

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

The People of the State)	
of California,)	S257631
)	
Plaintiff and Respondent,)	
)	
v.)	
)	
Heather Rose Brown,)	
)	
Defendant and Appellant.)	
_____)	

Third Appellate District No .C085988
 Shasta County Superior Court No. 15F2440
 The Honorable Stephen H. Baker, Judge

**Application to File Amicus Curiae Brief and
 Amicus Curiae Brief of Amicus Populi
 In Support of the People of the State of California**

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To the Honorable Tani Cantil-Sakauye, Chief Justice, and the Honorable Associate Justices of the Supreme Court:

Amicus curiae Amicus Populi requests permission to file the attached amicus curiae brief in support of respondent, The People of the State of California, pursuant to Rule 8.520(f) of the California Rules of Court.

Amicus Populi represents individuals who worked as prosecutors during the past three decades, when California became much safer. #From 1993 to 1998 alone, the state’s homicide rate was cut in half. From 1993 to 2014, the homicide rate dropped from 12.9 to 4.4 (per 100,000), its lowest in 50 years. The violent crime rate dropped from 1059 to 393 in 2014, so there were about 3,330 fewer homicides and 256,000 fewer violent crimes in that year than there would have been had crime remained at its 1993 level. The crime rate’s decline saved tens of thousands of lives and prevented millions of violent crimes over two decades.

Amicus Populi works to preserve this improvement, balancing the imperative of punishing offenders according to their culpability with the imperative of protecting public safety, the first duty of government. (See *People ex rel. Gallo v. Acuna* (1996) 14 Cal.4th 1090, 1126; *People v. Blake* (1884) 65 Cal. 275, 277.)

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

If this Court grants this application, amicus curiae requests the Court permit the filing of this brief which is bound with the application.

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Counsel for Amicus Curiae
Amicus Populi

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**Amicus Curiae Brief of Amicus Populi
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Table of Contents

Table of Authorities	6
Question Presented	8
Introduction	9
Statement of Case and Facts	10
Argument	11
I. Section 189 does not require the defendant willfully, deliberately, and with premeditation administered poison to the victim.	11
II. The mental state for poison murder does not track the required mental state for torture murder or lying-in-wait murder.	15
A. An additional mental state is needed for torture murder so that section 189 narrows the number of murders qualifying as first degree murder, but there is no such need with instrumentalities like explosives or poison.	15
B. Torture murder's first degree status rests on heightened subjective culpability, which requires an enhanced mental state, whereas poison murder's first degree status rests on heightened objective danger.	18
III. This Court should confine any new rule to this case's exceptional facts.	21
Conclusion	22
Certification of Word Count	23
Proof of Service	

Table of Authorities

Cases

<i>People v. Atkins</i> (2001) 25 Cal.4th 76	11
<i>People v. Bernard</i> (1946) 28 Cal.2d 207	17
<i>People v. Blair</i> (2005) 36 Cal.4th 686, disapproved on another ground in <i>People v. Rices</i> (2017) 4 Cal.5th 49	9, 11, 12
<i>People v. Catlin</i> (2001) 26 Cal.4th 81	9, 11
<i>People v. Ceja</i> (1993) 4 Cal.3d 1134	16
<i>People v. Cobler</i> (1934) 2 Cal.App.2d 375	17
<i>People v. Ireland</i> (1969) 70 Cal.2d 522	16
<i>People v. Knoller</i> (2007) 41 Cal.4th 139	11
<i>People v. Mattison</i> (1971) 4 Cal.3d 177	8, 13-16, 21
<i>People v. Milton</i> (1904) 145 Cal. 169	13
<i>People v. Morse</i> (1992) 2 Cal.App.4th 620	18, 19
<i>People v. Steger</i> (1976) 16 Cal.3d 539	8, 15, 18
<i>People v. Taylor</i> (2004) 32 Cal.4th 863	21
<i>People v. Thomas</i> (1953) 41 Cal.2d 470	13, 16, 17
<i>People v. Thompson</i> (1994) 24 Cal.App.4th 299	19
<i>The Queen v. Saunders & Archer</i> (1576) 75 Eng. Rep. 706	19

Statutes

Penal Code

Section 20 11
Section 189 14, 15, 17
Section 347 14

Secondary Sources

Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law*
(2004) 38 U.S.F. L. Rev. 261 18

Question Presented

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)? Was any such instructional error prejudicial?

Introduction

Longstanding precedent establishes malice, whether express or implied, is necessary *and sufficient* for first degree poison murder liability. (*People v. Blair* (2005) 36 Cal.4th 686, 745, disapproved on another ground in *People v. Rices* (2017) 4 Cal.5th 49, 76; *People v. Catlin* (2001) 26 Cal.4th 81, 149.) This Court should decline appellant’s invitation to create a new mental state element for the offense, based on the additional mental state required for a torture murder conviction. An additional mental element is needed for torture murder because Penal Code section 189 must narrow the murders supporting a conviction for first degree murder, and the test cannot be only “severe pain” because that is common to most murders. *People v. Steger* (1976) 16 Cal.3d 539, 544.) The instrument of poison (or explosives) is unusual enough that the first degree “exception” will not swallow the second degree “rule” without it. Furthermore, unlike torture, which rests on the killer’s aggravated subjective *culpability*, poison murders, like those using explosives, creates special objective *dangers* to the public. Poison (and explosives) can kill many unintended victims, even after the offender’s apprehension or death, they are easy to conceal, and enable the perpetrator to kill from a great distance. These murders can be easier to commit and harder to solve than others. They deserve the more severe categorization of first degree murder.

Statement of the Case and Facts

Amicus curiae incorporates by reference the statement of case and facts prepared by the People.

Argument

I. Section 189 does not require the defendant willfully, deliberately, and with premeditation administered poison to the victim.

Defendants may commit first degree poison murder through express malice or implied malice. (*People v. Blair* (2005) 36 Cal.4th 686, 745, disapproved on another ground in *People v. Rices* (2017) 4 Cal.5th 49, 76; *People v. Catlin* (2001) 26 Cal.4th 81, 149.) Implied malice appears where the defendant deliberately performs an act, dangerous to human life, with awareness of the danger and conscious disregard for life. (*People v. Knoller* (2007) 41 Cal.4th 139, 152.) No mental state beyond implied malice is necessary.

Crimes require a union of act and intent. (Pen. Code, § 20.) An intent is “general” where the crime describes only a particular act, and “specific” where it refers to the defendant’s intent to do some further act or achieve some future consequence. (*People v. Atkins* (2001) 25 Cal.4th 76, 82.) Accordingly, a defendant acts with implied malice where she deliberately pulls the trigger of a loaded gun, aware that it was loaded and could kill people in the line of fire. She acts with express malice where she intends this act will kill. The two are functionally equivalent; express malice is more *culpable* because the defendant intends the victim’s death, rather than merely being aware of the danger. Implied malice is more *dangerous* because the natural and probable consequences of the act must be dangerous to human life. By contrast, a defendant may act with express malice even if the act is not objectively dangerous to human life; the shooter could be guilty even if she is using tranquilizer darts that are unlikely to kill, rather than lethal bullets.

Accordingly, a shooter must *intend* only that she fire the bullet, the objective danger (and her knowing disregard of it) complete the mental state elements of implied malice murder. Express malice requires both the intent to fire the bullet and have it kill a victim.

Appellant asserts first degree poison murder requires a third, intermediate intent. She contends it was not enough that she consumed poison with conscious disregard for how it endangered her child's life. On the other hand, she concedes the People did not need to prove she specifically intended her child's death. She contends first degree poison murder occurs only where the defendant administers poison to the victim willfully, deliberately, and with premeditation. (Appellant's Opening Brief on the Merits (AOBM 18.)

This proposal involves a sui generis mental state. A defendant who uses a gun must intend to fire it but need not intend to "administer" the bullet into the victim's body, nor must a defendant willfully, deliberately, and with premeditation "administer" a blast from an explosive device to it. There must be an intent to do the act that sends the lethal agent toward the victim, but there is no requirement that the defendant intend the substance come into contact with the victim.

A variation on the facts of *People v. Blair, supra*, 36 Cal.4th 686, illustrates the point. Defendant Blair put cyanide in a bottle of gin, resealed it, and gave it to Miller to deliver to Green. (*Id.* at p. 697-698.) In fact, Miller did not know the bottle had been poisoned, and even drank some with Green, who died as a result of her consumption. (*Ibid.*) If, however, Blair offered Miller \$1,000 to deliver the bottle, and she suspected the bottle had been poisoned but delivered it to Green anyway (so she could get paid), she would have acted with implied malice, by deliberately performing

a dangerous act (delivering the poisoned bottle) with an awareness that its natural and probable consequences could cause death, and consciously disregarding the danger to human life. Such implied malice suffices for implied first degree poison murder; the killer need not intend the victim consume the poison any more than she must intend the victim be hit by a bullet.

Many of appellant's authorities contrast a purpose to administer the poison not with implied malice an *innocent* intent.

[U]nless the unlawful intent in administering the poison is made to appear, the most innocent act of one's life might turn out to be a murder, and that, too, a murder subjecting him to the gallows; so that one who **innocently** administered what he supposed to be a proper dose of medicine would be compelled to endure this ultimate indignity and disgrace. . . .

(*People v. Milton* (1904) 145 Cal. 169, 171 (emphasis added)).

Justice Traynor likewise distinguished the (insufficient) mental state of innocence from the sufficient mental state of implied malice as a ground for murder liability. "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." (*People v. Thomas* (1953) 41 Cal.2d 470, 478 (conc. opn. of Traynor, J.) (emphasis added)).

The more recent decision in *People v. Mattison* (1971) 4 Cal.3d 171, 183-184, also recognized implied malice supported first degree poison murder. The special grounds cited in section 189 could elevate a murder to the first degree but only (outside the felony-murder rule) if there was express or implied malice. There was no evidence of the former, so murder liability would rest on a showing (if it could be made) "that he had full knowledge that his conduct endangered the life of decedent, but that he

nevertheless deliberately administered the poison with conscious disregard for that life.” (*Ibid.*) Where malice could be implied from

the doing of an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. . . . murder by poison is murder in the first degree.

(*Id.* at p. 186.)¹

Implied malice suffices to establish first degree poison murder.

1

Mattison contrasted the “malice” establishing implied malice and therefore section 189 (first degree) murder with the “malice” shown by violating Penal Code section 347, which could establish implied malice (second degree) felony murder but not first degree murder under section 189. (*Id.* at p. 186.)

II. The mental state for poison murder does not track the required mental state for torture murder or lying-in-wait murder.

The *Mattison* court did identify additional mental states needed for torture murder and lying-in-wait murder. (*Mattison, supra*, 4 Cal.3d 171, 183.) This Court cited a required intent beyond implied malice, and appellant seeks to analogize those requirements to her crime. They do not apply, for reasons concerning *how* these forms of murder differ from second degree murders, and *why* they qualify as worthy of more serious punishment.

A. An additional mental state is needed for torture murder so that section 189 narrows the number of murders qualifying as first degree murder, but there is no such need with instrumentalities like explosives or poison.

Specified “means” renders a murder more serious, warranting first degree categorization. (*Mattison, supra*, 4 Cal.3d at p. 182.) So long as there is express or implied malice, the murder belongs in the more serious category. “The defendant need not intend that his victim die as a result of the torture, since his intention to commit acts that involve a substantial risk to human life makes him guilty of first degree murder if a death results.” (*Id.* at p. 183.) But what qualifies a murder as a *torture* murder, warranting its elevation to first degree murder? The element of torture must narrow the number of murders that qualify as first degree, so, as the Court would soon explain in *People v. Steger* (1976) 16 Cal.3d 539, 544, the test “cannot be whether the victim merely suffered severe pain since presumably in most murders severe pain precedes death.” The Court therefore needed to define the “means” of torture to distinguish this specie of murder from others graded as less serious (second degree), even though the victim also suffered pain before death. (*Steger, supra*, at p. 544; see also *People v. Ireland* (1969)

70 Cal.2d 522, 539 [felony murder rule could not apply to “great majority of homicides.”])

Lying in wait murder likewise demands clarification, lest too many murders qualify as first degree. Murderers often need to “wait” for their victim, and they even more commonly watch and conceal themselves (to avoid witnesses), so this first degree exception could easily swallow the generic murder rule absent meaningful limitations. The ground therefore supports first degree murder liability only where the defendant intended to take his victim unawares (rather than doing so through happenstance) and for the purpose of facilitating the attack. (*Mattison, supra*, 4 Cal.3d at p. 183; see also *People v. Ceja* (1993) 4 Cal.3d 1134, 1139-1140.)

By contrast, other section 189 grounds elevate a murder to the first degree based on involve *physical instrumentalities* like a “destructive device,” “explosive,” “weapon of mass destruction,” or “ammunition designed primarily to penetrate metal or armor,” rather than the defendant’s *personal conduct*. Poison resembles these grounds, and it clearly identifies a narrow ground for elevating murders to the first degree. Whereas torture or lying in wait could be (mis)construed to encompass a majority of murders because they involve “pain” or “concealment,” the definitions of these instrumentalities ensure they will not establish first degree murder liability for a murder that should stay at second degree.

Mattison did link poison to the torture and lying in wait grounds, but rather than hold malice (express or implied) was not *sufficient* for first degree murder liability, it held it was not *necessary*: “If, however, the 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.” (*Mattison, supra*, 4 Cal.3d at p. 183, citing *People v.*

Thomas, supra, 41 Cal.2d 470, 478 (conc. opn. of Traynor, J.) Justice Traynor correctly construed the statute as creating a legal policy that the specified means warranted first degree liability:

The use of such means makes the killing *as a matter of law* the equivalent of a ‘wilful, 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.

(*Thomas*, at p. 478, emphasis added.)

But the assertion that not intending *or* expecting the victim’s death was no defense overstated the holding of *People v. Bernard* (1946) 28 Cal.2d 207, 211, as the Court there held only *express* malice was unnecessary. “[T]he murderer who kills by torture or poison may intend only to inflict suffering, not death. . . . 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.” The *Bernard* court never rejected the need for malice in some form, as section 189 could elevate only a homicide that already qualified as murder to the first degree: “If the evidence establishes conclusively that the *murder* was so committed, then only a verdict of murder of the first degree may properly be rendered. (*Bernard*, at p. 211, emphasis added.)²

²

Nor did *People v. Cobler* (1934) 2 Cal.App.2d 375, 380, hold an “evil purpose” could substitute for express malice (intent) or implied malice (expectation). The defendant there asserted she added strychnine to her husband’s milk to frighten him out of his indulgence of liquor. She knew it was “poisonous” but did not know its precise effects. (*Id.* at p. 378.) She asserted the court erred in not instructing the jury on second degree murder. (*Id.* at p. 380.) The Court of Appeal concluded “clearly on the evidence,” there was no possible basis for a second degree murder

B. Torture murder's first degree status rests on heightened subjective culpability, which requires an enhanced mental state, whereas poison murder's first degree status rests on heightened objective danger.

Culpability and danger both aggravate a crime. (Keiter, *With Malice Toward All: The Increased Lethality of Violence Reshapes Transferred Intent and Attempted Murder Law* (2004) 38 U.S.F. L. Rev. 261, 263-268.) Express malice demands a higher level of culpability, as it requires intent to kill, rather than mere reckless disregard of the consequence. But implied malice requires an objectively dangerous act, which express malice does not. (Argument I, *ante*.)

This contrast between culpability and danger also applies to first degree murder. Torture reflects an especially culpable mental state. “[I]t is the state of mind of the torturer - the cold-blooded intent to inflict pain for personal gain or satisfaction - which society condemns.” (Steger, *supra*, 16 Cal.3d 539, 546.) Poison, like explosives, creates a greater danger to the public. The Court of Appeal has documented the special danger posed by explosives:

A bomb has special characteristics which obviously differentiate it from all other objects. In the first place, the maker often loses control over the time of its detonation.... In the second place, it may wreak enormous havoc on persons and property. In the third place, its victims are often unintended sufferers. And finally, considering its vast

conviction. Not only did her acknowledgement of its status as poison create the requisite awareness (implied malice does not require the killer *expects* death, as more likely than not), but she purchased the substance under an assumed name and fictitious address. (*Id.* at p. 377.) And had her goal really been to scare her husband away from alcohol, she would not have added the poison to his *milk*. There was no reasonable basis for finding second degree murder.

destructive potentialities, it is susceptible of fairly easy concealment.

(*People v. Morse* (1992) 2 Cal.App.4th 620, 646, internal citation omitted.) The danger created by explosives is so substantial that it may compensate for not only the *culpability* of an intent to kill but also the *harm* of death.

The use of destructive devices, Molotov cocktails in this instance, which can inflict indiscriminate and multiple deaths, marks defendant as a *greater danger to society* than a person who premeditates the murder of a single individual.

(*People v. Thompson* (1994) 24 Cal.App.4th 299, 307, emphasis added.)

The *Morse* analysis applies to poison as well. The killer loses all control over the time of its operation; one of the most famous cases involved a husband who poisoned an apple intending to kill his wife, but his daughter ate it instead. (*The Queen v. Saunders & Archer* (1576) 75 Eng. Rep. 706.) Like explosives, poison can continue to kill even after the perpetrator is apprehended or killed. Though poison wreaks less havoc on property than explosives, it also can kill many victims beyond what the killer anticipated. And it is even easier to conceal.

There are additional grounds that *Morse* omitted. Explosives and poison enable someone to kill from a distance; the homicide could occur while the killer is thousands of miles away, so he can evade detection, or even the creation of physical evidence like blood or DNA that could tie him to the homicide. The killer also faces little risk of resistance, further reducing the risk of detection, or injury to himself, which he might face if he attacked the victim with a knife or club. These characteristics make murders with poison or explosives easier to commit and harder to solve, which further endangers the public. By contrast, committing murder by torture or lying in wait invariably involves the direct contact with the victim that forfeits these advantages.

The danger of poison murder justifies first degree liability. No heightened intent beyond implied malice is necessary.

III. This Court should confine any new rule to this case's exceptional facts.

This case differs from ordinary poison murder cases in that appellant herself consumed the poison, and the victim had been living inside her. Fetal life generally enjoys the same protection from homicide as born human beings, even where the killer was unaware of the unborn child's existence, which was not the case here. (*People v. Taylor* (2004) 32 Cal.4th 863, 868-869.) First degree murder liability might provide less deterrence in a case of self-poisoning, though it could deter others providing the poison. (See *Mattison, supra*, 4 Cal.3d 177, 185: "[K]nowledge that the death of a person to whom heroin is furnished may result in a conviction for murder should have some effect on the defendant's readiness to do the furnishing.") In any event, if this Court concludes the instant offense does not warrant first degree murder liability, amicus urges this Court to confine its holding to the unique context of a pregnant woman's self-poisoning and not extend it to cases where the defendant applies it externally, to another human being.

Conclusion

Precedent, policy, and public safety favor aggravated liability for poison murder. This Court should affirm appellant's conviction.

Respectfully submitted,

Dated: August 21, 2020

Mitchell Keiter
Counsel for Amicus Curiae
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Certification of Word Count

(Cal. Rules of Court, rule 8.204, subdivision (c).)

I, Mitchell Keiter, counsel for amicus curiae, certify pursuant to the California Rules of Court, that the word count for this document is 3,112 words, excluding tables, this certificate, and any attachment permitted under rule 8.204(d). This document was prepared in WordPerfect word-processing program, and this is the word count generated by the program for this document. I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: August 21, 2020

Mitchell Keiter

Certification of Nonassistance

Amicus curiae certifies that no party or counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

Dated: August 21, 2020

Mitchell Keiter

Proof of Service

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action.

On August 21, 2020, I served the foregoing document described as **AMICUS CURIAE BRIEF** in case number **S257631** on the interested parties in this action through True Filing.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 21st day of August, 2020, at Beverly Hills, California.

Mitchell Keiter

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **PEOPLE v. BROWN**

Case Number: **S257631**

Lower Court Case Number: **C085998**

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