In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

AMALIA CATHERINE BRYANT,

Defendant and Appellant.

Case No. S196365

JAN 3 ? 2012

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

RESPONDENT'S OPENING BRIEF ON THE MERITS

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QUESTIONS PRESENTED

Did the appellate court abuse its authority by fashioning a new form of voluntary manslaughter -- death resulting from an inherently dangerous felonious assault without intent to kill and without malice -- and imposing a duty on the trial court to sua sponte instruct on this novel theory?

INTRODUCTION

Amalia Bryant stabbed her boyfriend, Robert Golden, and killed him. A jury found her guilty of second degree murder based on a theory of implied malice murder. The Court of Appeal interpreted the opinion in *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), as authority for the proposition that an unintentional killing without malice in the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. It consequently reversed the murder conviction because the trial court failed sua sponte to instruct on the *Garcia* theory of voluntary manslaughter.

The Court of Appeal erred in several respects. Foremost, it exceeded its judicial authority and relied on dicta in the *Garcia* opinion to create a third theory of voluntary manslaughter that is not grounded in statutory authority. The court in *Bryant* then imposed a sua sponte duty on the trial court to instruct on a theory that was neither a developed theory of law nor supported by evidence. Therefore, the Court of Appeal's opinion should be reversed and Bryant's murder conviction reinstated.

STATEMENT OF THE CASE

Amalia Bryant and Robert Golden began dating in September 2003, a few months after Golden graduated from high school. (2 RT 121; 3 RT 367.) They had a tumultuous relationship and broke up many times until Bryant discovered she was pregnant in Spring 2004. (2 RT 122; 3 RT 325, 369-370.) Bryant gave birth to twin boys in December 2004. (2 RT 122.) In June 2005, Bryant and Golden moved into a two-bedroom apartment at

the same complex where Golden's mother and sisters lived. (2 RT 123-125; 3 RT 321, 324, 327, 372.) In October and November of 2005, Golden told friends and family that he was unhappy with Bryant and wanted to end their relationship and move out. (2 RT 132-133; 3 RT 329, 394-395; 6 RT 878-879, 881, 883, 886-887, 891.)

On November 24, 2005, Thanksgiving Day, Bryant and Golden went to Golden's aunt's house for Thanksgiving dinner and then stopped by Bryant's parent's home on the way back to their apartment. (2 RT 141, 158-163, 168; 3 RT 332, 403.) On her way home, Golden's mother stopped by their apartment and dropped off dessert. (3 RT 403.) Golden was playing video games and said Bryant had gone to bed. (3 RT 403-404.)

At about 8:45 p.m., neighbors heard Bryant screaming for help. (2 RT 178-182, 207-208, 239, 243.) They responded and discovered Golden lying in the doorway of his apartment face down and Bryant kneeling over him. (2 RT 183, 185, 219, 246, 248.) Bryant was hysterical and pleading for help. (2 RT 191-193, 227, 244, 259.) She kept rocking Golden and telling him to "wake up." (2 RT 188, 196, 229, 250.) Bryant was dressed in a red negligee. (2 RT 258; 3 RT 428.)

When Deputy Joseph Narcisco of the Riverside County Sheriff's Department arrived at 8:53 p.m., Golden had no pulse and Bryant was kneeling over him crying hysterically. (3 RT 421-424, 426, 438.) Deputy Narcisco asked Bryant "who stabbed" Golden and she said "I did." (3 RT 427.) Paramedics responded and worked on Golden before taking him to the hospital where he was pronounced dead. (3 RT 446-456; 4 RT 502.)

Dr. Aaron Gleckman performed Golden's autopsy. (4 RT 560.) Golden was 6' 1" and weighed about 285 pounds. (4 RT 586, 605.) His cause of death was a four to five inch deep stab wound that passed through his xiphoid process (the small bone below the sternum), his pericardium,

and penetrated the right ventricle of his heart. (4 RT 583, 586-587, 590.) The stab wound was angled front to back and slightly upward. (4 RT 583.) After being stabbed, Golden may have been conscious for a minute or two before bleeding to death. (4 RT 601, 631.) Dr. Gleckman opined that it would have taken a significant amount of force to inflict the stab wound; meaning a person would have had to force the knife into Golden's chest and Golden could not have just walked into the knife. (4 RT 589, 599.)

Golden had additional injuries. Golden had a one-inch bruise underneath the surface of his scalp on the back right side of his head caused by significant force from blunt trauma. (4 RT 576.) He had a one inch by one half inch ecchymosis (bleeding under the skin) on the left side of his back. (4 RT 580.) Golden had scratches on the right side of his forehead, above his mouth, and the left side of his chin. (4 RT 576.) He had a one inch long curvilinear incised wound on the back of his left wrist. (4 RT 565.) In addition, he also had cuts or scratches on three of his fingers, and bruising on his hand that could have been consistent with striking something, and bruising on his left forearm consistent with being grabbed. (4 RT 565, 570-574, 610.)

Lieutenant Cheryl Evans interviewed Bryant. (6 RT 913; 7 RT 1056-1059 [see transcript at 2 CT 388-473].) Bryant was jealous because Golden was vibrant around his friends but not with her. (2 CT 401-402.) She was also lonely and depressed because Golden was no longer affectionate with her. (2 CT 403-404.) She was taking Prozac for her depression and bi-polar personality. (2 CT 430.) Bryant said the bruises on her arms were from an argument with Golden a few days earlier that stemmed from her belief that Golden was cheating on her. (2 CT 424.) She said Golden had been physically abusing her since they started dating. (2 CT 431.)

Bryant said that after returning home from Thanksgiving dinner, she put their children to bed and retired to her room where she wrote in her

journal. (2 CT 407-408.) Bryant wrote that she was angry at Golden because he was not more helpful with their children and did not show affection towards her. (2 CT 408.) She also wrote that she wanted to have an affair to upset Golden, and that she suspected him of cheating on her. (2 CT 408.) Bryant said she commonly wrote in her journals about her arguments with Golden and their mutual threats. (2 CT 409.)

Earlier that evening Bryant was trying to call her friend because she wanted to leave the apartment. (2 CT 412.) Golden unplugged the phone from the bedroom wall and smacked her on the leg with the phone. (2 CT 412.) He then pushed her down on the bed and strangled her while straddling her. (2 CT 415-416.) Bryant swung a doll at Golden and tried to break a glass candle holder against the dresser to show how mad she was. (2 CT 413.) She threw the candle holder into the hallway, grabbed a knife from the dresser drawer and started cutting herself. (2 CT 415, 454.) Golden knocked the knife out of Bryant's hand with a hair brush. (2 CT 456.) Bryant then picked up the broken candle holder from the hallway and tried to cut herself. (2 CT 457.) Golden smiled and told her, "Do it. Just do it. Don't hurt anyone else." (2 CT 457.)

Golden blocked Bryant from leaving through the front door so she grabbed the phone and hit him on the head with it. (2 CT 419.) She then grabbed a knife from the kitchen table to scare him and said, "You better let me leave or I'll hurt you." (2 CT 417, 439, 460.) While struggling over the knife, Golden bit Bryant. (2 CT 419, 422, 461.) During the struggle Bryant thrusted the knife from her waist and stabbed Golden while he was bent over. (2 CT 461-462.)

Lieutenant Evans took photographs of Bryant at about 2 a.m. (6 RT 913, 923; 7 RT 1053.) Bryant was wearing a red satin negligee with no visible blood on it. (6 RT 923-924.) She had no injury to her legs or feet. (6 RT 925.) Bryant had a fresh bruise on the back of her right thigh/buttock

area. (6 RT 934-935.) She also had bruising on her arms that was not fresh. (6 RT 927-932.) Bryant had numerous scars on her wrists from cutting herself and one fresh cut mark. (6 RT 931-934.) Finally, Bryant had an indentation injury to her thumb and a one half inch red mark on the left side of her face. (6 RT 926, 937.) Lieutenant Evans took more photographs 12 hours later and there were no changes to Bryant's injuries except the mark on her neck was gone. (6 RT 938-940; 7 RT 1053.) Lieutenant Evans noticed that there was no bruising or discoloration to Bryant's face or neck where she claimed Golden held her down and strangled her. (7 RT 1059-1060.)

In the interview Bryant told Lieutenant Evans about an online journal she kept. (2 CT 409; 6 RT 858-861, 957-958.) A handwritten journal was also recovered from Bryant's bedroom. (6 RT 959-960.) Numerous journal entries were read to the jury wherein Bryant expressed feelings of jealously, hatred and resentment towards Golden. (6 RT 974-987.)

In the master bedroom the phone cord had been removed from the wall, a knife was in a drawer, and on the floor was a doll, the battery cover to the phone, and Golden's broken glasses. (5 RT 690, 726, 729-730, 748, 757.) In the hallway outside of the bedroom was a broken glass candle holder. (5 RT 680, 717.) Also in the hallway was a large pool of blood with drops leading from it to the front door where there was another pool of blood. (5 RT 673-675.) The faceplate and handset to the cordless telephone were on the living room floor near the front door. (5 RT 698, 707-709, 725, 724.) Finally, there was a knife covered in blood on top of a book on the counter separating the kitchen and the living room. (5 RT 669.)

Bryant testified in her defense. In many respects, Bryant's trial testimony was identical to the statement she gave to the police the evening of her arrest. However, there were additional details provided by Bryant at

trial that will be recited here. Bryant started dating Golden in September 2003, when they were both 18 years old. (7 RT 1234.) Soon after that Golden became abusive; the physical abuse was mutual. (7 RT 1236-1237, 1240, 1244-1258, 1265, 1312.)

On Thanksgiving Day Bryant was sad and lonely because there was little interaction between she and Golden. (7 RT 1273.) On the ride home from dinner she asked Golden if he were tired, he said yes, and she replied that was too bad because she wanted to have sex. (7 RT 1274.) Bryant said she was more depressed than angry, and saw her proposition as the "last test" to "see if there was anything left in the relationship." (7 RT 1314.) She put their children to bed, dressed herself in a negligee in hope of getting a reaction from Golden, and wrote in her journal while listening to music. (7 RT 1276, 1279.) After Golden's mother left, Bryant threw Golden's blankets and pillows on the living room floor, told him they were done, and grabbed the phone. (7 RT 1280.)

Thereafter, Bryant and Golden fought and struggled in the bedroom. (7 RT 1282-1290.) He then got on top of her, held her down, and choked her. (7 RT 1284-1285.) During which, Bryant grabbed a steak knife from the desk drawer that she used for cutting herself and threatened Golden by telling him, "if he didn't let me leave, I was going to kill him." (7 RT 1291-1292.) She then started cutting her wrist with the knife. (7 RT 1292.) Golden knocked the knife out of her hands with a hairbrush before leaving the room. (7 RT 1292.) Bryant left the bedroom and hit Golden on the head with the phone but he did not move. (7 RT 1296-1297; 8 RT 1457-1458.)

Bryant walked about eight feet and grabbed a knife from the kitchen table with her right hand. (7 RT 1297, 1302; 8 RT 1458.) She thrusted the knife at Golden and pulled it back hoping to scare him into backing away from the door so she could leave. (7 RT 1297-1299, 1302; 8 RT 1424.) As

she did so, she repeated, "Let me leave." (7 RT 1299.) Instead, Golden tried to disarm Bryant. (7 RT 1300-1302.) Golden grabbed her wrist, twisted it, and bit her thumb to force her to drop the knife. (7 RT 1300-1301.) Bryant stepped back and switched the knife into her left hand so Golden could not disarm her. (7 RT 1301.) Bryant testified that Golden "came at me, and I thrust the knife at him." (7 RT 1301.) She pulled the knife out and Golden stepped back and said, "You stabbed me." (7 RT 1302.) She dropped the knife and ran outside for help. (7 RT 1303-1304.) Bryant said she had mixed feelings of love and hate for Golden but never intended to kill him and did not plan to kill him. (7 RT 1310-1311.)

Bryant admitted to cheating on Golden in 2004 with her former boyfriend Marcos. (8 RT 1335.) She was also violent with Marcos because she thought he was cheating on her. (8 RT 1336.) In late 2003 and early 2004, Bryant made a scrapbook for Golden that she later defaced. (8 RT 1392-1394.) For instance, on a card given to her by Golden she drew a picture of a knife with blood droplets stabbing the man in the picture to symbolically represent Golden. (8 RT 1395-1397.)

When Deputy Bommer responded to the scene, Bryant was crouched beside Golden. Bryant said, "It's all my fault," and "this wasn't supposed to happen. He wouldn't let me leave. He never lets me leave." (9 RT 1518-1525.)

Forensic pathologist Dr. Paul Herrman opined that Golden had two distinct bruises on his right hand from striking something or someone striking him, and bruising on his left hand consistent with hitting something or someone within a day or two of his death. (7 RT 1154, 1160, 1164-1165.) Dr. Herman explained if the knife actually went through the bone of the xiphoid process it would take somewhat more force, but because it is not a very large bone it is hard to tell how much force it would take. (7 RT 1171.)

As to Bryant, Dr. Hermann said her bruising was consistent with her being hit or grabbed a few days earlier. (7 RT 1224.) He also said that people do not always bruise after being choked. (7 RT 1192-1193.) Overall, Golden's and Bryant's injuries were consistent with there being a struggle between them. (7 RT 1194.) Forensic scientist Dr. John Thorton reviewed the physical evidence and found it to be consistent with a struggle between Bryant and Golden that would not have taken more than two minutes. (8 RT 1463, 1491, 1497.)

The trial court instructed the jury on the concepts of murder and manslaughter. It described the necessary elements of murder. (See CALCRIM Nos. 500, 520, 521; 3 CT 629-631; 10 RT 1904-1907.) It also described the necessary elements of manslaughter based on heat of passion (see CALCRIM No. 570; 3 CT 632-633; 10 RT 1907-1908), and imperfect self-defense (see CALCRIM No. 571; 3 CT 634; 10 RT 1908-1909). The jury was also instructed on a justified killed based on self-defense (see CALCRIM Nos. 505, 3471, 3472, 3474; 10 RT 1912-1915).

The prosecutor maintained Bryant acted with express malice when she lunged and plunged the knife at least four inches into Golden's chest. (10 RT 1925.) He also argued that, at the very least, she acted with implied malice when she lunged at him a second time with the knife and stabbed him in the chest knowing the act was dangerous to human life. (10 RT 1925-1926.) Defense counsel argued Bryant killed Golden in self-defense. (10 RT 1977-1982.) She further argued the manner of killing did not support a finding of intent to kill (10 RT 1982), and addressed both theories of voluntary manslaughter (10 RT 1984-1987). The jury returned a verdict of second degree murder. (10 RT 2026.)

Bryant argued on appeal that the trial court should have instructed on the lesser included offense of involuntary manslaughter. On its own motion, the Court of Appeal requested additional briefing that asked the

parties to assume Bryant committed at a minimum felony assault with a deadly weapon, and address whether the trial court committed reversible error by failing to instruct the jury sua sponte that an unintentional killing without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter.

In a published decision issued August 9, 2011, the Court of Appeal concluded the trial court committed reversible error by failing to instruct the jury sua sponte pursuant to *Garcia* that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constitutes voluntary manslaughter. (Slip Opn. at pp. 2-3.) The Court of Appeal reversed the jury's finding of second degree murder and ordered the conviction to be modified to voluntary manslaughter unless the People retry Bryant on second degree murder. (Slip Opn. at p. 3.)

On November 16, 2011, this Court granted respondent's petition for review.

I. THE COURT OF APPEAL ABUSED ITS JUDICIAL AUTHORITY WHEN IT FASHIONED A THIRD THEORY OF VOLUNTARY MANSLAUGHTER AND IMPOSED A SUA SPONTE DUTY ON THE TRIAL COURT TO INSTRUCT ACCORDINGLY

Relying solely on dicta in the *Garcia* opinion, the Court of Appeal created a third theory of voluntary manslaughter premised on an inherently dangerous felony assault committed without intent to kill (the other two theories being heat of passion and imperfect self-defense). In doing so, the Court of Appeal acted outside its authority because the creation of laws are within the purview of the Legislature, not the courts. Furthermore, existing legislation suggests the Legislature has been intentionally silent on the issue. Finally, assuming this is a viable theory, the trial court should not have been required to sua sponte instruct on it because it was not a well developed theory of law and not sufficiently supported by the evidence.

A. The *Garcia* Opinion did Not Articulate an Additional Theory of Manslaughter

The Court of Appeal relied solely on the reasoning of the *Garcia* opinion to create, *ipse dixit,* a theory of voluntary manslaughter based on a theory of an unintentional killing without malice in the course of an inherently dangerous assaultive felony. However, *Garcia* did not expressly articulate a theory of manslaughter, only that such a combination of actus reus and mens rea could not be involuntary manslaughter, and at a minimum, had to at least be voluntary manslaughter. (*People v. Garcia, supra*, 162 Cal.App.4th at p. 22.)

In *Garcia,* the defendant struck the victim in the face with the butt of a shotgun, causing him to fall to the sidewalk and hit his head, resulting in his death. (*People v. Garcia, supra*, 162 Cal.App.4th at pp. 22-23.) Garcia claimed that the victim "lunged" at him and so he struck the victim with the butt of the shotgun to back him up. (*Id.* at pp. 23-24.) The jury found Garcia guilty of voluntary manslaughter. (*Id.* at p. 23.) Garcia did not challenge the sufficiency of the evidence to support the voluntary manslaughter conviction. (*Id.* at p. 26.) Rather, he claimed the trial court should have instructed on involuntary manslaughter as a lesser included offense. (*Ibid.*) Answering this precise claim, the *Garcia* court stated,

> An unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is at least voluntary manslaughter. Because an assault with a deadly weapon or with a firearm is inherently dangerous, the trial court properly concluded the evidence would not support Garcia's conviction for involuntary manslaughter and, therefore, did not err in declining to instruct the jury on involuntary manslaughter as a lesser included offense of murder.

(*Id.* at p. 22.)

In coming to its conclusion that the trial court was not required to instruct on involuntary manslaughter, the court in *Garcia* reviewed case

law and reasoned "an unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter." (*People v. Garcia, supra*, 162 Cal.App.4th at pp. 26-31, italics added.) This is correct. (*People v. Blakeley* (2000) 23 Cal.4th 82, 88-89; *People v. Lasko* (2000) 23 Cal.4th 101, 108; *People v. Rios* (2000) 23 Cal.4th 450, 460; *People v. Breverman* (1998) 19 Cal.4th 142, 153-154; *People v. Burroughs* (1984) 35 Cal.3d 824, 835-836.)

The court in *Garcia* explained that generally when the victim is killed during the commission of an inherently dangerous felony, the defendant could be found guilty of second degree murder under the felony murder doctrine without proof of express or implied malice. (*People v. Garcia, supra*, 162 Cal.App.4th at p. 28, see *People v. Chun* (2009) 45 Cal.4th 1172, 1181 ["'[a]n unlawful killing in the course of the commission of a felony that is inherently dangerous to human life but is not included among the felonies enumerated in section 189 . . .'"].) However, when the felony is an assault, application of the felony murder rule is prohibited under the *Ireland* merger doctrine. (*Garcia*, at p. 29, citing *People v. Ireland* (1969) 70 Cal.2d 522, 580; see *Chun*, at p. 1200 ["[w]hen the underlying felony is assaultive in nature . . . the felony merges with the homicide and cannot be the basis of a felony-murder instruction"].)

The court in *Garcia* pointed out that in *People v. Hansen* (1994) 9 Cal.4th 300, 312, overruled on another ground in *People v. Chun, supra*, 45 Cal.4th at p. 1199, this Court observed a felonious assault committed without malice aforethought but resulting in death is "punishable as manslaughter," but, did not specify whether such an offense was punishable as voluntary or involuntary manslaughter. (*People v. Garcia, supra*, 162 Cal.App.4th at p. 29.) Citing *Hansen* and other Supreme Court authority defining the boundaries of voluntary and involuntary manslaughter, the court in *Garcia* explained that manslaughter is involuntary in three limited

circumstances: Homicides committed while driving a vehicle; homicides committed in the course of a misdemeanor or a noninherently dangerous felony (*People v. Cox* (2000) 23 Cal.4th 665, 676); or homicides resulting from a lawful act committed without due caution and circumspection. (*Garcia*, at pp. 27, 32-33; see *People v. Benavides* (2005) 35 Cal.4th 69, 102.) Thus, the court in *Garcia* reasoned, when the killing is committed during the commission of an inherently dangerous assaultive felony, even if unintentional and without conscious disregard for human life, the offense "is at least voluntary manslaughter." (*Garcia*, at p. 31.)

The court in *Garcia* explained why instructions on involuntary manslaughter were not called for: Assault with a deadly weapon (a "wobbler" offense)[1] was charged as a felony in that case, and thus the misdemeanor manslaughter theory of involuntary manslaughter could not have applied. (*People v. Garcia, supra*, 162 Cal.App.4th at pp. 27, 31-32.) The criminal negligence version of involuntary manslaughter was not at issue. (*Id.* at p. 32.) And, there was no vehicle involved. (*Id.* at p. 27.)

The court in *Garcia* essentially found that since the defendant's crime, as characterized by Garcia, did not fall within the statutory definition of either murder or involuntary manslaughter, it must be at least voluntary manslaughter because, if the killing was unintentional, *it could be* voluntary manslaughter, as intent to kill is not an element of voluntary manslaughter. (*Id.* at p. 32.) However, it is critical to understand that the court in *Garcia* was not announcing a new basis or theory for voluntary manslaughter, but

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[1] Assault with a deadly weapon may be punished either as a felony or a misdemeanor. (Pen. Code, § 245, subd. (a)(1).) However, the act becomes a misdemeanor only by the sentence imposed and remains a felony for all purposes up to imposition of sentence. (Pen. Code, § 17, subd. (b); *People v. Alotis* (1964) 60 Cal.2d 698, 699; *People v. Rhodes* (1989) 215 Cal.App.3d 470, 476 & fn. 2, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 201, fn. 7.)

rather, was showing by deduction that Garcia's crime was not involuntary manslaughter.

Having established that no error occurred in not instructing the jury on involuntary manslaughter, no further discussion was required. (*Garcia, supra,* 162 Cal.4th at p. 33.) The defendant in *Garcia* was not challenging the sufficiency of the evidence to support his conviction for voluntary manslaughter. (*Id.* at p. 26.) However, in dicta, the court in *Garcia* went on to explain why it was of the view that an unintentional killing during the commission of a felony assaultive offense constitutes at least voluntary manslaughter. This discussion, while interesting, was not required for the issues before the court, and hence, was dicta, and does not constitute valid authority on the point. (*People v. Evans* (2008) 44 Cal.4th 590, 599.)

Garcia merely concluded that an unintentional killing in the course of an inherently dangerous felony is *at least* voluntary manslaughter, and therefore, an involuntary manslaughter instruction was not warranted under those facts. The *Garcia* opinion did not articulate a new theory of voluntary manslaughter, as well it could not. Rather, in an intellectual exercise and by process of deduction, it surmised that such a combination of *actus reus and mens rea* would be at least voluntary manslaughter. Thus, the *Bryant* court's first mistake was in its conclusion that the *Garcia* opinion created or discovered a third theory of voluntary manslaughter.

B. The *Bryant* Opinion Exceeded the Precincts of the Judicial Office

If a new third theory of voluntary manslaughter premised on the *Garcia* reasoning is to be recognized and applied in the courts, it must be codified by the Legislature. "[R]ewriting of the statutes, [is] a task for the Legislature (or the voters) not for the courts." (*People v. Ramos* (2007) 146 Cal.App.4th 719, 722.) Article III, section 3 of the California Constitution provides: "The powers of state government are legislative, executive, and

judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution."

> [Courts] are not empowered to criminalize conduct by judicial ukase, or to punish that which the Legislature has not brought within its penal reach. To attempt to do so is a violation of the separation of powers provision of the California Constitution.

(*People v. Zambia* (2011) 51 Cal.4th 965, 984, quoting *People v. Kroncke* (1999) 70 Cal.App.4th 1535, 1558-1559 (conc. & dis. opn. of Corrigan, J.).)

Manslaughter is defined in the Penal Code as the "unlawful killing of a human being without malice." (Pen. Code, § 192.) Voluntary manslaughter is a lesser included offense of murder. (*People v. Lasko*, *supra*, 23 Cal.4th at p. 106.) The offense of voluntary manslaughter has been traditionally established by the negation of malice through "heat of passion" and/or "imperfect self-defense." (CALCRIM Nos. 570 & 571.) A defendant is guilty of voluntary manslaughter when he commits an unlawful killing either with intent to kill or with conscious disregard for life, but lacks malice either because (1) he acts in unreasonable self-defense or (2) the killing results from a sudden quarrel or heat of passion. (*Lasko, supra,* at p. 108; *People v. Blakely*, *supra*, 23 Cal.4th at pp. 87-88.)

Voluntary manslaughter upon a sudden quarrel or heat of passion was codified by the Legislature in enacting the California homicide statutes in 1872, and has remained unchanged since. (Pen. Code, § 192, subd. (a); *People v. Steele* (2002) 27 Cal.4th 1230, 1252 ["Since its adoption in 1872, section 192, subdivision (a), has described voluntary manslaughter as the unlawful killing 'upon a sudden quarrel or heat of passion.'"].)

In *People v. Flannel* (1979) 25 Cal.3d 668, this Court recognized imperfect self-defense as an additional basis for voluntary manslaughter: "An honest but unreasonable belief that it is necessary to defend oneself from imminent peril to life or great bodily injury negates malice

aforethought, the mental element necessary for murder, so that the chargeable offense is reduced to manslaughter." (*People v. Flannel, supra,* 25 Cal.3d at p. 674, italics omitted.) Similar to the evolution of diminished capacity, the court in *Flannel* found the development of imperfect self-defense was merely giving effect to the statutory definition of manslaughter by recognizing factors other than sudden quarrel and heat of passion may render an individual incapable of harboring malice. (*Id.* at p. 677, fn. 3, quoting *People v. Mosher* (1969) 1 Cal.3d 379, 385, fn. 1.) The Legislature's subsequent elimination of the diminished capacity did not have any bearing on the validity of imperfect self-defense. (*In re Christian S.* (1994) 7 Cal.4th 768, 778.)

A killing is specifically voluntary manslaughter if a person intentionally kills either in unreasonable self-defense or in a sudden quarrel or heat of passion. (*People v. Blakeley, supra,* 23 Cal.4th at p. 88; *People v. Lasko, supra,* 23 Cal.4th at pp. 107-108). An unintentional killing may also be voluntary manslaughter when the defendant, acting with conscious disregard for life and the knowledge that the conduct is life-endangering, either (1) unintentionally kills while having an unreasonable but good faith belief in the need to act in self-defense (*Blakeley, supra*, 23 Cal.4th at pp. 88-91), or (2) unintentionally but unlawfully kills in a sudden quarrel or heat of passion (*Lasko, supra*, 23 Cal.4th at pp. 108-111). Thus, either intent to kill or a conscious disregard for life is an essential element of voluntary manslaughter. (*Blakeley,* at pp. 88-91; *Lasko,* at pp. 108-109.)

The *Garcia* "deduction" of "at least" voluntary manslaughter goes beyond merely giving effect to the existing definition of voluntary manslaughter. The two recognized forms of voluntary manslaughter are encompassed by legislation providing murder may be reduced to manslaughter by negating the subjective mental component necessary to establish malice. (Pen. Code, § 192.) Here, *Garcia* eliminates the process

of negating malice, distinguishing it from the codified theories of voluntary manslaughter. This may be a reasonable legal "deduction," but requires more than a logical workout of existing statutory authority, and therefore mandates input from the Legislature.

In *Anderson,* the defendant argued a new theory of voluntary manslaughter was necessary for situations such as his where he claimed he had killed while under duress and without malice. (*People v. Anderson* (2002) 28 Cal.4th 767, 770.) This Court rejected the contention, pointing out that new theories of homicide must be enacted by the Legislature. (*Id.* at p. 783 ["Recognizing killing under duress as manslaughter would create a new form of manslaughter, which is for the Legislature, not courts, to do."].) While this Court did recognize that "policy arguments can be made that a killing out of fear for one's own life, although not justified, should be a crime less than the same killing without such fear," such "policy questions are for the Legislature, not a court, to decide." (*Id.* at p. 784.) Accordingly, this Court declined the defendant's request to add to the statutory forms of voluntary manslaughter and create a new theory. (*Ibid.* ["[Defendant's] arguments are better directed to the Legislature."].)

Of importance in *Anderson,* was this Court's ability to distinguish the defendant's request that duress should reduce murder to manslaughter by negating malice from this Court's own earlier refinement of unreasonable self-defense as negating malice as being anchored in the voluntary manslaughter statute, itself. (*Anderson, supra*, 28 Cal.4th at pp. 781-783.) This Court reasserted that heat of passion voluntary manslaughter is expressly grounded in statute, and imperfect self-defense, although less obvious, is grounded in "both well-developed common law and in the statutory requirement of malice." (*Id.* at p. 782, quoting *In re Christian S., supra,* 7 Cal.4th at p. 777.) When killing under duress, unlike imperfect self-defense, a person kills believing it is necessary to save his or her own

life and intends to kill unlawfully, not lawfully. (*Anderson, supra*, 28 Cal.4th at p. 783.) Thus, duress, as a matter of law, cannot negate malice. (*Id.* at pp. 781-784.) Furthermore, if the defendant's proposition that killing under duress is manslaughter were accepted, it would create a new form of manslaughter, "which is for the Legislature, not courts, to do." (*Id.* at p. 783.)

The court in *Bryant* not only relied on dicta in *Garcia* to create a new theory of voluntary manslaughter, but it did so without any basis in the statute. Penal Code section 6 codifies that for an act or omission to be criminal or punishable it must be prescribed or authorized by the Penal Code or other authorizing legislation.

> This section embodies a fundamental principle of our tripartite form of government, i.e., that subject to the constitutional prohibition against cruel and unusual punishment, the power to define crimes and fix penalties is vested exclusively in the legislative branch.

(*Keeler v. Superior Court* (1970) 2 Cal.3d 619, 631.) The Court of Appeal's ruling completely disregarded the Legislature's role in defining crimes and exceeded its authority when it mined *Garcia* for a new theory of manslaughter without offering statutory support for its finding. (See *People v. Anderson, supra*, 28 Cal.4th at pp. 781-784.)

Likewise, here, any supposed gaps in the Penal Code are to be filled by the Legislature not the courts. And, at this point, ". . . if a new form of manslaughter is to be created, the Legislature, not this court, should do it." (*People v. Anderson, supra*, 28 Cal.4th at p. 770.) While the court in *Garcia* was reasoning from the hypothetical fact pattern before it, that a killing during an inherently dangerous assaultive felony should be "at least voluntary manslaughter," policy concerns regarding actually establishing criminal offenses are for the Legislature, not the courts, to address. (*People v. Farley* (2009) 46 Cal.4th 1053, 1121.)

While the Penal Code currently defines manslaughter as an unlawful killing without malice, it specifically limits voluntary manslaughter to situations in which malice is negated. (See Pen. Code, § 192.) Since the *Garcia* theory of voluntary manslaughter is premised on the utter absence of malice--intent to kill or conscious disregard for life---in the context of inherently dangerous assaultive felonies, it does not fall within the current statutory definition of voluntary manslaughter in the Penal Code. Therefore, its recognition as a crime extends beyond statutory interpretation and requires the creation of a new crime that must be accomplished by the Legislature.

C. The Existence of a Third Theory of Voluntary Manslaughter does Not Comport With Legislative Intent

The Legislature's failure to create a crime defined as an unlawful unintentional killing without malice in the course of an inherently dangerous assaultive felony may be purposeful because it is an unneeded statute. The existence of a statute fixing liability for assaultive unintentional killings under specified circumstances, such as child abuse, demonstrates first, that the Legislature knows how to create such a crime when it intends to do so, and raises the distinct possibility of legislative intent not to recognize such a theory of voluntary manslaughter, as was done in *Bryant*.

For instance, Penal Code section 273ab, subdivision (a), provides:

> Any person, having the care or custody of a child who is under eight years of age, who assaults the child by means of force that to a reasonable person would be likely to produce great bodily injury, resulting in the child's death, shall be punished by imprisonment in the state prison for 25 years to life. Nothing in this section shall be construed as affecting the applicability of subdivision (a) of Section 187 or Section 189.

Thus, to commit "child-homicide," an individual must assault a child in that individual's care or custody, by means of force that to a reasonable person would be likely to produce great bodily injury, which results in the child's death. (*People v. Norman* (2003) 109 Cal.App.4th 221, 227.) This crime defines an unintentional killing without malice in the course of the commission of an inherently dangerous assault, precisely the formulation of the supposed "*Garcia* specie of voluntary manslaughter."

"[T]he assault element of a section 273ab offense requires an intentional act and actual knowledge of those facts that would lead a reasonable person to realize that great bodily injury would directly, naturally, and probably result from the act." (*People v. Wyatt* (2010) 48 Cal.4th 776, 786.) "The defendant, however, need not know or be subjectively aware that his act is capable of causing great bodily injury. [Citation.] This means the requisite mens rea may be found even when the defendant honestly believes his act is not likely to result in such injury." (*Id.* at p. 781.)

> [T]he stated purpose of the bill was to create 'a new felony carrying a sentence equal to second degree murder for which the prosecution would not have to prove the defendant had an intent to kill.' (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 27X (1993-1994 Reg. Sess.) as amended Aug. 8, 1994.)

(*People v. Malfavon* (2003) 102 Cal.App.4th 727, 739, footnote omitted.) "The manifest purpose of section 273ab is 'to protect children at a young age who are particularly vulnerable.'" (*People v. Wyatt, supra,* 48 Cal.4th at p. 780, quoting *People v. Albritton* (1998) 67 Cal.App.4th 647, 660.)

Further, and important to this analysis, is the fact that the offense does not require malice, either express or implied. It is also of note that the Legislature here affixed a punishment for this offense (25 years to life) far greater than that for voluntary manslaughter (4, 7, or 11 years).

The Legislature's enactment of the child-homicide statute demonstrates its awareness that currently there is no recognized crime for unintentional murder without malice in the course of an assaultive felony. To remedy this omission, the Legislature specifically created the child-homicide statute to impose criminal liability for the unintentional killing of a child resulting from assaultive conduct. Thus, the Legislature "closed the gap" and fashioned a statute that affixed liability commensurate with conduct of assaulting a child in a manner that results in death, without having to prove the necessary intent to kill for murder or manslaughter. The fact the Legislature has not taken further action and enacted additional statutes codifying this specie of crime shows an intent not to recognize its existence.

This is not to say that an individual committing a nonmalicious felonious assault resulting in death will not be forced to answer for his or her actions. First, it is extremely likely the majority of unlawful killings that involve inherently dangerous assaultive felonies will result in findings of implied malice. An inherently dangerous felony is one which, "'by its very nature, cannot be committed without creating a substantial risk that someone will be killed [citation]', or carries 'a high probability that death will result.'" (*People v. Robertson* (2004) 34 Cal.4th 156, 166-167, overruled on other grounds in *People v. Chun, supra*, 45 Cal.4th at p. 1198; *People v. Patterson* (1985) 49 Cal.3d 615, 627; *People v. Garcia, supra*, 162 Cal.App.4th at p. 28, fn. 4.) A high probability does not mean a greater than 50 percent chance; death need not result in a majority, or even in a great percentage, of instances. (*People v. Robertson, supra*, at p. 167; *People v. Clem* (2000) 78 Cal.App.4th 346, 349.)

> Malice is implied when the killing is proximately caused by 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. In short, implied malice requires a defendant's awareness of engaging in conduct that endangers the life of another—no more, and no less.

(*People v. Knoller* (2007) 41 Cal.4th 139, 143, internal citation and quotation omitted.) Thus, implied malice has an objective component that is met when an individual intentionally commits an act that endangers the life of another. It also has a subjective component that requires the individual to subjectively appreciate his or her conduct is endangering the life of another.

In the majority of cases, when an individual commits an inherently dangerous assaultive felony, that individual objectively acts in conscious disregard of the victim's life and hence has implied malice. The subjective component of implied malice, similar to other findings of a person's mental state, is generally proven by circumstantial evidence, such as the surrounding circumstances of the crime. (*People v. Thomas* (2011) 52 Cal.4th 336, 355; *People v. Smith* (2005) 37 Cal.4th 733, 741.) Consequently, a jury is not likely to be hard pressed to find implied malice in killings involving inherently dangerous assaultive felonies. This is not to say that there cannot exist rare scenarios that might make the fact finder's determination of the existence of the subjective element of implied malice difficult, only that the scarcity of such circumstances does not warrant creating an additional theory of voluntary manslaughter.

Here, the jury found Bryant acted with intent to kill or at least with conscious disregard for human life. Had there been concern about proving malice, the prosecution had discretion to charge Bryant with an additional felony. For instance, the prosecutor had the option of pursuing an additional charge of assault with a deadly weapon as it is not a lesser included offense of murder. (Pen. Code, § 245, subd. (a)(1); *People v. Sanchez* (2001) 24 Cal.4th 983, 988.) The prosecution could have also

charged a great bodily injury enhancement under circumstances involving domestic violence. (Pen. Code, § 12022.7, subd. (e).) An assault with a deadly weapon conviction and an accompanying great bodily injury enhancement under circumstances involving domestic violence would have resulted in a total punishment ranging from five to nine years in prison. (Pen. Code, §§ 245, subd. (a)(1) [two, three, or four years in state prison]; 12022.7, subd. (e) [three, four, or five years in state prison].) The resulting punishment is similar to that of voluntary manslaughter. (Pen. Code, § 193, subd. (a) ["Voluntary manslaughter is punishment by imprisonment in the state prison for 3, 6, or 11 years."].) But, this was a charging decision for the prosecutor to make and the prosecutor properly exercised his discretion here to charge only murder and attempt to prove it.

Therefore, the Legislature's silence on the matter may be due to the fact this crime is already sufficiently encompassed in the existing Penal Code. Any further action defining such a crime and its punishment is to be undertaken by the Legislature, which has evidently remained silent on the issue despite its recognition of the possibility of such an amalgam of actus reus and mens rea in the context of a child homicide.

D. There was Insufficient Evidence to Support a *Garcia* Instruction

Assuming this Court accepts the legal theory of *Garcia* voluntary manslaughter as a lesser included offense of second degree implied malice murder, there was insufficient evidence supporting such an instruction in the instant case. It is well settled that a trial court in a criminal case has a sua sponte duty to instruct on general principles of law applicable to the case (*People v. Blair* (2005) 36 Cal.4th 686, 745), that is, "those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case." (*People v. Valdez* (2004) 32 Cal.4th 73, 115, internal quotations omitted.) This obligation

includes the duty to instruct on a lesser included offense if the evidence raises a question as to whether the elements of the lesser included offense are present. (*People v. Valdez, supra,* 32 Cal.4th at p. 115; *People v. Breverman, supra,* 19 Cal.4th at p. 154.) "[B]ut not when there is no evidence that the offense was less than that charged." (*Breverman,* at p. 154.)

The court in *Bryant* creatively drummed up a scenario based on an interpretation of the evidence wherein Bryant did not act with implied malice when she killed Golden because she did not subjectively appreciate that her conduct endangered his life:

> To begin with, the stabbing occurred during a heated physical struggle shortly after Robert had attempted to wrest the knife from Bryant, and while he was lunging toward her. Robert expressed surprise that he had been stabbed, and Bryant testified that she did not know that she had stabbed Robert until she saw him bleeding. There also is undisputed evidence that Robert suffered a single stab wound, as well as expert testimony that 'it wouldn't take a whole lot of force' to have caused Robert's wound. In addition, it is undisputed that after Bryant realized that she had stabbed Robert, she immediately attempted to summon medical assistance, and that she was hysterical and expressed extreme remorse immediately after the stabbing. A reasonable jury also could have found credible the statements that Bryant made in the immediate aftermath of the stabbing, such as, '[T]his wasn't supposed to happen,' and, 'I didn't mean to.' Further, Bryant told Lieutenant Evans during her initial police interview in the hours after the stabbing that she 'never really wanted to stab [Robert] or anything,' and that the only thing she wanted to do was 'to scare [Robert] ... .' Finally, the jury could have believed Bryant's testimony that she never intended to kill Robert. In light of this evidence, we conclude that a reasonable jury could have found that Bryant did not harbor implied malice at the time of the stabbing, because she did not subjectively appreciate that her conduct endangered Robert's life.

(Slip Opn. at pp. 26-27.)

While the court in *Bryant* cited a barrage of evidence in the record supporting Bryant's claim that she did not intend to kill Golden, it completely missed the mark on the issue of whether she was *subjectively* aware that her conduct endangered the life of another, i.e., harbored a conscious disregard for life, implied malice. Intent to kill is not an element of implied malice. (*People v. Knoller, supra*, 41 Cal.4th at p. 155.) Furthermore, it was undisputed Bryant thrusted the knife at Golden and ultimately killed him. Even though Bryant claimed she only intended to scare Golden, this does not exclude the inference that intentionally assaulting a person with a knife is objectively inherently dangerous to life. Furthermore, the inherently dangerous nature of the offense itself was the reason she committed it: To scare Golden. There was no evidence that Bryant's act of thrusting the knife at Golden was unintentional, or anything but volitional on her part. There was also no evidence that she did not appreciate that thrusting a knife at Golden was dangerous to his life. Therefore, there was no evidence that she did not subjectively appreciate her conduct endangered Golden's life.

Furthermore, Bryant's testimony does not support a *Garcia* instruction. An assault "requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams* (2001) 26 Cal.4th 779, 790.) The elements of assault with a deadly weapon, under Penal Code section 245, subdivision (a)(1), include, (1) an assault, which requires the intent to commit a battery, and (2) the foreseeable consequence of which is the infliction of great bodily injury upon the subject of the assault. (*People v. Cook* (2001) 91 Cal.App.4th 910, 920.)

Under Bryant's own version of the events, she could not have been committing an assault with a deadly weapon because it required her to have

"the general intent to willfully commit an act the direct, natural and probable consequences of which if successfully completed would be the *injury to another.*" (*People v. Wyatt, supra,* 48 Cal.4th at p. 780.) "Put another way, '[t]he mens rea is established upon proof the defendant willfully committed an act that by its nature will probably and directly result in injury to another, i.e., a battery.'" (*Ibid.*) Although Bryant did not need to have the "specific intent" to harm Golden, there is simply no way that the evidence can be reconciled with the notion that Bryant had sufficient general criminal intent to be guilty of assault with a deadly weapon, but did not appreciate the dangerousness of her conduct. Neither evidence nor logic supports such a scenario.

If Bryant were intentionally thrusting the knife at Golden, as she testified, that conduct, by its very nature amounted to implied malice, as it was a killing "resulting from an intentional act," the "natural consequences of which are dangerous to human life," and performed with "conscious disregard for human life." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 216.) The natural consequences of intentionally thrusting a knife at a person are clearly dangerous to human life, and there was no evidence indicating Bryant would not have known that to be the case. This is particularly true here where the knife penetrated Golden's chest up to his heart, an act which required considerable force. Accordingly, this case did not call for a jury instruction on the theory of voluntary manslaughter suggested in the *Garcia* "deduction." Such a theory was not applicable and the trial court did not err by not instructing the jury on it.

E. The Trial Court had No Duty to Instruct on *Garcia* Because it was an Undeveloped Theory of Law

After concluding *Garcia* "articulates a third theory of manslaughter," the court in *Bryant* then found error in the trial court's failure to instruct on this self-created theory of voluntary manslaughter sua sponte even after

acknowledging the absence of authority on the matter at the time of the trial. (Slip Opn. at pp. 30-31.)

A trial court's duty to instruct sua sponte on lesser instructions does not extend to indistinct and undeveloped theories of law. (*People v. Flannel, supra*, 25 Cal.3d 668, 682-683.) A trial court has a duty to instruct only on general principles of law. (*Ibid.*) General principles of law do not include legal concepts that have been referred to "only infrequently" and with "inadequate elucidation." (*People v. Bacigalupo* (1991) 1 Cal.4th 103, 126, relying on *Flannel* at p. 681.) This *Bryant* decision is the only authority interpreting the *Garcia* opinion as pronouncing a third theory of voluntary manslaughter. Even if it were valid, it could not compel a conclusion that the trial court was required to predict its discovery and instruct a criminal jury in advance of its elucidation by a higher court in a binding opinion. This is beyond retroactivity; it required omniscience.

The utter absence of then-existing authority for this novel theory of voluntary manslaughter would require a trial court to be clairvoyant were it to be held accountable to instruct on a theory heretofore unknown in the law. Yet, after fashioning an entirely new theory of voluntary manslaughter, the court in *Bryant* found it error for the trial court not to have instructed the jury thus sua sponte. Further, it imposed this duty without even addressing the issue of whether the *Garcia* theory could be considered a general principle of law, even though it essentially acknowledged that it was an indistinct and undeveloped theory of law:

> The *Garcia* theory of voluntary manslaughter is not described in any CALCRIM jury instruction, and the case is not referred to in the bench notes of any instructions. In light of its importance in clarifying a distinct theory of voluntary manslaughter, we urge the Judicial Council of California Advisory Committee on Criminal Jury Instructions to consider including an instruction based on *Garcia* in its set of standard criminal jury instructions.

(Slip Opn. at p. 30, fn. 22.)

The court in *Bryant* adopted the *Garcia* theory of voluntary manslaughter as if divine writ, and treated it as established legal theory. However, the fact no other court had similarly done so either in the 159 years prior to the *Garcia* decision or over the last three years since *Garcia* was published, in spite of the hundreds of prosecutions and appeals in California involving implied malice murder, shows its non-status as accepted legal theory and a general principle of law. Simply put, if trial courts are expected to instruct on a theory of law, they deserve notice. Announcing a third theory of voluntary manslaughter premised on dicta and simultaneously imposing a retroactive sua sponte duty to instruct is unreasonable and contrary to this Court's established authority.

In *Blakeley*, the defendant was charged with murder, claimed self-defense and imperfect self-defense, and was convicted of voluntary manslaughter. (*People v. Blakeley, supra*, 23 Cal.4th at p. 86.) He contended on appeal that the trial court erred in refusing to instruct on involuntary manslaughter based on an unintentional killing done without malice because of the unreasonable belief in the need to defend against the victim. (*Id.* at p. 88.) This Court rejected the argument and held that "when a defendant, acting with a conscious disregard for life, unintentionally kills in unreasonable self-defense, the killing is voluntary rather than involuntary manslaughter." (*Id.* at p. 91.) This Court also held that this rule could not be applied retroactively to the *Blakeley* defendant's case because it constituted an "unforeseeable judicial enlargement of the crime of voluntary manslaughter." (*Id.* at p. 92.) As this Court explained:

> [W]hen defendant killed [the victim six years earlier] this court had not yet addressed the issue of whether an unintentional killing in unreasonable self-defense is voluntary or involuntary manslaughter. But three decisions by the Courts of Appeal in this state held that such a killing was only involuntary manslaughter [citations]; no case held to the contrary. Thus, our decision today—that one who, acting with conscious disregard

> for life, unintentionally kills in unreasonable self-defense is guilty of voluntary manslaughter rather than the less serious crime of involuntary manslaughter—is an unforeseeable judicial enlargement of the crime of voluntary manslaughter, and thus may not be applied retroactively to defendant.

(*People v. Blakeley, supra*, 23 Cal.4th at p. 92.)

While *Garcia* engaged in a logical exercise related to the issue, it did not squarely address whether an unlawful and unintentional killing without malice in the course of an inherently dangerous assault felony was in fact, as opposed to "at least," voluntary manslaughter. Other existing precedent left room for interpretation on the matter. For instance, a killing without malice in the commission of a felony not enumerated in section 189 and not inherently dangerous to human life also may be involuntary manslaughter. (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled on other grounds as stated in *Blakeley, supra*, 23 Cal.4th at p. 89; *Garcia, supra,* 162 Cal.App.4th at p. 30.) This Court has also left open the possibility that a defendant who kills in imperfect self-defense, but without an intent to kill and without conscious disregard for danger to human life, would be guilty of involuntary manslaughter. (*Blakeley*, at p. 91.)

Respondent submits that the trial court's sua sponte duty did not extend to undeveloped legal theories, such as the theory of "at least" voluntary manslaughter in *Garcia* and adopted in *Bryant*. (*People v. Valdez* (2004) 32 Cal.4th 73, 116 [speculation is an insufficient basis to trigger a sua sponte duty for instruction on a lesser offense].) Therefore, the court in *Bryant* was incorrect when it concluded the trial court had a sua sponte duty to instruct the jury according to its interpretation of *Garcia*. Furthermore, this Court should find the *Garcia* theory of voluntary manslaughter should not be applied retroactively.

CONCLUSION

For the foregoing reasons, respondent respectfully asks this Court to reverse the judgment of the Court of Appeal and reinstate the judgment of conviction against Bryant.

Dated: January 10, 2012

Respectfully submitted,

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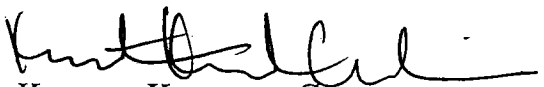

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S OPENING BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 9138 words.

Dated: January 10, 2012

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

Case Name: ***People v. Bryant***
No.: **S196365**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **January 10, 2012**, I served the attached **RESPONDENT'S OPENING BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **January 10, 2012,** to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **January 10, 2012**, at San Diego, California.

S. McBrearty
Declarant

S. McBrearty
Signature

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