IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent, S257631

v.

HEATHER ROSE BROWN,

Defendant and Appellant.

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

ANSWER TO AMICUS CURIAE BRIEF OF AMICUS POPULI

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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

Amicus curiae argues in support of respondent that first degree murder by poison ("poison murder") does not require proof that the poison's administration was willful, deliberate and premeditated. (ACB, at pp. 11-20.) Ms. Brown respectfully disagrees.

A. Malice and Poison Murder

Amicus curiae contends that the only mental state required for first degree poison murder is malice. (ACB, at p. 11.) It attempts to make its point by comparing that crime to murder committed by use of a gun. Its logic is flawed.

Amicus curiae writes that the shooter "need not intend to 'administer' the bullet into the victim's body." (ACB, at p. 12.) It is correct with respect to second degree implied malice murder. As it writes, the shooter must only intend to discharge the gun, and his knowing disregard of the danger such conduct poses completes "the mental state element[] of implied malice murder." (ACB, at p. 12; see *People v. Knoller* (2007) 41 Cal.4th 139, 143 [implied malice requires the deliberate performance of an act

dangerous to life by one who knows of the danger and consciously disregards it].) The issue here though is not whether Ms. Brown is guilty of second degree murder. The issue is what is required to elevate an implied malice murder involving poison to murder in the first degree. On that question, amicus curiae's shooter analogy fails to undermine Ms. Brown's claim that the willful, deliberate and premeditated administration of poison is required.

In most situations, for a shooting to be murder in the first degree,[1] the shooter must have express malice—i.e., the intent to kill (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653)—which equates to the intent to "administer" the bullet into the victim's body. Significantly, even that intent is not enough.[2] (*People v. Halvorsen* (2007) 42 Cal.4th 379, 419; *People v. Koontz* (2002) 27 Cal.4th 1041, 1080; see *People v. Swain* (1996) 12 Cal.4th 593, 601 ["unpremeditated murder with express malice" is "*second degree* murder"].) It is proof of what amicus curiae calls in the context of this case an "intermediate intent" (ACB, at p. 12) that elevates the killing to murder in the first degree. The prosecutor

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[1] An obvious exception is a shooting that triggers the felony murder doctrine, which is not at issue here.

[2] Amicus curiae writes that one who kills another by shooting a gun with express malice "is more culpable" than one who does so with implied malice because he "intends the victim's death, rather than merely being aware of the danger." (ACB, at p. 11.) That is not so, at least as the law treats the mental states. The law treats both killings—with implied or express malice—the same in that context; both are only murder in the second degree. (See *Swain, supra,* 12 Cal.4th at p. 601.)

must prove the killing was willful, deliberate and premeditated.[3] (*Halvorsen,* at p. 419; *Koontz,* at p. 1080.)

In attempting to analogize this case to a shooting, amicus curiae sidesteps the nature of the issue before this court. The issue here is one of statutory construction. The question presented is whether the Legislature intended poison murder within the meaning of Penal Code[4] section 189 to require proof of willfulness, deliberation and premeditation. (See *People v. Cruz* (1996) 13 Cal.4th 764, 774-775 ["fundamental task of statutory construction is to 'ascertain the intent of the lawmakers so as to effectuate the purpose of the law'"]; see also *People v. Steger* (1976) 16 Cal.3d 539, 545-546 [identifying the legislative intent in "labeling" murder "'by means of . . . torture'" in section 189 "as a 'kind' of premeditated killing"].) To answer that question, it is imperative to understand the Legislature's rationale in dividing murder into degrees.

Among the reasons, the Legislature separated murder into degrees because, as viewed by society, "some murders are more deplorable than others," with killings it designated as first degree murder deemed "comparatively more deplorable" than those it categorized as second degree murder. (*Steger, supra,* 16 Cal.3d at

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[3] For first degree premeditated murder by a gun, *the killing* must be willful, deliberate and premeditated. Ms. Brown reiterates she is not arguing that is the case in the poison-murder context. Rather, it is *the administration* of the poison that must be willful, deliberate and premeditated.

[4] Hereafter, all statutory references are to the Penal Code unless otherwise noted.

pp. 545-546.) Amicus curiae takes the position that a mother who causes her infant's death by knowingly administering drug-tainted milk to it, not for the purpose of exposing her child to the drugs but for the benefits the milk provides, should be liable for first degree murder. In other words, it believes that conduct is more deplorable than an unpremeditated shooting committed with the intent to kill. Ms. Brown disagrees and maintains the Legislature did not agree either when it adopted section 189 or at any time thereafter.

Amicus curiae attempts to bolster its claim with a fictional scenario based on *People v. Blair* (2005) 36 Cal.4th 686. (ACB, at pp. 12-13.) In *Blair*, the defendant poisoned his neighbor by placing cyanide in a gin bottle from which she drank. (*Blair*, at p. 697.) He was convicted of first degree murder with a poison-murder special circumstance, meaning the jury found he intended to kill the neighbor. (*Id.* at p. 696; § 190.2, subd. (a)(19) ["intentionally killed the victim by the administration of poison"].)

Amicus curiae posits a situation in which the defendant in *Blair* paid someone to deliver the bottle to the neighbor, who did so exclusively for the money despite "suspect[ing]" the bottle contained poison. (ACB, at pp. 12-13.) Amicus curiae simply asserts, without any analysis or supporting authority, that the delivery person would thereby be liable for first degree poison murder based only on implied malice and without any intention that the victim consume the poison. (ACB, at p. 13.) That is not clear.

Implied malice requires that the delivery person "know" his conduct endangers another's life; merely suspecting the bottle has been poisoned is not enough. (See *People v. Roberts* (1992) 2 Cal.4th 271, 317 [defining implied malice].) If he did have such knowledge, he would likely be liable for first degree murder not under the poison-murder theory but as an aider and abettor of an intentional killing. (See *People v. Chiu* (2014) 59 Cal.4th 155, 167 ["An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent" and thus "acts with the mens rea required for first degree murder"].) Thus, amicus curiae's fictional scenario sheds no light on the issue in this case.[5]

B. Murder by Torture, Lying in Wait, and "Instrumentalities"

Amicus curiae next attempts to distinguish murder by means of torture and lying in wait from murder by means of poison and what it calls other "*physical instrumentalities*," the other "means" enumerated in section 189. (ACB, at pp. 15-20, emphasis in original.) It writes that murder by torture and lying

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[5] Amicus curiae also points out the reference to an "innocent intent" in two cases cited by Ms. Brown (*People v. Milton* (1904) 145 Cal. 169; *People v. Thomas* (1953) 41 Cal.2d 470) and statements in *People v. Mattison* (1971) 4 Cal.3d 177 suggesting implied malice in the only mental state required for poison murder. (ACB, at pp. 13-14.) Ms. Brown has thoroughly addressed those cases and their relevance or lack thereof to this case in prior briefing, and thus no further elaboration is required.

in wait require proof of additional mental states beyond merely malice to "narrow the number of murders that qualify as first degree." (ACB, at p. 15.) Amicus curiae contends that such narrowing is not a concern with murder by poison or other "instrumentalities" because their definition ensures they "will not establish first degree murder liability for a murder that should stay at second degree." (ACB, at p. 16.) Once again, amicus curiae's logic is flawed.

Notably, amicus curiae never discusses the definition of poison murder or any of the other so-called "instrumentalities." Because poison is the instrument in question here, Ms. Brown addresses that definition directly. As instructed in this case, first degree poison murder is a death resulting from the use of a substance that merely has the ability to kill coupled with no other mental state than implied malice. (OBM, at p. 18.) To determine whether the same kind of narrowing amicus curiae defends with respect to murder by torture and lying in wait is warranted for poison murder, it is helpful to identify the type of conduct that falls within its scope.

As this case demonstrates, poison murder includes a mother who, aware her conduct poses a danger, feeds her baby drug-tainted breast milk because she believes the benefit of the milk outweighs the danger of the drugs. It also includes the parent who, despite being aware that antihistamines pose a danger to life, mindlessly gives his or her child too much of the drug to treat the child's allergy symptoms (as opposed to intentionally doing so with the potential consequences in mind

after weighing and considering in advance the reasons for and against that conduct). (See *People v. Kraft* (2000) 23 Cal.4th 978, 1010 [poisoning by antihistamines]; see also *People v. Nelson* (2016) 1 Cal.5th 513, 544 [citing approvingly CALCJIC No. 8.20's definitions of willful, deliberate and premeditated].)

By contrast, first degree torture murder *does not include* the defendant who, with malice, tortures another to death—i.e., inflicts great bodily injury with the intent to cause cruel or extreme pain and suffering for revenge, extortion, persuasion, or a sadistic purpose—but without "a wilful, deliberate, and premeditated intent to inflict extreme and prolonged pain." (*Steger, supra,* 16 Cal.3d at pp. 544, 546; see also § 206 [defining torture].) That crime is no more than second degree murder.

Amicus curiae takes the position that the willful-deliberate-premeditated requirement was necessary to ensure the torturer described above was not treated too harshly but that no such restriction is necessary to narrow the scope of the poison murder doctrine so that the parents described above are treated similarly. Again, Ms. Brown disagrees. If, in the absence of a willful-deliberate-premeditated mindset, someone can kill by torture without triggering first degree murder treatment, a parent who lacks a similar mindset but kills by recklessly administering drugs or medicine to a child should be deemed to have committed no more than second degree murder as well.

Amicus curiae's attempt to distinguish murders by torture and lying in wait—requiring proof of a mental state beyond merely malice—from the so-called "instrumentalities"—which it

claims does not—is similar to respondent's "mechanisms" subgroup argument, the flaws in which were thoroughly addressed in Ms. Brown's reply brief. Nevertheless, Ms. Brown addresses amicus curiae's attempt to equate poison murder with murder committed by means of an explosive, one of the enumerated "means" in section 189.

Amicus curiae contends that poison is like an explosive device in that it "creates a greater danger to the public" than means such as torture. (ACB, at pp. 18-19.) It reasons that the killer can lose control of the time both devices cause death, potentially continuing to kill "even after the perpetrator is apprehended or killed" and potentially killing "many victims beyond what the killer anticipated." (ACB, at p. 19.) Both means, amicus curiae continues, can also kill from a distance and surreptitiously, allowing the killer to avoid resistance and the risk of detection or injury to himself. (ACB, at p. 19.)

The analogy fails. Preliminarily, the analogy presumes the use of an explosive need not be willful, deliberate and premeditated to trigger first degree murder treatment. That issue has never been decided and is not at issue in this case. Even if the presumption is accurate, the analogy still falls short of bolstering amicus curiae and respondent's position.

With explosives, the danger to those other than the killer's target is inherent in the means used because such devices are purposefully designed for "rapid combustion" and the instantaneous release of deadly "gas and heat." (See § 189, subd. (c)(2) ["'Explosive' has the same meaning as in Section 12000 of

the Health and Safety Code"]; Health & Saf. Code, § 12000 [definition of explosives].) Poisons do not carry that same characteristic. A poison within the meaning of section 189 is simply any "substance, applied externally to the body or introduced into the body, that can kill by its own inherent qualities." (CALCRIM 521.) Poisons are, by definition, more contained and concentrated in effect.

Ms. Brown does not doubt there may be scenarios in which the use of a poison can have intentionally or recklessly broad effects, such as the poisoning of a community's water supply. However, there are likely more scenarios in which the effects would be targeted and confined to a specific individual, such as where the conduct involves the poisoning of another's food or drink or the administration of a drug or medicine to a particular person. The issue then is whether the Legislature intended to treat the use of poison like the use of an explosive out of concern over an uncharacteristic and unusual occurrence. It is doubtful.

More importantly, amicus curiae's argument presumes that, if the use of poison required a willful-deliberate-premeditated mindset, such deplorable occurrences would not be treated as first degree murder, which they deserve. However, in equating poison with explosives, amicus curiae assumes that mindset is present. Amicus curiae expresses concern over harming individuals beyond the killer's "anticipated" victim, which suggests the purposeful targeting of another person for poisoning. (ACB, at p. 19.) Its discussion regarding setting the killing in motion while "thousands of miles away" to "evade

detection" and to avoid being tied "to the homicide" also reflects a willful-deliberate-premeditated mindset as does the use of a method to kill another to avoid resistance and injury from the victim. (ACB, at p. 19.) Accordingly, even if poison murder requires the willful, deliberate and premeditated administration of the substance, the situations about which amicus curiae expresses concern would still constitute first degree poison murder.

There is another flaw in amicus curiae's logic. The very effects of concern it expresses with respect to poison murder and explosives are present with killings by guns. The discharge of a bullet or bullets can be difficult to control, potentially harming unintended victims. Killings by gun can be accomplished from a distance and surreptitiously, from a concealed location, to avoid detection and to prevent resistance and injury from the victim. However, despite section 189's nearly 150-year inclusion of "means" that trigger first degree murder treatment, and the Legislature's repeated expansion of that list, the Legislature has never seen fit to add gun use to it. If the concerns expressed by amicus curiae were the reason for adding specific "instrumentalities" to the list of "means," it surely would have included guns among them.

C. Breadth of Holding's Applicability

Finally, amicus curiae argues that, should this court hold poison-murder requires proof the administration of the poison was willful, deliberate and premeditated, it should restrict that

holding to the "unique" circumstances of this cases. (ACB, at p. 21.) That argument is premised on a misunderstanding of this case's facts. Amicus curiae believes D.R.'s death resulted from in utero exposure to the drugs: "This case differs from ordinary poison murder cases in that appellant herself consumed the poison, and the victim had been living inside her." (ACB, at p. 21.) It argues for limiting the holding "to the unique context of a pregnant woman's self-poisoning." (ACB, at p. 21.) In actuality, the drug exposure that purportedly caused D.R.'s death was delivered to her post-birth via Ms. Brown's breast milk. (1RT 661-662, 665-666; see OBM, at p. 11.) Thus, even if limited to the facts of this case, the holding would not be limited to cases in which a pregnant woman poisons herself.

Importantly, in addition to amicus curiae's factual misunderstanding, underpinning its desire to restrict this court's holding to a singular factual circumstance is a misunderstanding of the nature of the inquiry itself. As noted above, at issue is the intent of the Legislature in categorizing poison murder as murder in the first degree. Absent some indication that the Legislature intended to limit the prosecutor's burden of proof regarding that element only to a particular fact pattern, which amicus curiae has not established, that mental state must be deemed an element in all poison-murder cases.

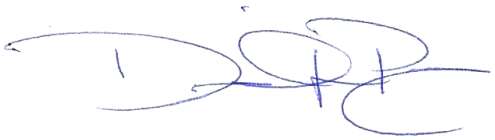
Admittedly, amicus curiae is correct that this "case differs from ordinary poison murder cases." (ACB, at p. 21.) However, that fact makes a favorable holding self-limiting. In most cases involving murder by poison, it is not open for debate whether the

administration, let alone the killing, was willful, deliberate and premeditated. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 646 [the defendant's deliberate administration of "a potentially lethal dose of prescription and over-the counter sedatives" to his son was "entirely consistent with a preconceived design to kill"].) It is difficult to conceive of scenarios in which a poisonous substance is knowingly administered to another without having the potential consequences in mind after weighing and considering in advance the reasons for and against that conduct. This case presents one, and others may arise. However, the dearth of authority presenting such circumstances and addressing the question posed by this case indicates their rarity. Therefore, there is no need for this court expressly to limit a favorable holding to the unique facts of this case, and amicus curiae advances no rationale for doing so.

CONCLUSION

For the reasons stated above and in her prior briefing in this matter, Ms. Brown asks this court to reverse the judgment.

Dated: September 23, 2020. Respectfully submitted,



David L. Polsky
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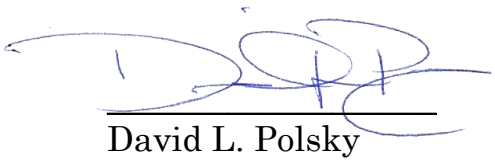

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