is a mechanism, and torture is a method. The two are different and for good reason.

2. Torture murder

Despite *Diaz* and other cases that hold no separate proof of premeditation and deliberation is required for a conviction of first degree murder by poison when malice and the use of poison have been proven, Brown insists that the jury must be instructed to find that the poison was administered with premeditation and deliberation. (OBM 18.) No case addressing poison murder has ever said so. Brown's argument relies heavily on the instructions required in torture-murder cases. Brown fails to recognize that the requirement in torture-murder cases arose out of a need to define torture itself and is therefore limited to those cases. Moreover, torture murder, which falls within the subgroup of "method" murders, is different from murder by poison, which falls within the subgroup of "mechanism" murders. "Mechanism" murders do not require a further explanation of the mental state required as do the "method" murders: torture murder, lying in wait murder, and other willful, deliberate or premeditated murders.

A close examination of torture murder demonstrates why its requirement of a particular mental state is unique to torture and cannot be imposed on murder by other means, especially murders committed by the use of a specific mechanism, such as murder by poison. Murder by torture requires the commission of acts with a "high degree of probability of death," committed with the intent to cause "pain and suffering for the purpose of revenge, extortion,

persuasion or for any other sadistic purpose." (*People v. Wiley*, *supra*, 18 Cal.3d at pp. 168-169; see also *Jennings*, *supra*, 50 Cal.4th at p. 643.) Torture murder does not require either an intent to kill or that the victim actually suffer pain. (*Wiley*, at p. 168; *Jennings*, at p. 643.) Instead, this Court explained that certain kinds of murder

> carry with them conclusive evidence of premeditation. These the Legislature has enumerated in the statute (section 189, Pen. Code), and has taken upon itself the responsibility of saying that they shall be deemed and held to be murder in the first degree. … When the killing is perpetrated by means of poison, lying in wait, or torture, the *means* used is held to be conclusive evidence of premeditation.

(*Wiley*, at p. 171, original italics.) Thus, for these and other similar means of committing murder, the statute itself "determines that the killing is willful, deliberate, and premeditated and the trier of the facts has no alternative but to find the offender guilty of murder in the first degree." (*Ibid.*; see *People v. Heslen* (1945) 163 P.2d 21, 27 [first degree murder conviction reversed for lack of either evidence of torture or evidence of willful, deliberate, premeditated murder].)

This Court has explained that torture murder is punished as first degree murder because "it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal gain or satisfaction—which society condemns. Such a crime is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder." (*Steger*, *supra*, 16 Cal.3d at p. 546.) The trier of fact must therefore find this state of mind in order to find torture. (*Ibid.*)

Then, if "a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is murder of the first degree." (*People v. Turville* (1959) 51 Cal.2d 620, 632.)

In *Steger*, the defendant was convicted of first degree murder by torture of her three-year-old stepdaughter. (*Steger*, *supra*, 16 Cal.3d 539.) The child sustained numerous injuries.

> [T]he fatal injury, a subdural hemorrhage covering almost the entire left half of the brain, was undoubtedly caused by trauma. The child's body was also covered from head to toe with cuts, bruises and other injuries, most of which could only have been caused by severe blows. Among the injuries were hemorrhaging of the liver, adrenal gland, intestines, and diaphragm; a laceration of the chin; and fractures of the left cheek bone and right forearm.

(*Id.* at p. 543.) The medical evidence showed that the injuries had been inflicted at various times over the course of a month before the child died. (*Ibid.*) The defendant testified that she had disciplined the child for wetting her pants, sticking her tongue out and generally disobeying her. (*Ibid.*) There was ample evidence that the defendant acted with malice aforethought, either express or implied, sufficient to support the murder conviction. (*Id.* at pp. 543, 548.) The means used, however, simply did not amount to torture. (*Id.* at p. 548.)

This Court upheld the murder conviction but found that the defendant lacked the "cold-blooded intent to inflict extreme or prolonged pain" "for personal gain or satisfaction" necessary for a conviction of murder by torture in the first degree. (*Steger*, *supra* 16 Cal.3d at pp. 546, 548.) In reaching that conclusion, the Court

considered "how torture fits into the scheme of first degree murder in California." (*Id.* at p. 544.) The Court observed that California created two degrees of murder with different punishment for two reasons. (*Ibid.*) Firstly, some murders are easier to prevent than others by the deterrence of severe penalties. (*Id.* at p. 545.) Secondly, "some murders are more deplorable than others. Society instinctively senses a greater revulsion for a calculated, deliberate murder than it does for any other type of killing." (*Ibid.*)

The victim of torture murder often suffers extreme pain and severe wounds, and this is relevant to a finding of torture. (*Steger*, *supra*, 16 Cal.3d at p. 546.) Yet extreme pain and severe wounds, without more, are not enough to elevate the murder to first degree. This is because extreme pain and severe wounds may occur in a variety of killings, including killings occurring in the heat of passion or during an outburst of violence, that are not among the most deplorable murders. (*Steger*, at pp. 544, 546; *People v. Cole* (2004) 33 Cal.4th 1158, 1214.) To be in a category with other deliberate and premeditated killings, then, the circumstances of torture murder must show more. Society condemns "the state of mind of the torturer – the cold-blooded intent to inflict pain for personal gain or satisfaction." (*Steger*, at p. 546.) Torture murder is more prone to deterrence "by first degree murder sanctions and comparatively more deplorable than lesser categories of murder." (*Ibid.*)

In *Wiley*, decided the same year as *Steger*, the defendant aided and abetted her brother in beating her husband with a

hammer and baseball bat in order to recoup money she believed her husband had taken from her. (*People v. Wiley*, *supra*, 18 Cal.3d at pp. 166-168.) He may have been too drunk to feel pain, but he died as a result of the beating. (*Id*. at p. 166.) This Court held that murder by torture does not require either an intent to kill or that the victim actually suffer pain. (*Wiley*, at p. 168; *Jennings*, at p. 643.) Instead, the *Wiley* Court explained, while quoting *Steger*, *supra*, 16 Cal.3d 539, 546, that, the "state of mind" of the killer makes murder by torture first degree murder:

> In holding the evidence of intent to inflict pain insufficient to support the verdict on [a torture-murder] theory [in *Steger*,] we again emphasized that "it is not the amount of pain inflicted which distinguishes a torturer from another murderer, as most killings involve significant pain. [Citation.] Rather, it is the state of mind of the torturer—the cold-blooded intent to inflict pain for personal gain or satisfaction. . . . [W]e hold that murder by means of torture under section 189 is murder committed with a willful, deliberate, and premeditated intent to inflict extreme and prolonged pain."

(*Wiley*, at p. 173.) Thus, *Wiley* and *Steger* hold that the intent to inflict extreme and prolonged pain is the legal equivalent of a finding that the murder was willful, deliberate, and premeditated.

Thus, it is now well established that, to find a defendant guilty of first degree murder by torture, the jury must find "'(1) acts causing death that involve a high degree of probability of the victim's death; and (2) a willful, deliberate, and premeditated intent to cause extreme pain or suffering for the purpose of revenge, extortion, persuasion, or another sadistic purpose.

[Citations.]' (*People v. Cook* (2006) 39 Cal.4th 566, 602.)" (*Jennings*, *supra*, 50 Cal.4th at p. 643.) In other words, in a torture-murder case, there must be proof that the defendant intended to inflict extreme and prolonged pain for a sadistic purpose because that intent and action together define torture for the purpose of section 189. But it has also been clear since *Steger* that the requirement of a willful, deliberate, and premeditated intent, as uniquely defined in the specific context of torture murder, is not applicable to the other means of murder identified in section 189: "We have said that 'When a killing is perpetrated by means of torture, the means used is conclusive evidence of malice and premeditation, and the crime is murder of the first degree.' [Citation.] For each case, however, the question which must first be answered is whether there was 'torture' within the meaning of the statute." (*Steger*, *supra*, 16 Cal.3d at p. 546, fn. 2.)

3. Brown's arguments are not persuasive, and the authorities on which she relies in arguing for a reinterpretation of the law of murder by poison do not support her position

Brown provides several theories and cases to support her position. But they are to no avail.

Brown asserts that "the conduct as defined by CALCRIM 521 [the use of poison] is not more deplorable than other forms of murder. The instruction says nothing about the degree of danger posed by such a substance but merely makes any use of any substance with the mere capability of causing death first degree murder." (OBM 27.) Brown then points out that a car, depending on how it is used, is also capable of causing death.

(OBM 27-28.) What Brown fails to acknowledge is that murder by poison requires more than "the mere use of a substance." (*Ibid.*) It requires that the jury find either the intent to kill or knowledge of the dangerousness of the substance, that the substance could cause death by its own inherent qualities, and that the defendant consciously disregarded the danger to human life. And of course, a car is obviously not the same thing as poison, since a car can be, and usually is, used safely and for legal purposes. One could argue that Vicodin and Valium are also substances that could be used safely and for legal purposes, as in *Jennings*. (*Jennings*, 50 Cal.4th at p. 631.) In addition, most people can see a car coming, which is not the case with poison. Poison can be and usually is hidden, making it more insidious, dangerous and deadly.

Brown also contends that, by its placement in the statute's list of means of killing, "the Legislature requires the same proof of deliberation and premeditation for first degree murder that it does for other types of first degree murder." (OBM 28-29.) This is not a reasonable construction of the statute. Again, section 189 provides, "All murder which is perpetuated 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 . . . is murder of the first degree." (Italics added.) A case cited by Brown (OBM 31) actually refutes her construction of the statutory language:

> Where a statute or other document enumerates several classes of persons or things, and immediately following

> and classed with such enumeration the class embraces 'other' persons or things, the word 'other' will generally be read as 'other such like,' so that the persons or things therein comprised may be read as of the same kind, class, or nature, with and not of a quality superior to, or different from, those specifically enumerated.

(*Ex Parte Williams*, *supra*, 87 P. at p. 567; accord, *People v. Arias* (2008) 45 Cal.4th 169, 180.)

Thus, the phrase in section 189, subdivision (a)—"and any *other* willful, deliberate and premeditated murder" (italics added)—describes poison, torture, and lying in wait as already being in "the same kind, class or nature" as willful, deliberate, and premediated murder. (*Ex Parte Williams*, *supra*, 87 P. at p. 567.) Murders other than the types listed must be found by a jury to be willful, deliberate, and premeditated in order to be of the same character as "specifically listed types." (*People v. Thomas* (1945) 25 Cal.2d 880, 899-901.) As Justice Traynor commented, "By the use of the phrase 'or any *other* kind of willful, deliberate, and premeditated killing' (original italics) following the phrase 'All murder which is perpetrated by means of poison, or lying in wait, torture,' the Legislature identified murder committed by any of the enumerated means as a 'kind of' willful, deliberate, and premeditated killing." (*People v. Thomas*, *supra*, 41 Cal.2d at pp. 477-478 (conc. opn. of Traynor, J.) Brown's construction of the statutory language is flawed.

Brown surveys a few older murder-by-poison cases, urging that they "suggested that proof of an intent or purpose to kill was required to establish [murder by poison]." (OBM 31.) Proof of an intent or purpose to kill would of course establish express malice.

(§ 188, subd. (a)(1).) To the extent that Brown is arguing that malice must be express in murder by poison cases and cannot be implied, that argument is contrary to section 188, which plainly says that "[f]or purposes of Section 187, malice may be express or implied." (§ 188, subd. (a).) In any event, as will be seen, *none* of these cases hold, or even suggest, that the administration of poison must be willful, deliberated, and premeditated. (See OBM 7, 18.)

In *People v. Botkin* (1908) 9 Cal.App. 244, 248, 252-253, Botkin mailed arsenic-laced candy to the wife of a man she wanted for herself. The wife ate the candy and died. (*Id*. at pp. 248, 256.) Botkin was found guilty of first degree murder by poison. (*Id*. at p. 248.) Brown states that Botkin mailed the poison "'with intent that Mrs. Dunning should eat thereof and be killed thereby.'" (OBM 31, quoting *Botkin*, at p. 249.) But, this is simply a description of murder by poison with express malice. The opinion discusses jurisdiction; it did not purport to state any additional intent requirement for murder by poison. "[C]ases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.) Brown also notes that the *Botkin* court had held that "[t]he [trial] court did not err in instructing the jury 'That a malicious and guilty intent is conclusively presumed from the deliberate commission of an unlawful act for the purpose of injuring another.' [Citation.]" (OBM 31, quoting *Botkin*, at p. 257.) Again, this says nothing about what is generally required for murder by poison.

Consequently, the *Botkin* opinion does not support Brown's position.

Brown also cites *People v. Potigian* (1924) 69 Cal.App. 257. (OBM 31.) Motivated by jealously or revenge, Potigian was convicted of first degree murder by poison of her stepdaughter. (*Id.* at p. 264.) Brown notes only that the appellate court held that the evidence supported the jury's finding that the cause of the victim's death was "'poisoning administered with intent to bring about her death.'" (OBM 31, quoting *Potigan*, at p. 264.) In other words, as in *Botkin*, the evidence showed the administration of poison with express malice. The opinion does not discuss willfulness, deliberation, or premeditation, nor does it address implied malice murder by poison, which is the crime for which Brown stands convicted. (*People v. Ault*, *supra*, 33 Cal.4th at p. 1268, fn. 10 ["cases are not authority for propositions not considered."].)

In *People v. Albertson* (1944) 23 Cal.2d 550, the victim died almost immediately after ingesting cyanide-laced vitamin capsules mailed to him disguised as herbal supplements for older men. (*Id.* at pp. 558-559, 562, 567.) Brown's parenthetical description of the holding contends that "the court analyzed sufficiency of the evidence to prove the defendant 'poisoned the capsules with intent to murder.'" (OBM 31, quoting *Albertson,* at pp. 566-568 [*sic*].) Not so. The *Albertson* opinion is factually dense but the only legal issue it addressed was the erroneous admission of prejudicial evidence of an unrelated incident 40 days before the murder and the jury instruction concerning it. (*Id.* at

pp. 568-581.) Because of this error, the judgment and order denying the new trial motion were reversed. (*Id.* at p. 581.) The opinion does not discuss the mental state required for first degree murder by poison. (*People v. Ault*, *supra*, 33 Cal.4th at p. 1268, fn. 10 ["cases are not authority for propositions not considered."].)

Brown also selects language from other types of murder cases that she believes "suggested that proof of an intent or purpose to kill was required to establish [murder by poison]." (OBM 31.) Again, if the cases do suggest that, they would be contrary to section 188 and fall far short of establishing that willfulness, premeditation, and deliberation is required for murder by poison. Furthermore, these cases, as discussed *ante* and *post*, tend to support the People's position.

For example, Brown contends that "one of the earliest cases to interpret murder by poison" was *People v. Milton*, *supra*, 145 Cal. 169. (OBM 29.) But *Milton* (discussed in section I.A.4, *ante*) was not a murder-by-poison case, it was a felony-murder case. (*Id.* at p. 170.) This Court considered and rejected a claim that the prosecution must show willfulness, deliberation, and premeditation in every first degree murder case. (*Ibid.*) The Court did recognize that an Indiana case, *Bechtelheimer v. State* (1876) 54 Ind. 128, had held it was "necessary to establish the unlawful intent or purpose in the administration of the poison." (*Milton*, at pp. 170-171.) The *Milton* Court, however, did not adopt this requirement. (*Id.* at p. 171.) Instead, it observed that no express or implied malice would have been found under California law on the same facts. (*Ibid.*)

Brown also cites *Ex parte Williams* as "suggest[ing] that proof of an intent of purpose to kill [is] required to establish [murder by poison]." (OBM 31.) *Ex parte Williams* is a gambling case interpreting the meaning of the statutory language "for money, checks, credits, or other representative of value." (*Ex Parte Williams*, *supra*, 87 P. at p. 566.) The opinion mentioned the murder statute by analogy. (*Id.* at p. 567.) Brown extracts this quote: "One who administers poison to another with intent to kill, and death results therefrom, is at once guilty of murder in the first degree." (OBM 31, quoting *Williams*, at p. 567.) While true, this establishes only that poison with express malice is first degree murder, not that some additional mental state is required. Indeed, Brown omits part of the sentence, which actually reads: "One who administers poison to another with intent to kill, and death results therefrom, is at once guilty of murder in the first degree, *because the deliberation, malice aforethought, and all have been established*." (*Ex Parte Williams*, at p. 567, italics added.)

Brown cites *People v. Bender* (1945) 27 Cal.2d 164 in support of the proposition that first degree murder by poison requires the willful, deliberate, and premeditated administration of poison. (OBM 22.) Bender was convicted of first degree murder after his wife had been found dead from various head and facial wounds; she also had been strangled, but that was not the cause of her death. (*Bender*, at pp. 167, 171.) This Court found insufficient evidence of torture, which would have made the murder first degree murder. (*Id.* at p. 177.) This Court also found insufficient

evidence of first degree murder based on a theory that the murder was willful, deliberate, and premeditated. (*Id.* at pp. 179-180.) Rather, the evidence suggested heat of passion--"a tempestuous quarrel, hot anger, and a violent killing." (*Id.* at p. 179.) Thus, *Bender* cannot support Brown's position.

Brown points to the reference in *Bender* to the "'cool and deliberate malice'" of murder by poison. (OBM 22, quoting *Bender*, *supra*, 27 Cal.2d at pp. 177-178.) But this is dicta and taken out of context. The entire quote reads:

> 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. The following words of Blackstone, written in another connection (killing by stabbing), apply here: "For in point of solid and substantial justice, it cannot be said that the mode of killing, whether by stabbing, strangling, or shooting, can either extenuate or enhance the guilt; unless where, as in case of poisoning, it carries with it an internal evidence of cool and deliberate malice."

(*Bender*, at pp. 177-178, quoting II Cooley's Blackstone, 4th ed., 1360.)

Thus the reference to poison "carry[ing] with it an internal evidence of cool and deliberate malice" supports the People's position, not Brown's. That is, murder by poison is inherently the equivalent of a murder committed willfully, deliberately and with premeditation and, thus, is murder of the first degree.

Brown relies on this Court's opinion in *People v. Valentine* (1946) 28 Cal.2d 121 for the proposition that the defendant must

"intend some harm" to be guilty of first degree murder by poison. (OBM 32.) *Valentine* involved a neighbor shooting and killing another neighbor after a quarrel, perhaps in self-defense or as the result of sudden provocation. (*Id.* at pp. 125-130.) This Court held that the jury had been misinstructed on the law of homicide in respect to both class and degree. (*Id.* at pp. 125, 130-131.) It was not a poison case, but the Court's interpretation of section 189 is helpful here:

> Similarly the murderer who kills by torture or poison may intend only to inflict suffering, not death. Evidence of the means used might support an inference that the killing was willful, deliberate, and premeditated, but where the jury has found that the killing was by poison, lying in wait, or torture it is not their function to go farther and draw inferences as to the manner of the formation and carrying out of an intention to kill. In such a case the question which the statute (Pen. Code, § 189) answers affirmatively is not, "Is the killing willful, deliberate and premeditated?"; it is, "Is the killing murder of the first degree?" Killings by the means or on the occasions under discussion are murders of the first degree because of the substantive statutory definition of the crime.

(*Valentine*, at p. 136.)

Thus, this Court's interpretation of the statute makes clear that poison murder is first degree murder by statute and does not require the jury to determine whether there was willful, deliberate premeditation. (*Valentine*, *supra*, 28 Cal.2d at p. 136.) Brown's brief quotes the same passage but omits the last two sentences which make this point clear. (OBM 32.)

Brown describes a concurring opinion in *People v. Thomas*, *supra*, 41 Cal.2d 470 as presenting "[a]n even more thorough

analysis of poison murder." (OBM 32.) *Thomas* was not a poison murder case. Thomas was convicted of first degree murder by lying in wait after intentionally shooting a woman inside a restaurant from his car. (*Thomas*, at pp. 471-472.) In *Thomas*, this Court found that the jury was properly instructed that the crime of lying in wait was of the first degree by operation of statute. (*Id*. at p. 473.)

Brown interprets Justice Traynor's concurring opinion in *Thomas* as requiring an "evil purpose" for the administration of poison to be first degree murder. (OBM 33.) The People disagree with Brown's interpretation. Justice Traynor explained that, if a "defendant administered poison to his victim for an evil purpose, so that malice aforethought is shown, it is no defense that he did not intend or expect the death of his victim." (*Thomas*, *supra*, 41 Cal.2d at p. 478 (conc. opn. of Traynor, J.).) This comment recognizes that the requirement is malice, exactly as section 187 says.

The People agree that the concurring opinion is helpful. The point that Brown repeatedly misses in her discussion of these authorities is that the jury must always first find either an intent to kill (express malice) or conscious disregard (implied malice) before a murder of any degree or type is proven. Only then can the jury consider whether the means used qualify it as first degree murder. (See *Thomas*, *supra*, 41 Cal.2d at p. 478 (conc. opn. of Traynor, J.).) As Justice Traynor explained:

> If the killing is murder within the meaning of Penal Code, sections 187 and 188, and is by one of the means enumerated in section 189, the use of such means

> makes the killing as a matter of law the equivalent of "a willful, deliberate, and premeditated killing." Since any question as to the defendant's willfulness, deliberation, and premeditation is taken from the trier of fact by force of the statute [citations], it bears emphasis that a "killing" by one of the three means enumerated in the statute is not the equivalent of a "willful, deliberate, and premeditated killing" unless it is first established that it is murder. Thus, if it is contended that a murder was committed by means of poison, it is not enough to show that a poison was administered and that a death resulted. If the poison was innocently given under the belief that it was a harmless drug and that no serious results would follow, there would be no malice, express or implied, and any resulting death would not be murder. [Citation.]

(*Thomas*, at p. 478 (conc. opn. of Traynor, J.).)

C. Conclusion

For these reasons, the trial court was not required to instruct the jury that Brown's administration of poison was willful, deliberate, or premeditated. Rather, the court correctly instructed the jury that, to find Brown guilty of first degree murder, it had to find that she caused the death of her baby by administering poison; that poison is defined as a substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities; and that it must find that she acted with malice aforethought. The jury was also correctly instructed that, to find malice, it had to find that Brown (1) intended to kill or (2) intentionally committed an act; the natural and probable consequences of which were dangerous to human life; she knew her act was dangerous to human life; and she deliberately acted with conscious disregard for human life.

II. Any Error in Instructing the Jury Was Harmless Beyond a Reasonable Doubt

This Court has asked whether, if there was error in the instructions, the error was harmless. The answer is yes. The evidence in this case demonstrates that, if instructed in the manner appellant now requests, the jury would have found beyond a reasonable doubt that Brown willfully, deliberately, and with premeditation administered poison to Dae-Lynn. Brown knew that the drugs she was using were being transmitted to her baby. Through her Internet research and her own experience, she determined after giving birth that her child was exhibiting signs of drug withdrawal. To address the child's symptoms, Brown again consulted the Internet and, based on her research, was determined to intentionally administer drugs to Dae-Lynn through her breast milk. Brown has conceded that the drugs she administered were poison. As a result, Brown's conduct was willful, deliberate, and premeditated. She knew exactly what she was doing and she acted deliberately. Her actions are the very essence of willful, deliberate, premeditation.

A. Legal Standard for Harmless Error

The failure to instruct the jury on an element of a crime is federal constitutional error, and the judgment must be reversed unless it can be shown that the error is harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24; *People v. Flood* (1998) 18 Cal.4th 470, 492-504; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 324-325.)

> "The thrust of the many constitutional rules governing the conduct of criminal trials is to ensure that those trials lead

> to fair and correct judgments. Where a reviewing court can find that the record developed at trial establishes guilt beyond a reasonable doubt, the interest in fairness has been satisfied and the judgment should be affirmed."

(*People v. Flood*, at p. 492, quoting *Rose v. Clark* (1986) 478 U.S. 570, 579.)

An act is willful if it is done intentionally. (*People v. Delgado* (2017) 2 Cal.5th 544, 571 .) An act is deliberate if it is done after a "careful weighing of considerations in forming a course of action." (*Ibid.*) An act is premeditated if it was thought over in advance of taking the action. (*Ibid.*) "'An intentional killing is premeditated and deliberate if it occurred as the result of preexisting thought and reflection rather than unconsidered or rash impulse.' " (*Jennings*, *supra*, 50 Cal.4th at p. 645, quoting *People v. Stitely* (2005) 35 Cal.4th 514, 543.)

B. Brown's Actions Were Deliberate, Premeditated, and Willful

1. Brown's administration of poison was deliberate

Brown chose to nurse Dae-Lynn with poisoned breast milk after a "careful weighing of considerations." (*Delgado*, *supra*, 2 Cal.5th at p. 571.) Accordingly, her actions were deliberate.

Brown was interviewed by law enforcement the day Dae-Lynn died and again six months later. (2 CT 368-446, 452-535.) Both of her two-hour long interviews were played in their entirety for the jury. (1RT 603-608, 761-764.) In addition, the evidence at trial included testimony from Brown's mother, stepmother, father, the midwife, her drug-using friend Ben Aitken, and the law enforcement officers who interviewed her.

Brown knew that, if she delivered her baby in a hospital, her drug use would be revealed. (1RT 333-334, 340, 433, 445, 690-691, 744-745; 2CT 378.) She knew that her baby would be tested and found positive for illicit drugs. (1RT 371, 450-451, 630-631, 690-693; 2RT 742; 2CT 420, 437-438, 490-491, 531.) She admitted this in her interviews, she discussed it with her mother, she knew it from her sister-in-law's experience, and the midwife had told her. (*Ibid.*) She also knew that having the baby in a hospital could result in her child being taken away from her and placed in foster care. (1RT 626-627, 631; 2CT 490-491, 531-532.) Brown wanted to keep her baby. (2CT 416, 491.) Therefore, she planned to deliver her outside of a hospital environment in a hotel room with an uncertified midwife. (1RT 340, 358-361, 364-365, 549, 628, 630-631; 2RT 711, 738, 741, 755; 2CT 479,481, 488, 502, 510, 530.) Then, after the child started exhibiting signs of drug withdrawal, Brown gave Dae-Lynn drug-tainted breast milk for the express purpose of addressing those drug-withdrawal symptoms. (1RT 549, 553-554, 560, 590, 655-656, 658, 660-661, 746, 755; 2RT 782, 786, 889; 2CT 384, 414, 422, 430, 479, 488, 506-507.) Data taken from Brown's cell phone showed the Internet sites she had researched, how long and how often she had researched them, and what research she saved. (2RT 865-871.) These actions demonstrate that Brown was acting deliberately—according to a plan she had created after a "careful weighing of considerations in forming a course of action." (*Delgado*, *supra*, 2 Cal.5th at p. 571.) Brown knew the consequences of each of her choices. Therefore, Brown's conduct,

being a product of a plan in which she had carefully weighed her options and the consequences of her choices, was proof of her deliberation.

2. Brown's administration of poison was premeditated

Brown also thought over her actions before taking them. (*Delgado*, *supra*, 2 Cal.5th at p. 571.) Thus, Brown premeditated her choice to feed Dae-Lynn her poisoned breast milk.

The evidence demonstrated that Brown clearly thought about her actions before taking them. She thought about the fact that her drug-use was harmful to the baby, which is why she agreed to Reed's plan to interrupt her drug-use while she was pregnant. (1RT 632-633, 2CT 406-409, 411, 419.) During her pregnancy, Brown thought about her plan to deliver the baby and concluded she would deliver her outside of a hospital. (2CT 373; 1RT 351-352, 354-355.) Brown had more than several months to think about this decision. Once the baby was born, on the second day in fact, Brown started seeing signs of drug withdrawal in the child. (2CT 422-423, 428-429.) Brown knew from her own drug-use experience when Dae-Lynn's drug withdrawal symptoms would likely occur and knew what that would feel like. (2CT 409-411, 439, 458.) Brown thought about this and spent hours on the Internet researching and reading about what to do so that she could address those symptoms herself. (2CT 384, 429; 2RT 865-866.) Then she took action and gave Dae-Lynn more drugs by feeding her drug-tainted breast milk. (2CT 422-424, 428-429; 1RT 748, 754.)

Brown's conduct shows that she premeditated her actions. Premeditation occurs "'as a result of a preexisting thought and reflection rather than unconsidered or rash impulse.'" (*Jennings*, *supra*, 50 Cal.4th at p. 645, quoting *People v. Stitely*, *supra*, 35 Cal.4th at p. 543.) Brown thought about and reflected upon her actions. Her actions were not unconsidered or the result of a rash impulse. She did not mistakenly or accidentally give Dae-Lynn drugs in breast milk. Her actions were willful, deliberate, and premeditated.

3. Brown's administration of poison was willful

Finally, an act is willful if it is done intentionally. (*Delgado*, *supra*, 2 Cal.5th at p. 571.) From the time Brown became pregnant to the time Dae-Lynn died, Brown intentionally consumed heroin, methamphetamine and marijuana. (1RT 302-305, 307-308, 628-629, 635, 639, 737.) She consumed these drugs knowing that her fetus was also being exposed to the drugs she was using. (2RT 865-866; 2CT 422-423.) Brown also knew that the drugs she was using were being transmitted to her breast milk. (1RT 746; 2CT 414, 422-423, 428-430.) Indeed, she intentionally administered these same drugs to Dae-Lynn after she was born precisely because she knew they were in her breast milk. (1RT 549, 553-554, 560, 590, 655-656, 658, 660-661, 746, 754-755; 2RT 782, 786, 865-866, 889; 2CT 384, 414, 422, 424, 430, 479, 488, 496, 502, 506-507, 530.) Brown's use of drugs and delivery of them to Dae-Lynn was not accidental, involuntary or uninformed. Brown committed these acts with the full knowledge of what she was doing. Because Brown did these acts

voluntarily, knowledgeably and intentionally, they were willful. (*Delgado*, at p. 571.)

4. Any instructional error was harmless beyond a reasonable doubt

Consequently, if the jury had been instructed that it must find Brown willfully, deliberately, and with premeditation administered drugs to Dae-Lynn in order to find her guilty of first degree murder by poison, it would have, beyond a reasonable doubt, so found. Indeed, the jury was instructed that a person commits an act willfully "when he or she does it willingly or on purpose." (3CT 640.) The jury was also instructed that in order to find implied malice it must find that Brown committed an intentional act and that she acted deliberately. (3CT 619.) The considerable evidence supporting the jury's finding on guilt of first degree murder by poison also supported a finding of deliberation, premeditation, and willfulness. Thus, any error in failing to instruct the jury that Brown's actions in administering poison to her child must be willful, deliberate and premediated was harmless beyond a reasonable doubt.

CONCLUSION

For all of these reasons, the People respectfully ask this Court to affirm the judgment.

Dated: June 3, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached ANSWER BRIEF ON THE MERITS uses a 13 point Century Schoolbook font and contains 13,911 words.

Dated: June 3, 2020

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

Case Name: People v. Brown
No.: S257631

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 collecting and processing electronic and physical correspondence. 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 with postage thereon fully prepaid that same day in the ordinary course of business. Correspondence that is submitted electronically is transmitted using the TrueFiling electronic filing system. Participants who are registered with TrueFiling will be served electronically. Participants in this case who are not registered with TrueFiling will receive hard copies of said correspondence through the mail via the United States Postal Service or a commercial carrier.

On June 3, 2020, I electronically served the attached ANSWER BRIEF ON THE MERITS by transmitting a true copy via this Court's TrueFiling system. Because one or more of the participants in this case have not registered with the Court's TrueFiling system or are unable to receive electronic correspondence, on June 3, 2020, I placed a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550, addressed as follows:

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(1) Courtesy copy for Councils Client

The Honorable Stephanie A. Bridgett
Shasta County District Attorney's Office
1355 West Street
Redding, CA 96001

Clerk of the Court
Shasta County Superior Court
1500 Court Street, Room 219
Redding, CA 96001

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 June 3, 2020, at Sacramento, California.

M. Sanchez	/s/ *M. Sanchez*
Declarant	Signature

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Supreme Court of California
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STATE OF CALIFORNIA
Supreme Court of California

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