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.

S257631

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

REPLY BRIEF ON THE MERITS

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HEATHER ROSE BROWN by
appointment of the California
Supreme Court

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I.

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

Respondent contends that, *unlike* first degree murder by torture ("torture murder"), first degree murder by poison ("poison murder") does *not* require proof of an "objective or intent" beyond merely the malice inherent in murder itself. (ABM, at p. 19.) Instead, as respondent reads Penal Code section 189,[1] the only additional element the prosecutor needs to prove is the "use of poison" (ABM, at p. 19), a substance with the mere capability of killing (CALCRIM 521). Respondent's distinction between poison murder and torture murder is unpersuasive.

A. Categories of First Degree Murder

As respondent recognizes (ABM, at p. 22), all murders are of the second degree unless the prosecutor proves beyond a reasonable doubt additional elements that elevate them to first degree murder. (§ 189, subds. (a), (b); see *People v. Steger* (1976) 16 Cal.3d 539, 545 [for first degree murder, "the prosecution is required to prove not only the elements of murder, but also the

[1] Hereafter, all statutory references are to the Penal Code unless otherwise indicated.

aggravating elements of first degree murder"]; *People v. Moreno* (1936) 6 Cal.2d 480, 484 ["All murders not of the first degree are of the second degree"].) Section 189 defines first degree murder as follows:

> All murder that 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 that 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 of the vehicle with the intent to inflict death, is murder of the first degree.

(§ 189, subd. (a), emphasis added.) Respondent characterizes that provision as describing three categories of first degree murder. (ABM, at p. 22; accord, *People v. Chavez* (2004) 118 Cal.App.4th 379, 385; *People v. Rodriguez* (1998) 66 Cal.App.4th 157, 163.) The first are premeditated killings, denoted by the italicized portion in the quote above. (ABM, at p. 22; § 189, subd. (a).) The second are "felony murders (murders perpetrated during felonies or attempted felonies such as arson, rape, carjacking, etc.)." (*Rodriguez*, at p. 163; accord, *Chavez*, at p. 385; ABM, at p. 22.) The third are murders "perpetrated by means of discharging a firearm from a motor vehicle." (§ 189, subd. (a); see ABM, at p. 22; *Chavez*, at p. 385; *Rodriguez*, at pp. 163-164.) Ms. Brown has no quarrel with this classification.

However, respondent then divides the first "category" into two distinct "subgroups" with different evidentiary requirements—"mechanism" and "method" subgroups. (ABM, at pp. 23-25.) Respondent lists as enumerated "mechanisms" the use of destructive devices, explosives, weapons of mass destruction, armor and metal piercing ammunition, and poison. (ABM, at p. 23.) It contends the "method" subgroup consists of lying in wait, torture, and any other willful, deliberate, and premeditated killing. (RB, at p. 24.) Respondent claims that while each "method" listed in section 189 requires proof of "both an additional mental state and additional conduct" beyond merely malice and the use of the method in question, the "mechanisms" do not require such extra proof.[2] (RB, at pp. 23-24.)

Respondent cites no authority holding or even implying that the Legislature intended the first category of first degree murder to describe distinct subgroups, each with their own unique evidentiary requirements. Instead, respondent rests its novel interpretation of the statute on characteristics it believes distinguish its so-called "mechanisms" from "methods."

According to respondent, unlike the listed "methods," the "mechanisms" (1) "employ the use of *inherently* dangerous items or substances," presenting "a '*high probability* of death,'" (2) require "thought, planning, and preparation" to acquire because they are "regulated materials," (3) rarely occur "in the heat of

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[2] To be clear, respondent actually writes that murder by one of the listed "mechanisms" does not require proof of "intent to kill." (ABM, at pp. 23-24.) However, proof of intent to kill is not at issue in this case. (See OBM, at pp. 6, 21.)

passion or during an outburst of violence," and (4) "can be easily hidden." (ABM, at p. 32, emphasis in original.) Respondent concludes therefrom that, "by their very nature," their use conveys "a willful, deliberate, and premeditated state of mind," which relieves the prosecutor of the burden to prove more than their mere use "to elevate murder to the first degree." (ABM, at p. 32.) On the other hand, respondent argues that the use of "torture and lying in wait" are not deemed "the equivalent of premeditation" and are not "capable of regulation" in the absence of "an additional mental state and additional conduct." (ABM, at pp. 32-33.) Respondent's logic is flawed.

1. Risk of Death

In *People v. Morse* (1992) 2 Cal.App.4th 620, 645-646, cited by respondent (ABM, at p. 32), the Court of Appeal held that, for purposes of second degree felony murder, the reckless or malicious possession of a bomb is inherently dangerous because it poses a high probability of death. However, the court never addressed the inherent dangerousness of any of the other "mechanisms" identified by respondent.

Notably, the mere use of "poison" does not necessarily pose a high probability of death. Poison is any "substance . . . that *can* kill by its own inherent qualities" (3CT 621 [CALCRIM 521], emphasis added), meaning a substance qualifies as long as it is merely "able to" cause death (Webster's Ninth New Collegiate Dict. (1991) p. 200 ["can" means "to be able to do, make, or accomplish" or "be physically . . . able to"]; see *People v. Van Deleer* (1878) 53 Cal.147, 148-149 [poison is any substance which,

"'by its own inherent qualities, is capable of destroying life'"]). In other words, even substances that pose a low probability of causing death when applied to or introduced into the body are poisons.

It has been held that furnishing and administering heroin or other narcotics to a minor is inherently dangerous to human life for purposes of second degree felony murder. (*People v. Poindexter* (1958) 51 Cal.2d 142, 149; *People v. Taylor* (1970) 11 Cal.App.3d 57, 58-59.) However, dangerousness is determined by viewing the underlying "felony" in the abstract, without regard for the defendant's specific conduct. (*People v. Hansen* (1994) 9 Cal.4th 300, 309, overruled on other grounds in *People v. Chun* (2009) 45 Cal.4th 1172, 1199.) As defined by CALCRIM 521, the use of poison, in the abstract, does not require that the substance be heroin or another narcotic or that the victim be particularly vulnerable to its dangers, such as a minor. As noted, the use of any substance that merely has the ability to kill is enough, and it need not be inherently dangerous. (Cf. *People v. Burroughs* (1984) 35 Cal.3d 824, 830-832, overruled on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89 [the felony practice of medicine without a license requiring "'circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, *or death*'" is not "inherently dangerous to human life"]; *People v. Caffero* (1989) 207 Cal.App.3d 678, 683 [felony child abuse under circumstances "likely to produce 'great bodily harm or death'" is not inherently dangerous because statute "may be violated by conduct which does not endanger human life"].)

Even if the use of poison is inherently dangerous, that does not distinguish it from torture. A review of the torture statute's language demonstrates its inherently dangerous qualities.[3] Section 206 defines torture as inflicting "great bodily injury" "with the intent to cause cruel or extreme pain and suffering for the purpose of revenge, extortion, persuasion, or for any sadistic purpose." Thus, the proscribed conduct does not merely pose the risk of great bodily injury; the statute requires its infliction along with an effort to cause "cruel or extreme pain and suffering." Other, less dangerous, conduct has been deemed inherently dangerous. (Cf. *People v. Ordonez* (1991) 226 Cal.App.3d 1207, 1225 [aggravated kidnapping for ransom, extortion or reward].) Moreover, torture has been the basis of second degree felony murder prosecutions (see *People v. Gonzales* (2011) 51 Cal.4th 894, 939; *People v. Whisenhunt* (2008) 44 Cal.4th 174, 216), casting it as a felony that poses a high probability of death (see *Hansen, supra,* 9 Cal.4th at p. 309).[4] (See also *Tison v. Ariz.*

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[3] As will be discussed in more detail below, prior to section 206's enactment in 1990, torture was defined only by case law. However, section 206 adopted the pre-1990 definition of that offense, so it is relevant to this inquiry.

[4] The standard instruction on torture murder requires the jury to find not only willfulness, deliberation and premeditation but also that the "acts causing death involved a high degree of probability of death." (CALCRIM 521.) This court has repeatedly characterized this "probability" requirement as an element of torture murder. (*People v. Powell* (2018) 5 Cal.5th 921, 944; *People v. Wiley* (1976) 18 Cal.3d 162, 167-168.) However, CALCRIM 521 does not require the jury to find the same risk of

(1987) 481 U.S. 137, 157 [107 S.Ct. 1676, 95 L.Ed.2d 127] ["some nonintentional murderers may be among the most dangerous and inhumane of all—the person who tortures another not caring whether the victim lives or dies"].)

Furthermore, the danger posed by a substance that is merely capable of causing death—a poison—is a far cry less than the danger posed by the other so-called "mechanisms." For example, weapons of mass destruction, explosives, and

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death for poison murder, and the trial court did not include such a requirement in the instruction in this case (3CT 621).

Although unclear, the "probability" requirement in CALCRIM 521 actually appears to have originated as an element not of torture murder but of implied malice. (See *People v. Thomas* (1953) 41 Cal.2d 470, 480 (conc. opn. of Traynor, J.) [implied malice requires "an act that involves a high degree of probability that it will result in death"].) As this court later made clear, an act involving a high probability of death defines the objective component of implied malice. (*People v. Knoller* (2007) 41 Cal.4th 139, 157.) Even so, it is not a part of the standard instruction defining implied malice for juries anymore, which instead requires only an act the "natural and probable consequences" of which is "dangerous to human life." (CALCRIM 520; 3CT 619.) This court has decided the two definitions are "substantively similar." (*People v. Nieto Benitez* (1992) 4 Cal.4th 91, 104.) Ms. Brown doubts a jury would view them the same though. If one were to ask what the consequence of an act was to his or her life, receiving a response that it would probably result in one's death or pose a high probability of one's death would be very different from, and more terrifying than, receiving a response that it would probably pose a danger to one's life.

Nevertheless, it is odd that the standard instruction on torture murder appears to incorporate an element of implied malice, especially one no longer included in the standard malice instruction. It is odder still that those charged with torture murder benefit from the additional requirement whereas those charged with poison murder do not.

destructive devices have the ability to kill on a massive scale, and the scope of their damage can be uncontrollable. (See *Morse, supra,* 2 Cal.App.4th at p. 646 [a bomb maker may lose control over "'its detonation'" and the device "'may wreak enormous havoc on persons and property'" and victimize "'unintended sufferers'"].) Also, the ammunition in question is that which is "designed primarily to penetrate metal or armor" (see § 12022.2; see also § 16660 [designed primarily to penetrate a body vest or body shield]), which makes it uniquely deadly and its use particularly cruel and aggravated. It is so dangerous that the Legislature has made it unlawful to possess. (§ 30315.) By contrast, as defined by CALCRIM 521, a poison can include over-the-counter and prescription medications with safe and appropriate personal uses. (See Argument I.A.2., *post*.) That cannot be said of the other items with which respondent attempts to equate it.

2. Regulation of Materials

Next, respondent's effort to distinguish the "mechanisms" from "methods" based on their status as "regulated materials" that are difficult to obtain is misplaced. No doubt, the possession and use of destructive devices, explosives, weapons of mass destruction, and armor and metal piercing ammunition is regulated. (See, e.g., Pen. Code, § 11415 et seq. [weapons of mass destruction]; Pen. Code, §§ 12022.2, 16660, 30315 [metal or armor piercing ammunition]; Pen. Code, §§ 16460, 16510, 18710 et seq. [destructive devices and explosives]; Health & Saf. Code, § 12000 et seq. [explosives].) Additionally, some substances that

might be considered poisons are as well. (See, e.g., Health & Saf. Code, § 11350 [unlawful possession of controlled substance, including heroin].) Arguably their status as regulated materials might make them somewhat difficult to acquire.

However, as defined by CALCRIM 521, a poison need not be a substance that is so regulated it is difficult to obtain. Certainly, over-the-counter drugs and medicines "can kill" depending upon how they are used. (*People v. Jennings* (2010) 50 Cal.4th 616, 631 [child killed by, *inter alia*, administering "Unisom, an over-the-counter sleep aid"]; *People v. Kraft* (2000) 23 Cal.4th 978, 1010 [death caused by "[p]otentially fatal levels of acetaminophen, as well as . . . antihistamines"].) Drugs prescribed to one person for a legitimate condition can be used improperly and kill as well. (*Jennings*, at p. 631 [administration of "prescription painkillers that had been prescribed to defendant for a work-related injury"].) Additionally, substances specifically designed to kill pests, such as rodents, or for agricultural purposes are readily available and can be lethal to humans. (*People v. Catlin* (2001) 26 Cal.4th 81, 99-100 ["poisoning by paraquat, a highly toxic poison used in agriculture to control weeds"]; *Tyler v. State* (1981) 247 Ga. 119, 120 [274 S.E.2d 549, 551] [defendant killed her husband by administering him rat poison].) All of these fall within CALCRIM 521's definition of poison. These substances require no special "thought, planning, and preparation" to acquire and, in many cases, may be something a particular individual has in his or her possession and readily available for proper and approved purposes before

deciding to administer them to another person improperly. Thus, the mere use of a substance that can kill does not necessarily reflect the willful, deliberate and premeditated mindset respondent claims it does.

3. Rash Conduct

Respondent also attempts to distinguish the use of poison from the other "means" enumerated in section 189 by claiming it "rarely, if ever, occurs in the heat of passion or during an outburst of violence." (ABM, at p. 32.) Respondent's logic is once again flawed.

As support, respondent cites cases holding that proof of torture murder requires more than the infliction of severe and horrible wounds, which may be consistent with an explosion of violence in the heat of passion rather than a calculated killing. (ABM, at p. 32, citing *People v. Cole* (2004) 33 Cal.4th 1158, 1214 and *Steger, supra,* 16 Cal.3d at pp. 544, 546.) It does not follow, though, that tortures resulting from passion rather than calculation are the norm or that rash and impulsive poisonings are more rare than calculated ones.

Moreover, respondent includes lying in wait in the same subgroup as torture. However, regarding the potential for rashness, it has little in common with torture. The act of lying in wait, by its very nature, shows premeditation and deliberation. (See *People v. Stanley* (1995) 10 Cal.4th 764, 794-795 ["Lying in wait is the functional equivalent of proof of premeditation, deliberation, and intent to kill"].)

> For lying in wait, . . . the prosecution must prove the elements of concealment of purpose together with "a

> substantial period of watching and waiting for an opportune time to act, and . . . immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage."

(*Id.* at p. 795; see Black's Law Dict. (6th ed. 1990) p. 949 [defined as "lying hidden or concealed for the purpose of making a sudden and unexpected attack upon a person when he shall arrive at the scene"].)

Lying in wait is not the functional equivalent of proof of premeditation, deliberation and intent to kill because of some definitional expansion resulting from case law, as respondent claims. (ABM, at p. 34.) That would imply there is a definition of lying in wait that is narrower than the one required for murder by lying in wait under section 189. There is not. "[T]here is a well-defined meaning of that phrase in the common law" and it parallels the definition our courts have applied to its use in section 189. (*Davis v. State* (Ind. 1985) 477 N.E.2d 889, 895.) Other jurisdictions have defined it likewise and found that, at its core, it requires concealment, watching, and waiting to ambush another. (*Id.* at pp. 895-896.) As noted above, Black's Law Dictionary defines lying in wait substantially the same way.

Given its inherent qualities, it seems impossible that any act of lying in wait could be rash and other than calculated. On the other hand, the use of poison does not require proof of concealment, watching and waiting. It is thus more likely to be committed rashly than lying in wait, but respondent classifies it in its "mechanism" subgroup while lumping lying in wait in the

same "method" subgroup as torture. Its classification in that regard makes no sense.

4. Ability to Conceal

Respondent's contention that the concealability of the items in its "mechanisms" subgroup readily distinguish it from torture and lying in wait misses the mark as well. Preliminarily, respondent cites *Morse, supra,* 2 Cal.App.4th at page 646 for support. (ABM, at p. 32.) However, *Morse* does not speak to this issue.

At issue in *Morse* was whether the felony of recklessly or maliciously possessing a bomb in a residential area was inherently dangerous such that it could support a second degree felony murder conviction. (*Morse, supra,* 2 Cal.App.4th at pp. 644-646.) The court held it was for a myriad of reasons, including its ease of concealment *when compared with "its vast destructive potentialities."* (*Id.* at p. 646, emphasis added.)

Regardless, that something is able to be hidden does not automatically indicate its use is willful, deliberate and premeditated, as respondent believes. (ABM, at p. 32.) A handgun can be concealed but can also be used rashly and impulsively rather than as part of a preconceived plan and after deliberate thought.

Moreover, torture too can be concealed. In fact, it would seem to be an inherent, although not necessarily required, characteristic of the offense. Because torture is the infliction of great bodily injury with the intent to cause cruel or extreme pain and suffering and for the purpose of revenge, extortion,

persuasion or for a sadistic purpose, its successful accomplishment would be facilitated by conducting it in a place where nobody could intervene to stop it. (See, e.g., *People v. Lewis* (2004) 120 Cal.App.4th 882, 885-886 [victim brought to an apartment where she suffered a prolonged and violent beating].)

Finally, lying in wait, which respondent groups with torture, also requires concealment by its very nature. As noted above, its conduct is defined as "lying hidden or concealed." (Black's Law Dict. (6th ed. 1990) p. 949.) Despite that fact, respondent places it in a different subgroup than poison.

5. Conclusory Thoughts on Subgroups

As shown, respondent's effort to manufacture a distinction between so-called "mechanisms" and "methods" to justify the definition of poison used in CALCRIM 521 makes no sense when closely scrutinized. It is likely why no authority exists to support it.

Not only do the characteristics of each "subgroup" respondent cites fail to justify that classification system but, from a historic perspective, the "subgroups" make no sense either. None of the so-called "mechanisms" were originally included in the precursor to section 189 except poison. The statute as written in 1856 defined first degree murder as "all murder which has been perpetrated by means of poison, lying in wait, torture, or other kind of willful, deliberate and premediated killing." (*People v. Bealoba* (1861) 17 Cal. 389, 393.)[5] Logically, if the Legislature

[5] In the opening brief, Ms. Brown mistakenly cited *Bealoba* as 7 Cal. 389 rather than 17 Cal. 389. (OBM, at p. 20.)

had intended to distinguish and treat differently poison from the other means of committing first degree murder, it would have used language to do so. However, it did not. Instead, it lumped "poison" in with "lying in wait" and "torture" as the three "means" of committing first degree murder in addition to the other "kind[s]" of willful, deliberate and premeditated killings.

Notably, courts have consistently treated these different "means," particularly poison and torture, as within the same class and have often relied on one to help define the other. (See, e.g., *People v. Mattison* (1971) 4 Cal.3d 177, 183-184 [discussing murder by torture and lying in wait to help define murder by poison]; *People v. Bender* (1945) 27 Cal.2d 164, 177-178 [equating torture murder with poison murder]; *People v. Sanchez* (1864) 24 Cal. 17, 29 [the first "class" of first degree murder is killings "perpetrated by means of poison, etc."].)

A closer examination of the "means" contained in respondent's "mechanism" subgroup further undermines its argument. For example, in 2002, the Legislature added weapons of mass destruction ("WMDs") to section 189. (Stats. 2002, ch. 606, § 1 (AB 1838).) According to respondent, because WMDs are among section 189's enumerated "mechanisms," their mere use is all that should be necessary to elevate a WMD murder to first degree. (ABM, at p. 32.) But the Legislature defined WMDs in a way that incorporates additional mental states that respondent claims need not be proved with "mechanisms."

At the time it amended section 189, the Legislature incorporated into it the definition of WMDs contained in section

11417. The latter section defines WMDs as various chemical, biological, radiological, and industrial agents. (§ 11417, subd. (a)(1).) It requires that some be "weaponized," meaning deliberately processed for use as a weapon. (§ 11417, subd. (a)(6).) It also includes the use of vehicles but only "with the intent of causing widespread great bodily injury or death by causing a fire or explosion or the release of a chemical, biological, or radioactive agent." (§ 11417, subd. (a)(1), (a)(7).) Similarly, it includes within its definition certain industrial or commercial materials but only when "knowingly utilized . . . with the intent to cause harm and the use places persons or animals at risk of serious injury, illness, or death, or endangers the environment." (§ 11417, subd. (b).)

B. "Means" Require Premeditation, Etc.

What the WMD definitions reveal is the crux of the issue before this court. In rejecting the effort to require proof of willfulness, deliberation and premeditation in poison-murder cases, respondent relies on the general principle repeatedly articulated by this court that "the means used is conclusive evidence" of those elements. (ABM, at pp. 38, quoting *Wiley, supra,* 18 Cal.3d at p. 171, *Steger, supra,* 16 Cal.3d at p. 546, fn. 2; see also *Sanchez, supra,* 24 Cal.17 at p. 29; *Bealoba, supra,* 17 Cal. at p. 394.) However, the use of the means can only be conclusive evidence of those elements *if the means or their use are defined in a way that suggests or implies the existence of those elements*.

For example, lying in wait is defined to include watching and waiting for an opportune moment to attack one's target. (*Stanley, supra,* 10 Cal.4th 764 at p. 795.) As discussed above, those elements were part of lying in wait even at common law. As this court recently wrote, watching and waiting distinguish "those cases in which a defendant acts insidiously from those in which he acts out of rash impulse." (*People v. Sandoval* (2015) 62 Cal.4th 394, 416, internal quotation marks omitted.) A "sufficient period of watching and waiting" shows "a state of mind equivalent to premeditation or deliberation." (*Ibid.*, internal quotation marks omitted.) It is why lying in wait is deemed "the functional equivalent of proof of premeditation, deliberation, and intent to kill" (*Stanley*, at pp. 794-795) and why, once established, "no further evidence of premeditation and deliberation is required in order to convict the defendant of first degree murder" (*Sandoval*, at p. 416).

Torture murder is different. Until 1990's enactment of section 206, torture was not defined as a crime in our Penal Code. (See *People v. Barrera* (1993) 14 Cal.App.4th 1555, 1559.) However, the offense "has a long-standing, judicially recognized meaning." (*Id.* at p. 1563.)

"Torture combines a specific state of mind with a particular type of violent conduct causing significant personal injury." (*Barrera, supra,* 14 Cal.App.4th at p. 1564.) As defined by at least one dictionary, it is an "'[a]ct or process of inflicting severe pain, esp. as a punishment in order to extort confession, or in revenge.'" (*People v. Tubby* (1949) 34 Cal.2d 72, 76; accord, *Barrera*, at p.

1563.) This court has held, "'Implicit in that definition is the requirement of an intent to cause pain and suffering.'" (*Tubby*, at p. 77; accord, *Barrera*, at p. 1563.) More clearly, torture requires an intent "to cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity." (*Tubby*, at p. 77; accord, *Barrera,* at p. 1564.)

"As written, section 206 continues the *Tubby* definition." (*Barrera, supra,* 14 Cal.App.4th at p. 1564.) Notably, what is neither implicit nor explicit in the codification of the *Tubby* definition is premeditation and deliberation. (*People v. Vital* (1996) 45 Cal.App.4th 441, 444 ["Section 206 makes no reference to 'willful, deliberate and premeditated'" and thus those are not elements of the crime]; *People v. Pre* (2004) 117 Cal.App.4th 413, 420 ["the torture offense in section 206 does not require that the defendant act with premeditation or deliberation"]; see also *Gonzales, supra,* 51 Cal.4th at p. 939 [second degree torture felony murder "does not require premeditation"].) It necessarily follows that premeditation and deliberation are not embodied in torture as defined by *Tubby* either.

In *Steger*, a torture-murder case, this court recited the historical definition of torture from *Tubby* and characterized it as "restrictive." (*Steger, supra,* 16 Cal.3d at p. 544.) The court observed it had "consistently followed this strict construction of torture in cases applying section 189." (*Id.* at p. 544.) It then explained the court's purpose in taking the case was to "examine

how torture fits into the scheme of first degree murder in California."[6] (*Ibid*.)

Steger noted that, when one kills by means of torture, "'the means used is conclusive evidence of malice and premeditation.'" (*Steger, supra,* 16 Cal.3d at p. 546, fn. 2.) However, it also noted that that is only true if torture is defined in a way that satisfies the requirements of section 189: "For each case, however, the question which must first be answered is whether there was 'torture' within the meaning of the statute." (*Ibid*.) As discussed in the opening brief, it reviewed the language used in section 189 and concluded the Legislature intended torture murder, like other first degree murders, to require evidence "of deliberation and premeditation."[7] (*Steger*, at pp. 545-546.) Specifically, it held,

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[6] The court was examining whether a more liberal interpretation of torture that permitted inferring the specific intent to cause cruel suffering "almost exclusively from the severity of the wounds on the victim's body" was appropriate. (*Steger, supra,* 16 Cal.3d at p. 544.) In doing so, though, it addressed the need for proof of premeditation and deliberation, as will be shown.

[7] In *Steger*, this court explained its reasoning as follows:

> "By conjoining the words 'willful, deliberate, and premeditated' in its definition and limitation of the character of killings falling within murder of the first degree, the Legislature apparently emphasized its intention to require as an element of such crime substantially more reflection than may be involved in the mere formation of a specific intent to kill." [Citation.] Further, we have declared that "'Deliberation means careful consideration and examination of the reasons for and against a choice or measure.' [Citation.]" [Citation.] [¶] In this

"[M]urder by means of torture under section 189 is murder committed with a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Id.* at p. 546.) It made clear that proof of those elements was necessary because the act of torturing another does not imply premeditation and deliberation: "It is possible to inflict severe and prolonged pain on another without deliberation or premeditation, but it may not be torture under section 189." (*Steger, supra,* 16 Cal.3d at p. 546, fn. 2.)

Significantly, *Steger*'s analysis of section 189 was not limited to torture murders. As *Steger* explained, the Legislature intended murders falling within the first category of first degree murder to "'require[] as an element of such crime substantially more reflection than may be involved in" the lower degree of murder, even one committed with "'a specific intent to kill.'" (*Steger, supra,* 16 Cal.3d at p. 545.) It cited two reasons for categorizing certain murders as first degree murders that carry more severe penalties, both of which rested on the "calculated, deliberate" nature of the conduct—(1) they are more susceptible to deterrence than uncalculated killings, and (2) society views them as more deplorable than second degree murders. (*Id.* at pp.

> perspective the phrasing of section 189 becomes clearer: "All murder which is perpetrated by means of . . . torture, or by *any other kind* of willful, deliberate, and premeditated killing . . . is murder of the first degree . . .." In labeling torture as a "kind" of premeditated killing, the Legislature requires the same proof of deliberation and premeditation for first degree torture murder that it does for other types of first degree murder.

(*Steger, supra,* 16 Cal.3d at pp. 545-546.)

544-545.) It wrote that the "element of calculated deliberation is required for . . . most . . . kinds of first degree murder." (*Id.* at p. 546.) And it concluded that a killing committed with a "cold-blooded intent . . . . is more susceptible to the deterrence of first degree murder sanctions and comparatively more deplorable than lesser categories of murder." (*Ibid*.)

CALCRIM 521's definition of a killing by means of poison is problematic. All it requires to elevate an implied malice murder to first degree murder is the use of a substance that "can kill by its own inherent qualities." (CALCRIM 521.) It does not define either the use of the substance or the substance itself in a way that would suggest or imply premeditation and deliberation. It does not require that the administration of poison be "cold-blooded" or "calculated" in any way.

It is not enough, contrary to respondent's suggestion (ABM, at pp. 28, 51), that a jury must find at least implied malice. All of the "means" enumerated in section 189 require at least implied malice. The issue is what is required to elevate the crime from second degree implied malice murder to a first degree premeditated and deliberate murder. As *Steger* holds, it is evidence of premeditation and deliberation.

As discussed above, respondent claims premeditation and deliberation are implied in the use of poison because of its inherent dangerousness, its difficulty to acquire, the rareness of using it rashly, and its concealability. As shown, none of the points have merit. The lack of merit in respondent's contention is

particularly apparent when CALCRIM 521's definition of the use of poison is applied to the facts of this case.

The evidence showed D.R. died as a result of post-birth ingestion of drugs—methamphetamine, heroin or both. (1RT 404, 407-409, 661, 665-666.) Ms. Brown admitted continuing to consume both drugs after D.R. was born because she could not control her use. (2CT 414, 420-423, 513.) She also admitted she was aware that her breast milk could be tainted by the drugs she consumed and thus the drugs could be passed to her child if fed her breast milk, and she still chose to feed D.R. the milk. (2CT 383, 422, 425, 429.)

The only evidence of why she gave D.R. drug-tainted breast milk came from Ms. Brown herself. Regarding the danger of exposure, Ms. Brown told police that, while she understood the drugs were bad for children, she did not breastfeed D.R. every day. (2CT 517.) She said she did not think she fed the baby "that much" of her breast milk and relied considerably on formula. (2CT 431, 441-442.) In fact, Ms. Brown claimed that, on the morning of D.R.'s death, she pumped some breast milk and fed it to D.R. but also gave her "a lot" of formula. (2CT 396, 400, 426.) She also did not think she (Ms. Brown) was ingesting enough drugs to cause D.R. to overdose but also failed to realize that D.R., as a small child, would be more susceptible to the effects of drugs than an adult. (2CT 530-531.)

Not only did she think the danger to D.R. was low, Ms. Brown thought the benefits of breast milk were great. She told the police that her mother told her breastfeeding was important

for mother-child bonding. (2CT 505.) She also said that D.R. was showing symptoms of withdrawals and heard that "breast milk" can ease those symptoms. (2CT 422-424, 430, 496.) When asked if she intended to give D.R. the drugs to take the edge off the withdrawals, Ms. Brown responded, "Absolutely not." (2CT 500-501.) Ms. Brown claimed she only wanted "to help her" baby and never intended her any harm. (2CT 520.) After D.R.'s death, she acknowledged she made a mistake. (2CT 499, 500.)

Arguably Ms. Brown's conduct evinced implied malice because, objectively, feeding the baby drug-tainted breast milk posed a danger to her life and, subjectively, Ms. Brown was aware there was such a risk and engaged in that conduct anyways. (See *People v. Patterson* (1989) 49 Cal.3d 615, 626 [defining implied malice]; accord, *Nieto Benitez, supra,* 4 Cal.4th at pp. 106-107 [same].) However, it does not evince the premeditation and deliberation required to elevate her conduct to first degree murder because it was never her purpose in feeding D.R. breast milk to administer drugs (the poison) to the child. Ms. Brown's purpose was to give her baby the milk, which happened to contain drugs, believing the benefits of the milk outweighed any danger posed by the drugs. Her conduct does not reflect the kind of "cold-blooded" or "calculated" use of one of the "means" enumerated in section 189 that the Legislature intended to qualify it as first degree murder. It is not the kind of conduct that is easily deterred by the imposition of severe penalties because it was done without thorough and accurate consideration of its consequences. It was also not more deplorable than second degree

implied malice murders (cf. *People v. Watson* (1981) 30 Cal.3d 290, 296-297 [vehicular homicide with implied malice]) and was less deplorable than other murders committed by the enumerated means (murders that employed torture, lying in wait, weapons of mass destruction, armor piercing ammunition, etc.) and especially murders in which one purposefully administers poison to his or her victim. Nevertheless, her conduct falls squarely within CALCRIM 521's definition of first degree murder by poison.

In its brief, respondent does not directly address whether poison murder under section 189 encompasses a mother who feeds her child breast milk that happens to be tainted with drugs out of good intentions and believing no harm would come to her because the benefits of the milk outweigh the danger of the drugs. Respondent mostly focuses on the use of poison in the abstract, claiming that, by its nature, it necessarily reflects premeditation and deliberation. However, it never demonstrates how those elements are reflected in the facts of this case. It never explains what about the mother's conduct is "'particularly repugnant and of aggravated character'" justifying the harsher punishment imposed for first degree murders. (ABM, at pp. 33-34.) The only time respondent attempts to apply the facts of this case to the law is when it assumes instructional error and argues the error was harmless, pushing the narrative that premeditation and deliberation were proven because Ms. Brown intended all along to give her baby the drugs, using milk merely as the delivery method. (ABM, at pp. 53-58.)

That is not to say that, in presenting its argument regarding the elements of poison murder, respondent never cites fact patterns constituting that offense. It just never addresses any that mirror the facts in this case. For instance, respondent relies on *Jennings, supra,* 50 Cal.4th 616 for support. (ABM, at pp. 35-36.) As respondent notes, in *Jennings*, the defendant and his wife

> 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.

(ABM, at p. 35, citing *Jennings*, at p. 640.) The evidence showed drug toxicity was the main cause of the child's death. (*Jennings*, at p. 633.) Attempting to equate that case with this one, respondent writes,

> Like Brown,[8] 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.

(ABM, at p. 35, citing *Jennings*, at p. 640.) However, that case is unlike this one.

In *Jennings*, the trial court instructed the jury on three separate theories of first degree murder—poison murder, torture

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[8] Actually, Ms. Brown has consistently disputed that drug exposure was a substantial factor in causing D.R.'s death. Ms. Brown challenged the sufficiency of the evidence of such causation in the court below, and she raised that issue as well in her petition for review. The issue is not before this court because the court did not grant review on it.

murder, and premeditated murder. (*Jennings, supra,* 50 Cal.4th at p. 639.) The verdict did not indicate the theory on which the jury rested its guilty verdict. (*Ibid*.) The defendant challenged his conviction under all three theories.

Respondent contends *Jennings* supports its position because, in addressing the sufficiency of the evidence of poison murder, this court only required proof of malice. (ABM, at p. 36.) Respondent's reliance on *Jennings* is misplaced because the court was not presented with the same issue presented here. In that case, the defendant challenged his conviction on the poison-murder theory on two grounds—the jury found the poison-murder special circumstance not true and his wife administered the fatal doses of drugs without the intent to kill. (*Jennings, supra,* 50 Cal.4th at p. 639.) The defendant never contended the administration of the drugs was not willful, deliberate and premeditated. To do so would have been frivolous as he essentially admitted to police it was. (See *id*. at p. 631.) In fact, he challenged proof of premeditation and deliberation on appeal to undermine his conviction based on the premeditated-murder theory, and this court rejected that claim, finding that "a potentially lethal dose of prescription and over-the-counter sedatives was deliberately administered" to the child "consistent with a preconceived design to kill." (*Id.* at p. 646.) Given the issues raised and the facts presented, that the *Jennings* court did not find premeditation and deliberation to be elements of poison murder is insignificant. Cases are not authority for propositions not considered. (*People v. Brown* (2012) 54 Cal.4th 314, 330.)

The facts in this case are a far cry from those in *Jennings*. There was no evidence Ms. Brown purposefully, with premeditation and deliberation, gave her baby drugs like the defendant in *Jennings* did. Moreover, the issue presented herein is different than the issue considered in that case, as noted.

Admittedly, other cases on which respondent relies for support, like *Jennings*, contain language indicating only proof of malice and the use of poison is required to establish poison murder. However, those cases do not aid respondent any more than *Jennings* did.

For example, respondent cites *People v. Mattison* (1971) 4 Cal.3d 177, 182, for the proposition that "if the murder is committed by the use of poison it is automatically—by operation of law—first degree murder." (ABM, at p. 28; see also ABM, at pp. 23, 33.) But like in *Jennings*, the court in *Mattison* was not presented with the issue raised in this case.

In *Mattison*, the defendant was convicted of *second degree murder* based on supplying the victim, a fellow prison inmate, methyl alcohol, which the victim drank, causing his death. (*Mattison, supra,* 4 Cal.3d at pp. 180-182.) The defendant claimed the jury should not have been instructed on second degree felony murder because murder by poison can only be first degree murder. (*Id.* at pp. 181-182.) Regarding the aggravated murder, the court wrote, "The amount of evidence that was adduced may or may not have been sufficient to support a conviction of first degree murder by poison. That is not the question before us." (*Id.* at p. 184.)

However, before addressing the issue the defendant raised, the court did address first degree poison murder as well as other "means" constituting first degree murder. Respondent correctly observes the court wrote that, as long as malice is proven, "the use of such means makes the killing first degree murder as a matter of law." (*Mattison, supra,* 4 Cal.3d at p. 182.) However, the court never addressed what constitutes "use of" the enumerated "means." As discussed above, how that use is defined determines whether it falls within the scope of section 189.

At most, *Mattison* hinted at the type of conduct that constitutes first degree poison murder. Focusing on the requirements of implied malice, it did find that "'innocently'" giving someone a poison "'under the belief that it was a harmless drug and that no serious results would follow'" was not enough for poison murder and that administering poison "'for an evil purpose'" was required.[9] (*Mattison, supra,* 4 Cal.3d at p. 183.)

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[9] *Mattison* also noted that the defendant must have "deliberately administered the poison" to his victim. (*Mattison*, supra, 4 Cal.3d at p. 183-184.) Many of the cases addressing implied malice in the poison murder context have held likewise. That is because this court has held implied malice requires, *inter alia*, an act "'*deliberately performed* by a person who knows that his conduct endangers the life of another'" and with conscious disregard for that life. (*Knoller, supra,* 41 Cal.4th at p. 143, emphasis added.) The standard instruction on implied malice includes that element as well, requiring the jury to find that the defendant "deliberately acted with conscious disregard for human life." (CALCRIM 520.) However, the reference to *deliberate performance* does more to confuse this issue than to help resolve it.

In the context of a willful, deliberate and premeditated murder, "deliberate means formed or arrived at or determined

Moreover, revealing the limited nature of *Mattison*'s holding regarding first degree murder, the court relied on the *Tubby* definition of torture and concluded the prosecution was only required to prove

> "the defendant intended to 'cause cruel suffering on the part of the object of the attack, either for the purpose of revenge, extortion, persuasion, or to satisfy some other untoward propensity.'"

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upon as a result of careful thought and weighing of considerations for and against the proposed course of action." (*People v. Burney* (2009) 47 Cal.4th 203, 235, internal quotation marks omitted.) However, the reference to a "deliberately performed" act in the context of implied malice does not seem to mean the same thing. Rather it appears to be synonymous with intentional, meaning not accidental. (See *Watson, supra,* 30 Cal.3d at p. 307 [implied malice requires "act done *intentionally* with conscious disregard for life"]; *People v. Gilbert* (1965) 63 Cal.2d 690, 705, judgment vacated on other grounds in *Gilbert v. California* (1967) 388 U.S. 263 [18 L.Ed.2d 1178, 87 S.Ct. 1951] [implied malice exists when the "defendant or his accomplice, with a conscious disregard for life, *intentionally commits* an act that is likely to cause death"]; *People v. Johnson* (2013) 221 Cal.App.4th 623, 631 [same]; see also *Merced Mutual Ins. Co. v. Mendez* (1989) 213 Cal.App.3d 41, 50 [in insurance context, an "accident . . . is never present when the insured performs a deliberate act"].) In fact, despite the reference to a deliberate act in the instruction, CALCRIM 520 expressly states that malice "does not require deliberation." (See 3CT 619.)

Importantly, on the facts of this case, the requirement of deliberately performing the act—whether it means intentional or after careful thought—does not fill the gap left by CALCRIM 521's definition of poison. Under CALCRIM 521, deliberately giving D.R. *the milk* was enough to satisfy the element of implied malice. However, it is not enough to establish that *the administration of the poison itself* was willful, deliberate and premeditated.

(*Mattison, supra,* 4 Cal.3d at p. 183.) It did not also hold the use of torture must be willful, deliberate and premeditated. That came later in *Steger*, which expanded upon our understanding of what the Legislature intended by its enumeration of "means" in section 189.

Next, respondent misplaces reliance on *Catlin, supra,* 26 Cal.4th at page 159, which it contends stands for the proposition that

> [n]o 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.

(ABM, at p. 28.) *Catlin* suggests no such thing. At other pages, it did hold that poison murder does not require intent to kill and that, in terms of satisfying the malice requirement to establish the crime as murder, implied malice is sufficient. (*Catlin, supra,* 26 Cal.4th at pp. 150, 158.) However, that is a wholly unremarkable proposition and does not help answer the question posed by this case: what constitutes the use of poison so as to bring it within the scope of section 189? Notably, at one point, the court rejected the defendant's claim that poison murder is "not particularly reprehensible," finding it is because the "poisoner acts surreptitiously, thus avoiding detection and defeating any chance at self-defense, and often betrays the most intimate trust." (*Catlin, supra,* 26 Cal.4th at p. 159.) Implicit in that understanding of the use of poison, though, is that

administration of the poison must be at least willful or intentional if not also premeditated and deliberate.

Respondent also quotes this court in *People v. Diaz* (1992) 3 Cal.4th 495, 538 as follows: "'[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.'" (ABM, at p. 28.) The quote is taken out of context. At issue in that case was whether the prosecutor was required to prove that *the killings* were willful, deliberate and premeditated and, relying on authorities interpreting murder by torture and lying in wait, held no such proof was required. (*Diaz*, at p. 538, citing *People v. Ruiz* (1988) 44 Cal.3d 589, 614 [lying in wait] and *Wiley, supra,* 18 Cal.3d at p. 168 [torture]; see also *Wiley*, at p. 173 [torture murder requires "a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain"].) Like the other cases on which respondent relies, *Diaz* says nothing about whether section 189 requires the willful, deliberate and premeditated *administration of poison* as an element of first degree murder by poison. For the reasons discussed above and in the opening brief, Ms. Brown maintains it does.[10]

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[10] Respondent takes exception with Ms. Brown's survey of older poison murder cases—most of which were included in a single string citation (OBM, at p. 31)—that suggest proof of an intent to kill is required. (ABM, at pp. 44-48.) Ms. Brown is not suggesting, and has never argued, that intent to kill is a necessary element of poison murder, and she has repeatedly made that clear. (See, e.g., OBM, at p. 6.) As explained in the opening brief, the survey was presented simply to show that poison murder "has not been as clearly defined as murder by

C. Prejudice

Finally, respondent argues that, even if the jury was misinstructed on the elements of poison murder, the error was harmless beyond a reasonable doubt because the evidence overwhelmingly showed Ms. Brown willfully, deliberately and with premeditation administered poison to her baby. (ABM, at pp. 53-58.) The crux of respondent's argument is that, because Ms. Brown researched Internet websites discussing infant withdrawals from drug exposure, she necessarily gave D.R. her milk for the purpose of administering the drugs contained therein as a means of addressing her withdrawal symptoms. (ABM, at pp. 55-57.) The problem with that argument is that there is no evidence any of the websites she visited suggested exposing her child to drugs as a treatment, and respondent does not claim they did. Thus, the only evidence as to why she gave her child drug-tainted milk came from her own statement.

As noted in the opening brief (and above), Ms. Brown claimed that she heard *the breast milk itself* was helpful in dealing with withdrawal symptoms (and breastfeeding was important for mother-child bonding). (OBM, at pp. 38-39.) She denied giving D.R. breast milk for the purpose of introducing any drugs contained therein into the baby's system. (OBM, at p. 39.) Accordingly, Ms. Brown continues to maintain the instructional error was prejudicial.

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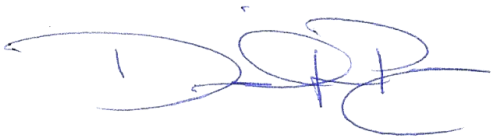
torture and has experienced some conflicting interpretations." (OBM, at p. 26.)

CONCLUSION

For the reasons stated above and in her opening brief, Ms. Brown asks this court to reverse the judgment.

Dated: June 23, 2020. Respectfully submitted,



David L. Polsky
Attorney for Ms. Brown

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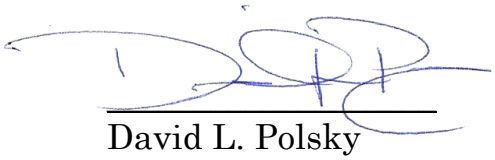

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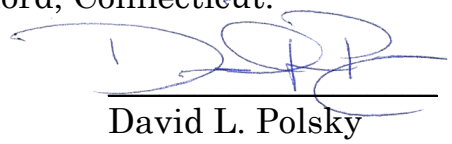

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