REVISED

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. AMALIA BRYANT, Defendant and Appellant.	No. S196365 SUPREME COURT FILED APR 17 2012 Frederick K. Ohlrich Clerk Deputy

Fourth District Court of Appeal, Division One, Case No. D057570
Riverside County Superior Court Case No. SWF014495
Honorable Timothy F. Freer, Judge Presiding

DEFENDANT'S ANSWER BRIEF ON THE MERITS

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ISSUE PRESENTED

May voluntary manslaughter be premised on an unintentional killing without malice that occurs during the commission of a felony assault with a deadly weapon?

FACTUAL AND PROCEDURAL BACKGROUND

Defendant adopts the Introduction and Factual and Procedural Background set forth in parts I and II of the Court of Appeal's Opinion, and notes that it accurately, concisely, and comprehensively sets forth the factual and procedural background of this case. (Slip Opn. pp. 2-8.)

SUMMARY OF DEFENDANT'S ARGUMENT

An unlawful killing is either murder or manslaughter, and the defining boundary between the two is malice. (*People v. Rios* (2000) 23 Cal.4th 450, 460.) Thus, this Court has previously observed that a felony assault committed without malice that results in a death constitutes the crime of manslaughter. (*People v. Hansen* (1994) 9 Cal.4th 300, 311-312.) However, in *Hansen*, this Court did not address whether the crime is voluntary manslaughter or involuntary manslaughter. (*Ibid.*)

This Court should hold that an unlawful killing without malice during the commission of an inherently dangerous felony is voluntary manslaughter, and that an unlawful killing without malice during the commission of a noninherently dangerous felony is involuntary manslaughter.

It has yet to be decided by this Court whether the crime of assault with a deadly weapon, when viewed in the abstract under the applicable test promulgated by this Court in *Burroughs*, constitutes an inherently dangerous felony for purposes of manslaughter. (See *People v. Burroughs* (1984) 35 Cal.3d 824, 830, 834-836 [holding that involuntary manslaughter may be based on an unlawful killing without malice during the commission of a noninherently dangerous felony].)

If assault with a deadly weapon is an inherently dangerous felony, then an unlawful killing committed without malice during the course of an assault with a deadly weapon constitutes the crime of voluntary manslaughter, as held by the Court of Appeal in this case. If assault with a deadly weapon is not an inherently dangerous felony, then an unlawful killing committed without malice during the course of an assault with a deadly weapon constitutes the crime of involuntary manslaughter.

ARGUMENT

I

IF ASSAULT WITH A DEADLY WEAPON IS AN INHERENTLY DANGEROUS FELONY, THEN AN UNLAWFUL KILLING COMMITTED WITHOUT MALICE IN THE COURSE OF AN ASSAULT WITH A DEADLY WEAPON CONSTITUTES THE CRIME OF VOLUNTARY MANSLAUGHTER, AS HELD BY THE COURT OF APPEAL

Assault with a deadly weapon is a "wobbler." (Pen. Code, § 245, subd. (a)(1).) It is therefore treated as a felony for all purposes unless charged as a misdemeanor or reduced by the trial court to a misdemeanor at sentencing or thereafter. (See *People v. Statum* (2002) 28 Cal.4th 682, 685 [setting forth the above rule for wobblers].)

Assault is not included in the list of felonies that will support a first degree felony murder conviction. (Pen. Code, § 189.) A felony assault also cannot serve as the basis for a second degree felony murder conviction

under the *Ireland* merger doctrine. (*People v. Ireland* (1969) 70 Cal.2d 522, 539; see also *People v. Chun* (2009) 45 Cal.4th 1172, 1200 [recently reaffirming the rule that under the *Ireland* merger doctrine, an assaultive felony may not form the basis of a second degree felony murder conviction].)

In 1969, this Court concluded that the utilization of the felony-murder rule in assault cases "extends the operation of that rule 'beyond any rational function that it is designed to serve.' [Citation.] To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault -- a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (*People v. Ireland, supra,* 70 Cal.2d at p. 539.)

Outside of the felony-murder context, an unlawful killing is either murder or manslaughter, and the defining boundary between the two is malice. (*People v. Rios, supra,* 23 Cal.4th at p. 460; see also Pen. Code, § 192 [defining manslaughter as the unlawful killing of a human being without malice].) Thus, this Court has previously observed that a felony assault committed without malice that results in a death constitutes the crime of manslaughter. (*People v. Hansen, supra,* 9 Cal.4th at pp. 311-312,

disapproved on another ground in *People v. Chun, supra,* 45 Cal.4th at p. 1199.) However, in *Hansen*, this Court did not address whether the crime is voluntary manslaughter or involuntary manslaughter. (*Ibid.*)

In 1984, this Court held that despite the statutory language defining involuntary manslaughter as an unlawful act not amounting to a felony or a lawful act committed without due caution and circumspection, "the only logically permissible construction of section 192 is that an unintentional homicide committed in the course of a noninherently dangerous felony may properly support a conviction of involuntary manslaughter, if that felony is committed without due caution and circumspection." (*People v. Burroughs, supra,* 35 Cal.3d at pp. 834-836, disapproved on another ground in *People v. Blakeley* (2000) 23 Cal.4th 82, 89.) A felony is considered inherently dangerous to human life when the felony, viewed in the abstract, "by its very nature, ... cannot be committed without creating a substantial risk that someone will be killed." (*Id.* at p. 833.)

Viewed against the above backdrop of authorities, the Court of Appeal in *Garcia* recently considered the question of what crime is committed when a defendant commits an "unintentional killing, without malice, during the commission of [an inherently dangerous assaultive] felony that is not murder as defined by Penal Code section 187, subdivision (a), and does not fall within the statutory definition of either voluntary or

involuntary manslaughter." (*People v. Garcia* (2008) 162 Cal.App.4th 18, 22, 28.) Upon conducting an extremely thorough review of the law of homicide, including the distinctions between murder, voluntary manslaughter, and involuntary manslaughter, as well as the *Ireland* merger doctrine applicable to assaultive felonies, the Court of Appeal concluded that the answer is voluntary manslaughter. (*Id.* at pp. 24-33.)

In *Garcia*, the Court of Appeal assumed, without analysis or citation to authority, that assault with a deadly weapon is an inherently dangerous felony. (See *People v. Garcia, supra,* 162 Cal.App.4th at pp. 22, 26, 29, 31-33.) If this assumption is true, then the Court of Appeal cogently and logically observed that a killing without malice is not malice aforethought murder, a killing in the commission of an assault with a deadly weapon cannot serve as the basis for a felony murder conviction, a killing in the commission of an inherently dangerous felony cannot serve as the basis for an involuntary manslaughter conviction because involuntary manslaughter is limited to lawful acts with criminal negligence, misdemeanors, and noninherently dangerous felonies, and that an unintentional killing without malice in the commission of an inherently dangerous felony, such as felony assault with a deadly weapon, constitutes the crime of voluntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 24-33.)

The evidence in *Garcia* disclosed that the defendant struck the victim in the face with the butt of a shotgun, causing the victim to fall, hit his head on the sidewalk and die. (*People v. Garcia, supra,* 162 Cal.App.4th at p. 22.) The defendant told police after his arrest, and testified at trial, that he was intoxicated at the time and that the victim lunged toward him. He said he thought the victim was going to try to fight him and was concerned the victim would take the gun. The defendant said he "just reacted" and insisted he had jabbed or swung at the victim to back him up. He did not intend to hit the victim in the face and "never intended to kill him or for him to die." (*Id.* at p. 25.) The Court of Appeal held that this evidence, which indisputably constituted the crime of felony assault with a deadly weapon/firearm, would therefore not support instruction on involuntary manslaughter because the crime was at least voluntary manslaughter. (*Id.* at pp. 22, 31, 33.)

In this case, citing to *Garcia* and without further analysis, the Court of Appeal also assumed that assault with a deadly weapon is an inherently dangerous felony. (Slip Opn. pp. 22, 25, 31, fn. 23, 34 & fn. 27.) Thereafter, based on this assumption, the Court of Appeal herein also concluded that an unintentional killing committed without malice during the course of an inherently dangerous assaultive felony constitutes the crime of voluntary manslaughter.

Again, if one assumes assault with a deadly weapon is an inherently dangerous felony, the logic and analysis in both this case and *Garcia* is sound. The felony-murder rule is inapplicable in assault cases. When felony murder does not apply, an unlawful killing without malice aforethought is manslaughter, not murder. An unlawful killing without malice in the course of a noninherently dangerous felony is involuntary manslaughter. A fortiori, an unlawful killing without malice in the course of an inherently dangerous felony constitutes voluntary manslaughter.

The analysis in this case and *Garcia* is also entirely consistent with the traditional common law rule that manslaughter "is a 'catch-all' concept, including as a matter of common law all homicide not amounting to murder on the one hand and not legally justifiable or excusable on the other." (See Perkins and Boyce, *Criminal Law* (3d. ed. 1982), pp. 104-105; see also *People v. Flannel* (1979) 25 Cal.3d 668, 679-680, [quoting with approval a prior edition of Perkins on Criminal Law stating that the common rule is that manslaughter is a "catch-all" concept].)

The only questionable portion of the opinions of the Court of Appeal in this case and *Garcia* is the assumption that assault with a deadly weapon is an inherently dangerous felony. For the reasons set forth below, this Court should conclude that assault with a deadly weapon is not an inherently dangerous felony. To the extent this Court disagrees and

concludes that assault with a deadly weapon is an inherently dangerous felony, then this Court should adopt the reasoning, analysis, and conclusion of the Court of Appeal in both this case and *Garcia* in its entirety.

II

ASSAULT WITH A DEADLY WEAPON SHOULD NOT BE DEEMED AN INHERENTLY DANGEROUS FELONY, AND IF THIS COURT AGREES, THEN AN UNLAWFUL KILLING COMMITTED WITHOUT MALICE IN THE COURSE OF AN ASSAULT WITH A DEADLY WEAPON CONSTITUTES THE CRIME OF INVOLUNTARY MANSLAUGHTER

A. The Evolution Of The Case Law And Recognition That An Unlawful Killing Committed Without Malice During The Commission Of A Noninherently Dangerous Felony Is Involuntary Manslaughter

Penal Code section 192, subdivision (b), provides that involuntary manslaughter is an unlawful killing in the commission of an unlawful act not amounting to a felony or in the commission of a lawful act with criminal negligence. (See Pen. Code § 192, subd. (b).) However, these two categories of involuntary manslaughter are not exclusive. Involuntary manslaughter can also be based on conduct that falls completely outside the two statutory definitions in section 192, subdivision (b), namely, a felony that is not inherently dangerous to life.

The leading case on point is *People v. Burroughs, supra,* 35 Cal.3d 824. *Burroughs* involved an appeal from a conviction of second degree murder based on the felony-murder rule. Much of the opinion in *Burroughs*

is devoted to explaining why the underlying felony was not a felony that was inherently dangerous and therefore could not support a conviction for second degree felony murder. (See *id.* at pp. 828-833.) After reaching this result, this Court expressly held that when a felony is not inherently dangerous to human life when its elements are viewed in the abstract, a death occurring during the commission of that felony is involuntary manslaughter despite the language in Penal Code section 192, subdivision (b), stating that involuntary manslaughter applies when the death occurs during the commission of an act *not* amounting to a felony. (*Id.* at pp. 833-836.)

As defendant will show, the offense of assault with a deadly weapon should be found not inherently dangerous to life when its elements are appropriately viewed in the abstract, a death occurring during the commission of this offense may therefore constitute involuntary manslaughter, and defendant's jury should have been so instructed.

In *Burroughs*, the defendant was convicted, among other things, of second degree murder on a felony-murder theory due to a death occurring in the commission of felony practicing medicine without a license. (*People v. Burroughs*, *supra*, 35 Cal.3d at pp. 826-827.) The victim, who had been diagnosed as suffering from terminal leukemia, died after defendant employed an unorthodox method of curing cancer, which included the

consumption of a unique lemonade, exposure to colored lights and a type of vigorous massage administered by the defendant. (*Id.* at p. 827.) The direct cause of death was massive hemorrhage of the mesentery in the abdomen, which the evidence suggested was the direct result of "deep" abdominal massages the defendant performed. (*Id.* at p. 828.)

On appeal, this Court held that the trial court erred when it instructed the jury that if the homicide resulted directly from the commission of felony unlicensed practice of medicine, the homicide was felony murder of the second degree. (*People v. Burroughs*, *supra*, 35 Cal.3d at pp. 828-829.) The Court reaffirmed that second degree felony murder applies only when the underlying felony is inherently dangerous to human life. (*Id.* at p. 829.) The Court also reaffirmed that when assessing whether a felony is inherently dangerous to human life, the court looks to the elements of the felony in the abstract and does not evaluate the particular facts of the case. (*Id.* at pp. 829-830.) The Court explained that in conducting this analysis the appellate court looks first to the primary elements of the offense in issue and then to the factors elevating the offense to a felony. When doing so, the court determines "whether the felony, taken in the abstract, is inherently dangerous to human life, or whether it *possibly* could be committed without creating such peril." (*Id.* at p. 830, citation omitted, emphasis added.) The Court noted: "In this examination we are required to view the statutory

definition of the offense as a whole, taking into account even nonhazardous ways of violating the provisions of the law which do not necessarily pose a threat to human life." (*Ibid.*)

The Court then examined felony unlicensed practice of medicine. The primary element was simply the practice of medicine without a license. Such practice was defined as treating the sick or afflicted. The Court failed to find inherent dangerousness at this stage of its investigation, because one can treat the sick with innocuous results, such as advising a person with a cold to rest in bed and drink fluids. (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830.)

The Court next analyzed the factors which elevated the offense to a felony. Those factors, as described by the statute defining the offense, were acting under "'circumstances or conditions which cause or create a risk of great bodily harm, serious mental or physical illness, *or death*.'" (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830, emphasis in original.) The Court found that because death was listed in the disjunctive as a separate risk, the statute applied to acts which did "not necessarily endanger human life." (*Ibid.*) Specifically, the acts could create a risk of serious bodily injury, such as a broken bone, yet "not jeopardize the life of the victim" and "not rise to the level of being inherently life-threatening." (*Id.* at p. 831.) After analyzing other potential risks in committing felony unlicensed practice of

medicine (*id.* at pp. 831-832), the Court concluded that offense was not an inherently dangerous felony and the second degree murder conviction based on felony murder had to be reversed. (*Id.* at p. 833.)

The Court went on to state that, on retrial, the defendant could be convicted of involuntary manslaughter for a killing in the course of the commission of a noninherently dangerous felony. (*People v. Burroughs*, *supra*, 35 Cal.3d at pp. 833-836.) The Court acknowledged that the Penal Code defines involuntary manslaughter as a killing without malice "in the commission of an unlawful act, not amounting to a felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection." (*Id.* at p. 835; Pen. Code, § 192, subd. (b).) The Court, however, agreed with the holding in *People v. Morales* (1975) 49 Cal.App.3d 134, that, as a matter of statutory construction, involuntary manslaughter also includes "an unintentional homicide committed in the course of a noninherently dangerous felony if the felony is done without due caution and circumspection." (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 835.)

In reaching this result, this Court found that the description of the bases for involuntary manslaughter found in subdivision (b) of section 192 -- unlawful acts not amounting to a felony and ordinarily lawful acts which might produce death -- was not controlling. Instead, the Court found that

for purposes of determining the acts which might result in a verdict of involuntary manslaughter the controlling statutory language was the introductory language of section 192 which defines manslaughter as an unlawful killing without malice. As the Court put it: "'[T]he basic definition set forth at the outset of Penal Code section 192 is of controlling significance -- "Manslaughter is the unlawful killing of a human being, without malice.'" [Citation.] The Legislature provided in section 192, subdivision 2 [currently subdivision (b)], that a killing in the commission of a lawful act which might produce death if committed without due caution and circumspection is involuntary manslaughter. A fortiori, an unintentional homicide committed in the course of a noninherently dangerous felony (which might, nevertheless, produce death if committed without due caution and circumspection) ought be punishable under section 192 as well." (*Id.* at p. 836.)

Burroughs reaffirms the rule, first stated in *People v. Morales*, *supra*, 49 Cal.App.3d 134, that involuntary manslaughter is not limited to the "misdemeanor" and "ordinarily lawful act" theories but applies to noninherently dangerous felonies as well. In *Morales*, the Court of Appeal first held that grand theft is not a felony that is inherently dangerous to life and, therefore, cannot be a basis for a conviction for second degree felony murder. (*People v. Morales*, *supra*, 49 Cal.App.3d at pp. 142-143.) The

Court of Appeal then discussed the nature of the homicide conviction that can result when a victim dies due to the commission of grand theft. (*Id.* at p. 143.) The Court of Appeal held that the defendant could be convicted of involuntary manslaughter if his conduct during the commission of the grand theft involved criminal negligence. (*Id.* at p. 144.)

The Court of Appeal recognized that "[i]t might seem that where the conduct resulting in a death constituted a 'non-inherently dangerous' felony, the plain words of the statute [currently found in Penal Code §192, subdivision (b)] would preclude defining the homicide as involuntary manslaughter. The statute refers only to killings 'in the commission of an unlawful act, *not amounting to felony*,' or 'in the commission of a *lawful act* . . . without due caution and circumspection.'" (*People v. Morales*, *supra*, 49 Cal.App.3d at p. 144, emphasis in original.) The Court of Appeal noted, however, that the California Supreme Court "has indicated that the list of elements of manslaughter in Penal Code section 192 is not exclusive." (*Ibid.*)

The Court of Appeal inferred from the Supreme Court cases that "the basic definition set forth at the outset of Penal Code section 192 is of controlling significance – 'Manslaughter is the unlawful killing of a human being, without malice.' The enumeration of specific instances of unlawful killings in which malice is deemed lacking is not exclusive, because the

Legislature could not have taken into account doctrines relating to the concept of malice which evolved subsequent to enactment of the statute. At the time Penal Code section 192 was adopted commission of the felony of larceny was deemed to imply the malice for murder. [Citation.] Under notions prevailing today, malice cannot be imputed to one who commits a larceny because that crime is not inherently dangerous to human life. It is thus only consistent with the legislative scheme that a killing committed in the perpetration of theft might be included among the nonmalicious criminal homicides classed as manslaughter." (*People v. Morales*, *supra*, 49 Cal.App.3d at p. 144 (*Id.* at p. 145.)

The Court of Appeal found additional support in language found in the 1969 second edition of Perkins' treatise on criminal law, which provides: "'And since manslaughter itself is a "catch-all" concept, including as a matter of common law all homicide not amounting to murder on the one hand and not legally justifiable or excusable on the other, the general outline of involuntary manslaughter is very simple. Every unintentional killing of a human being is involuntary manslaughter if it is neither murder nor voluntary manslaughter nor within the scope of some

recognized justification or excuse.'" (*People v. Morales*, *supra*, 49 Cal.App.3d at p. 145, fn. 7, quoting Perkins, *Criminal Law* (2d ed. 1969), p. 70.)[1]

Under *Burroughs* and *Morales*, involuntary manslaughter applies where the killing takes place during the commission of a noninherently dangerous felony if the defendant commits that felony without due caution and circumspection and the defendant does not harbor malice.

B. Assault with a Deadly Weapon Is a Felony that Is Not Inherently Dangerous to Life when Its Elements are Viewed in the Abstract

1. Currently Existing Case Law Is Inconclusive As No Case Has Applied The Current Test For Determining Whether A Felony Is Inherently Dangerous To Life To The Elements Of The Crime Of Assault With A Deadly Weapon

There are some Court of Appeal cases stating that an assault with a deadly weapon is a felony that is inherently dangerous to life. Most of these cases were decided in the 1960's, before or during the period the Supreme Court was establishing the current test for determining whether a felony can be a proper basis for a conviction for second degree felony murder. As defendant will show, none of these cases employs the correct test for

[1] The identical quotation appears in a more recent edition of Professor Perkins' treatise. (Perkins and Boyce, *Criminal Law* (3d ed. 1982), pp. 104-105.)

determining inherent danger to life, and most were decided before the current test for determining inherent danger was promulgated.

There also is a Court of Appeal case decided in 1989, after the development of the current test for determining inherent danger and after Supreme Court's decision in *Burroughs*, *People v. Rhodes* (1989) 215 Cal.App.3d 470, 476.

In *Rhodes*, the Court of Appeal summarily stated that an assault with a deadly weapon is an inherently dangerous felony due to the nature of the weapon or the degree of force, and therefore is not a proper basis for a verdict of involuntary manslaughter. (*People v. Rhodes, supra,* 215 Cal.App.3d at p. 476.)

Rhodes, however, was not meant to be published or even dispositive, because rehearing was granted and the subsequent opinion, which was not published, did not adopt the language in the original decision relating to assault with a deadly weapon being an inherently dangerous felony. Moreover, the analysis in the original opinion was flawed and was expressly rejected by a later case decided by the same court that issued the original opinion. (See *People v. Cameron* (1994) 30 Cal.App.4th 591, 602, fn. *.) This asterisked footnote in *Cameron* states: "Reporter's Note: Rehearing [in *Rhodes*] granted December 6, 1989. The subsequent opinion

was filed February 28, 1990, but was not certified for publication. By clerical error the first opinion was reported as a published opinion at 215 Cal.App.3d 470, 263 Cal.Rptr. 603. (See rule 976(d), Cal. Rules of Court.)." (*Ibid.*)

In a colorful and entertaining concurring opinion in *Cameron*, Justice Davis, who was also one of the justices who decided *Rhodes*, elaborated on what took place and further explained the reason for the lack of precedential significance of the opinion appearing in the official reporters, stating:

> "I concur.
>
> "'I do not rule Russia; ten thousand clerks do.' (Nicholas I (1796-1855).)
>
> "My colleague has done an admirable job exposing the flaws in the published version of *People v. Rhodes* (1989) 215 Cal.App.3d 470 [263 Cal.Rptr. 603]. As one of the participating justices in *Rhodes*, it is only fitting that I assume the burden of recounting how the published version of *Rhodes* has miraculously created a life for itself despite this court's best efforts to put a stake through its heart.
>
> "While it is unfortunately true that my two former colleagues and I initially filed the published version of *Rhodes*, all three of us recognized the error of our ways, granted Mr. Rhodes a rehearing, and issued a new, nonpublished opinion that in no way adopted the language we take issue with today. (*People v. Rhodes* (February. 28, 1990) C004019.) In such circumstances the publisher is normally notified of the court action and the superseded opinion which was initially designated for publication is never published in the official reports.

> "Alas, while we wearers of the robe had a great deal of authority (in contrast to power) over the matter of publication, it was our normally faultless clerical staff that had the final word regarding whether *Rhodes* would be published and what version it would appear in. Thus *Rhodes* has the distinction of being the only published opinion I am aware of that not only rightly receives no respect from other appellate courts, but also is saddled with the indignity of having no significance to the parties themselves. May it now rest in peace." (*People v. Cameron, supra,* 30 Cal.App.4th at p. 606.)

It is clear from the above-described and quoted portions of *Cameron* that the version of *Rhodes* appearing in the published reports has no precedential value and that the court which decided *Rhodes* came to a result in the unpublished opinion issued after rehearing that was inconsistent with the original opinion.

Finally, there are two more recent cases from the last decade, one of which assumed, without analysis or citation to authority on the point other than the debunked decision in *Rhodes*, that assault with a deadly weapon is an inherently dangerous felony. (See *People v. Garcia, supra,* 162 Cal.App.4th at pp. 22, 26, 29-33 [assuming that assault with a deadly weapon is inherently dangerous to life]; see also *People v. Parras* (2007) 152 Cal.App.4th 219, 227 [rejecting a claim that involuntary manslaughter could be based on assault with a deadly because that crime is a felony].) However, neither of those cases addressed the test for determining inherent danger to life or analyzed the elements of the crime of assault with a deadly weapon under the appropriate test, and it is not even clear in *Parras* that the

Court of Appeal drew a distinction between inherently dangerous and noninherently dangerous felonies for purposes of involuntary manslaughter.

The time has now come for a court to analyze assault with a deadly weapon in the *abstract* and determine whether it is a felony that is inherently dangerous to human life. If it is not, then a homicide committed during an assault with a deadly weapon can be a basis for a verdict of involuntary manslaughter under *Burroughs* and *Morales.*

The primary case from the 1960's is *People v. Montgomery* (1965) 235 Cal.App.2d 582. It holds that assault with a deadly weapon is a proper basis for a verdict of second degree felony murder. It bases this holding on earlier Supreme Court case law relating to felonies that are inherently dangerous to life and therefore a proper basis for a verdict of second degree felony murder. These earlier Supreme Court cases used a test for determining inherent danger to life that is not compatible with the test first announced by the Supreme Court shortly after *Montgomery* was decided and currently still in use.

In *Montgomery*, the jury was given an instruction stating that second degree murder included a situation in which "the killing is done in the perpetration or attempt to perpetrate a felony such as assault with a deadly weapon." (*People v. Montgomery, supra,* 235 Cal.App.2d at p. 586.) The defendant argued on appeal that the giving of this portion of the instruction

on second degree murder was error because "it ignored the fact that such an assault may be 'committed under mitigating circumstances which would negate the existence of malice in a killing resulting therefrom.'" (*Id.* at p. 587.) The Court of Appeal summarily rejected the contention. Its entire analysis of the point was: "[Appellant] cites no authority in support of this contention. A homicide that is a direct causal result of the commission of a felonious assault is murder in the second degree. (Generally see *People v. Schader* [(1965)] 62 Cal.2d 716, 732.) The instruction was not erroneous." (*Ibid.*)

The *Montgomery* court's reliance on *Schader* shows that the decision in *Montgomery* is no longer viable under current felony-murder analysis. This is because this Court has repudiated the holding in *Schader* and the reasoning in the cases on which the holding in *Schader* was based and has adopted a different test for determining whether a felony is inherently dangerous to life and therefore a proper basis for a conviction for second degree felony murder. (See *People v. Satchell* (1971) 6 Cal.3d 28, 35-41.)

In *Schader,* the Supreme Court followed two then-recent cases (*People v. Ford* (1964) 60 Cal.2d 772, 795; *People v. Robillard* (1960) 55 Cal.2d 88, 98) and held that possession of a firearm by a convicted felon is a felony that is inherently dangerous to life and therefore an appropriate basis for a conviction of second degree murder on a felony-murder theory.

(*People v. Schader*, *supra*, 62 Cal.2d at p. 732.) Six years later, this Court came to the opposite conclusion. (*People v. Satchell, supra,* 6 Cal.3d at pp. 35-41.) This Court explained in *Satchell* that its decisions in *Schader*, *Ford* and *Robillard* were incorrect, because they were based on an incorrect analysis that viewed the underlying felony in terms of the facts of the particular case, rather than using the correct and more recent approach of viewing the underlying felony in terms of the elements of the offense in the abstract. (*Id.* at p. 36.) As this Court Biblically put it, its prior cases were no longer good law because: "'[The] branch cannot bear fruit by itself, except it abides in the vine.' (John XV, 4.)" (*Ibid.*) *Montgomery* necessarily was based on the same mistaken approach for determining whether a felony is inherently dangerous as the *Schader* case on which it relied. Because the vine supporting *Montgomery* has shriveled and died, *Montgomery*, which was a fruit produced by that vine, does not contain a viable legal holding.

The death of *Montgomery* and the vine from which it grew took place only a few months after the Court of Appeal decided the *Montgomery* case, and not long after the Supreme Court decided the *Schader* case. In late 1965 the Supreme Court stated for the first time, and in a footnote, that the correct approach to determining if a felony is inherently dangerous to life, and therefore a proper basis for a conviction for second degree murder on a felony-murder theory, is to view the elements of the felony in the abstract,

rather than in terms of the facts of the particular case. (*People v. Williams* (1965) 63 Cal.3d 452, 458, fn. 5.)

As defendant has noted, before *Williams*, the approach for determining whether a felony was inherently dangerous had been to look at the facts of the case under review. (*People v. Williams, supra,* 63 Cal.3d at p. 458, fn. 5; *People v. Satchell, supra*, 6 Cal.3d at p. 36.) This pre-*Williams* factual approach was unworkable because in all cases a death had occurred during the commission of the underlying felony, so the felony necessarily had been committed in a way that not only endangered life, but actually resulted in the death of the victim. Therefore, to apply a factual based test would lead inexorably to the conclusion that the underlying felony is exceptionally hazardous. (*People v. Burroughs, supra,* 35 Cal.3d at p. 830.)

People v. Finley (1963) 219 Cal.App.2d 330, 340-341, which was decided two years before *Montgomery*, is another case that states that felony assault by means of force likely to produce great bodily injury can be a basis for a conviction for second degree murder on a felony-murder theory. However, *Finley* is based on the premise that *all* felonies can be a basis for a conviction for second degree felony murder except for those felonies listed in Penal Code section 189 as supporting a conviction for first degree felony murder. (*Ibid.*) *Finley* does not contain any analysis of

whether felony assault is a felony that is inherently dangerous to life when its elements are viewed in the abstract. (*Ibid.*) Thus, it has no viable precedential value since it views *all* felonies not listed in section 189 as being a proper basis for a conviction for second degree felony murder, a position which is in direct conflict with the rule later set forth by the Supreme Court in *Williams*.

The third case from the 1960's dealing with felonious assault in the context of second degree felony murder is *People v. Clayton* (1967) 248 Cal.App.2d 345, which was decided after the Supreme Court decided *Williams* but before the Supreme Court had an opportunity to apply the *Williams* test to any significant number of felonies.

In *Clayton*, the defendant was convicted of second degree murder after he fired a rifle twice at an African-American man he did not know, fatally shooting another stranger instead, and said he ought to shoot or kill "all them black son of a bitches." (*People v. Clayton, supra,* 248 Cal.App.2d at p. 347.) On appeal, the defendant challenged an instruction that told the jury that abusive, insulting or provocative words, not accompanied by a threat or apparent threat to inflict great bodily injury, did not justify an assault. (*Id.* at p. 351.) Before addressing the merits of this contention, the Court of Appeal stated that the trial court correctly instructed the jury that second degree murder can occur in three situations -

- (1) when the killing results from an unlawful act the natural consequences of which are dangerous to life, which act is deliberately performed by a person who knows that his conduct endangers the life of another, or (2) when the circumstances attending the killing show an abandoned or malignant heart, or (3) when the killing is done in the perpetration or attempt to perpetrate a felony such as assault with a deadly weapon. The Court of Appeal cited *Finley* as supporting the last theory. (*Id.* at p. 350.)

Clayton is a thin reed for supporting the proposition that assault with a deadly weapon is a felony that is inherently dangerous to life. Although *Clayton* was decided after *Williams*, and although it cites *Williams* for the general proposition that a felony must be inherently dangerous to life in order to support a conviction for felony murder (*People v. Clayton, supra,* 248 Cal.App.2d at p. 350), *Clayton* does not state or apply the test set forth in *Williams* for determining whether assault with a deadly weapon is a felony that is inherently dangerous to life. Nor does *Clayton* discuss the elements of assault with a deadly weapon or analyze the offense in the abstract. Instead, the court in *Clayton* simply cites *Finley* and summarily states that assault with a deadly weapon is a proper basis for a conviction for second degree felony murder.

In 1969, this Court decided *Ireland*, a case which contained a holding that made it unnecessary to determine if assault with a deadly

weapon is a felony inherently dangerous to human life and therefore a proper basis for a conviction of second degree felony murder. (*People v. Ireland, supra,* 70 Cal.2d 522.) In *Ireland*, this Court promulgated the merger doctrine, which holds that assault with a deadly weapon cannot be a basis for second degree felony murder because the great majority of homicides involve a felony assault, and application of the felony-murder rule in such cases would preclude the jury from considering the element of malice and improperly bootstrap all such cases into the category of murder. (*Id.* at pp. 538-540.) Since assault with a deadly weapon could no longer be a basis for felony murder under the merger doctrine, there was no need to determine if this was a noninherently dangerous felony that could not support a felony murder conviction for this separate reason.

When the Supreme Court decided *Burroughs* in 1984, the question of whether assault with a deadly weapon is an inherently dangerous felony became a viable question in the context of whether that felony could be a proper basis for a verdict of involuntary manslaughter. However, no published case since then has squarely addressed the issue of whether assault with a deadly weapon is an inherently dangerous felony. Instead, only a case inadvertently appearing in the official reports addresses it, and does so without discussing or applying the proper test for making this determination. (See *People v. Rhodes, supra,* 215 Cal.App.3d at p. 476.)

In *Parras*, the Court of Appeal stated that involuntary manslaughter can be based on either a lawful act or a misdemeanor. (*People v. Parras, supra,* 152 Cal.App.4th at p. 227.) The Court of Appeal then rejected a contention that the jury should have been instructed that an unintentional killing during the commission of "another crime" constitutes involuntary manslaughter, ruling that such instructions were not required because the underlying assaultive crime in that case "was a felony, not the misdemeanor required under this theory." (*Id.* at p. 228.) In reaching this conclusion, the Court of Appeal did not observe that involuntary manslaughter can also be based on a felony, and did not address the question of whether assault with a deadly weapon is an inherently dangerous felony. (*Ibid.*)

Finally, as previously noted, the Court of Appeal in *Garcia* assumed, without addressing the appropriate test for determining inherently dangerous felonies or the elements of the crime of assault with a deadly weapon -- and without citation to any authority on the point other than the debunked decision in *Rhodes* -- that assault with a deadly weapon is an inherently dangerous felony. (See *People v. Garcia, supra,* 162 Cal.App.4th at pp. 22, 26, 29-33.)

As the above demonstrates, there appears to be no currently valid published case which addresses the issue of whether the crime of assault

with a deadly weapon is a felony inherently dangerous to life applying the current test evaluating the elements of the offense in the abstract.

2. An Analysis of the Elements of Assault with a Deadly Weapon Supports The Conclusion That It Is Not A Felony Inherently Dangerous To Life

Under *Burroughs*, analysis of inherent dangerousness begins by looking at the primary elements of the offense and then to the elements elevating the offense to a felony. (*People v. Burroughs*, *supra*, 34 Cal.3d at p. 830; accord, *People v. Henderson* (1977) 19 Cal.3d 86, 93-94; *People v. Smith* (1998) 62 Cal.App.4th 1233, 1237.) The primary elements of an assault are "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." (Pen. Code, §240.) The term "violent" in this context has "no real significance." (1 Witkin and Epstein, *California Criminal Law* (3d ed. 2000), Crimes Against the Person, §12, p. 645.) It is not synonymous with bodily harm but rather is synonymous with physical force, although the kind of physical force is immaterial. (*People v. McCoy* (1944) 25 Cal.2d 177, 191.)

Because assault is an attempted battery (*People v. Rocha* (1971) 3 Cal.3d 893, 899), and because the least touching may constitute criminal battery (*id.* at p. 899, fn. 12; *County of Santa Clara v. Willis* (1986) 179 Cal.App.3d 1240, 1251, fn. 6), simple assault would include a mere

attempt, coupled with present ability, to touch another person. Viewed in the abstract, the primary elements of assault are not inherently dangerous to human life. Attempting merely to touch another is not inherently dangerous to life. Neither is a completed touching.

The next level of analysis requires a consideration of the factor which elevates assault to a felony. (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830; *People v. Henderson*, *supra*, 19 Cal.3d at p. 94; *People v. Smith*, *supra*, 62 Cal.App.4th at p. 1237.) This factor is that the assault is committed with objects such as guns, knives and blackjacks, which are viewed as being deadly weapons as a matter of law, or with ordinarily harmless objects that are being used in a manner that is likely to produce death or great bodily injury. (See Pen. Code, § 245, subd. (a); *People v. Aguilar* (1997) 16 Cal.4th 1023, 1029.) The offense of assault with a deadly weapon does not require an intent to inflict bodily harm or even to cause any particular injury. (*People v. Rocha*, *supra*, 3 Cal.3d at p. 899.) For example, it is not necessary that the defendant attempt to shoot the victim. It is an assault with a firearm to point the gun at someone and order him to raise his hands. (*People v. Schwartz* (1992) 2 Cal.App.4th 1319, 1326.) In fact, as Witkin points out, assault with a firearm includes "attempting to draw a loaded gun, or drawing it without aiming it, aiming it without firing

it, or firing it without intent to hit. . . ." (1 Witkin, *California Criminal Law*, Crimes Against the Person §41, p. 664 [and cases cited].)

When reviewing the primary elements of the offense and the factors elevating the offense to a felony in order to determine whether the felony is inherently dangerous to life when viewed in the abstract, the court asks "whether [the felony] possibly could be committed without creating such peril." (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830.) When conducting this analysis courts "are required to view the statutory definition of the offense as a whole, taking into account even nonhazardous ways of violating the provisions of the law which do not necessarily pose a threat to human life." (*Ibid.*) "A felony is considered inherently dangerous to human life when the felony, viewed in the abstract, 'by its very nature ... cannot be committed without creating a substantial risk that someone will be killed', or carries a 'high probability' that death will result." (*People v. Robertson* (2004) 34 Cal.4th 156, 166-167, citations omitted.) "High probability" in this context does not mean a greater than 50% chance. (*People v. Clem* (2000) 78 Cal.App.4th 346, 349.)

It is helpful to view assault with a deadly weapon or firearm using the analysis the Supreme Court used in *Burroughs* to view felony unlicensed practice of medicine. The felony elevating factors of unlicensed practice of medicine involved, *inter alia*, engaging in such activity under

circumstances which cause or create a risk of great bodily harm or death. (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830.) The Supreme Court viewed the risk of death and the risk of great bodily harm disjunctively, and found that injuries which constitute great bodily harm -- such as broken bones -- are not necessarily life threatening. (*Id.* at pp. 830-831.)

Assaulting someone with a gun is not inherently dangerous to life in cases in which the defendant does not actually shoot the gun. Indeed, a defendant can be found guilty of an assault with a firearm even if he does not exhibit the weapon, or point or fire the weapon, but merely cocked the gun while holding it inside a leather purse since this gives the defendant the present ability to injure the victim with the gun and goes beyond mere preparation. (*People v. Escobar* (1992) 11 Cal.App.4th 502, 505.) It also is an assault to display a gun in a threatening manner without attempting to inflict an injury. (See *People v. Vorbach* (1984) 151 Cal.App.3d 425, 429.) And it is an assault with a firearm to use the weapon as a bludgeon. (*People v. Fain* (1983) 34 Cal.3d 350, 357, fn. 6; *People v. Miceli* (2002) 104 Cal.App.4th 256, 270-271.) An assault committed by using a firearm as a bludgeon is not inherently dangerous to life because there is no need to actually hit the victim with the gun. Even if the defendant strikes the victim with the gun, the assault is not necessarily inherently dangerous to life because the blow can be inflicted with minimal force or may be directed

toward a part of the body, such as the leg or arm, where the blow would at most result in minimal injury. The same is true with an assault with a knife. The knife does not have to contact the victim, and even if the defendant strikes the victim with the knife, the assault is not necessarily inherently dangerous to life because the blow can be inflicted with minimal force or may be directed toward a non-vital part of the body that would not be likely to result in a death. Similarly, a blackjack can be used with minimal force and, even when used with great force, if used to strike a person's arms or legs, death would not be a likely result.

In addition, because an assault with a deadly weapon consisting of a firearm can be committed without actually firing the firearm, it is different than offenses whose elements include the firing of a firearm, such as discharging a firearm at an inhabited dwelling, discharging a firearm at an inhabited vehicle, and discharging a firearm in a grossly negligent manner. These latter offenses have been found to be felonies inherently dangerous to life, because there is a high probability that the discharging of a firearm in such circumstances might result in death since all three of these offenses are based on innocent people being in harm's way when the firearm is discharged and there is always the risk that someone might die from being struck by the bullet. (*People v. Hansen, supra,* 9 Cal.4th at pp. 309-311;

People v. Clem, supra, 78 Cal.App.4th at pp. 350-354; *People v. Tabios* (1998) 67 Cal.App.4th 1, 9-11.) These cases do not apply since an assault with a firearm can be committed without firing (or even pointing or drawing) the firearm.

As this Court explained in *Burroughs*, the relevant inquiry involves "whether the felony, taken in the abstract, is inherently dangerous to human life, or whether it *possibly* could be committed without creating such peril." (*People v. Burroughs*, *supra*, 35 Cal.3d at p. 830, citation omitted, italics added.) As is clear from the foregoing discussion, it is possible to commit an assault with a deadly weapon in numerous common ways that do not create a peril to life. Accordingly, the elements of assault with a firearm or deadly weapon, viewed in the abstract, are not inherently dangerous to life.

C. If This Court Agrees That Assault With A Deadly Weapon Is Not An Inherently Dangerous Felony, Then The Trial Court Should Have Instructed Defendant's Jury That An Unintentional Killing Without Malice In The Commission Of An Assault With A Deadly Weapon Is Involuntary Manslaughter

A trial court has a sua sponte to instruct on all lesser included offenses that are supported by the evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155.)

In this case, the Court of Appeal held that the trial court prejudicially erred in not instructing defendant's jury that an unintentional killing

committed without malice in the course of a felony assault with a deadly weapon is manslaughter. (Slip Opn. pp. 25-34.) Defendant agrees.

Based on the belief that assault with a deadly weapon is an inherently dangerous felony, and thus would not support an involuntary manslaughter instruction, the Court of Appeal held the jury should have been instructed that an unintentional killing committed without malice in the course of an assault with a deadly weapon is voluntary manslaughter. (Slip Opn. pp. 25-34.)

To the extent this Court determines that assault with a deadly weapon is not an inherently dangerous felony, then for the exact same reasons set forth by the Court of Appeal, the trial court prejudicially erred in not instructing defendant's jury that an unintentional killing committed without malice in the course of a felony assault with a deadly weapon constitutes involuntary manslaughter, rather than voluntary manslaughter. Subject to this modification, the Court of Appeal's Opinion should otherwise be affirmed.

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III

THE ARGUMENTS ADVANCED BY RESPONDENT THAT ARE CONTRARY TO THE ABOVE ANALYSIS LACK MERIT

A. Recognizing The Form Of Manslaughter At Issue In This Case Does Not Violate The Separation Of Powers

Respondent first contends that recognizing the form of manslaughter at issue in this case would constitute an unconstitutional violation of the separation of powers. (Respondent's Brief on the Merits "RBM" pp. 14-18.) This argument lacks merit.

Of course, if this Court deems that an assault with a deadly weapon is a noninherently dangerous felony and thus an unlawful killing without malice in the commission of that offense is involuntary manslaughter, respondent's argument can be summarily rejected because this Court over 25 years ago approved of this form of involuntary manslaughter. (*People v. Burroughs, supra,* 35 Cal.3d at pp. 834-836.)

Even if the offense is deemed voluntary manslaughter, respondent's argument must be rejected because the analysis is based on a straightforward application of the current statutory scheme. Pursuant to Penal Code section 187, subdivision (a), murder is the unlawful killing of a human being with malice aforethought. Pursuant to Penal Code section 192, manslaughter is the unlawful killing of a human being without malice.

Plainly, under the statutory scheme, if a person unlawfully kills without malice, he is guilty of manslaughter, not murder. (See also *People v. Rios, supra,* 23 Cal.4th at p. 460.)

In arguing to the contrary, respondent contends that "[t]he 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.)" (RBM p. 15.) Respondent also contends that "[w]hile 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.)" (RBM p. 18.)

The Penal Code says no such thing. Penal Code section 192 states that manslaughter is the unlawful killing of a human being without malice. (Pen. Code, § 192.) The Penal Code does not say anything about negating the subjective mental component necessary to establish malice or limiting voluntary manslaughter to situations in which malice is negated, and ironically, it is respondent who is attempting to rewrite the Penal Code.

Certainly the courts have observed that the existence of either imperfect self-defense or heat of passion operates to negate the element of malice. (See, e.g., *People v. Manriquez* (2005) 37 Cal.4th 547, 583 ["an intentional killing is reduced to voluntary manslaughter if other evidence

negates malice," such as "when the defendant acts upon a sudden quarrel or heat of passion on sufficient provocation [citation], or kills in the unreasonable, but good faith, belief that deadly force is necessary in self-defense [citation]."]) However, those decisions do not preclude a finding of manslaughter when malice does not exist in the first instance. Consistent with section 192, an unlawful killing without malice is manslaughter, whether malice is negated or never existed.

Respondent also relies on *Anderson* in support of its separation of powers argument. (See RBM pp. 16-17, *People v. Anderson* (2002) 28 Cal.4th 767.) However, *Anderson* is readily distinguishable. In *Anderson*, this Court held that duress is not a defense to murder under either the common law or the current statutory scheme, including Penal Code sections 26, 195, and 197. (*Id.* at pp. 772-780.) This Court also rejected a claim that duress can negate malice for purposes of a manslaughter verdict. (*Id.* at pp. 781-784.)

In rejecting a manslaughter theory, this Court observed that unlike imperfect self-defense in which a person intends to kill lawfully (but does so unreasonably), a person who kills an innocent believing it necessary to save the killer's own life intends to kill unlawfully, not lawfully. (*People v. Anderson, supra,* 28 Cal.4th at pp. 782-783.) Because an intent to kill unlawfully equals express malice, a person who kills under duress kills with

express malice, there is nothing in the statutory scheme to negate malice in that situation, and recognizing a killing under duress as manslaughter under these circumstance would create a new form of nonstatutory manslaughter. (*Ibid.*) The Court also acknowledged that although there are some "policy arguments" that can be made for negating malice based on duress, the Court was not going to recognize a new form of voluntary manslaughter based on policy arguments, which arguments are better directed to the Legislature. (*Id.* at pp. 783-784.)

Unlike *Anderson*, the form of manslaughter at issue in this case is already grounded in statute, namely Penal Code section 192, which defines manslaughter as an unlawful killing without malice. Moreover, defendant is not making any policy arguments. Rather, pursuant to the current statutory scheme, a person who kills during an assault with a deadly weapon with malice is guilty of murder, and a person who kills during an assault with a deadly weapon without malice is guilty of manslaughter. Thus, respondent's reliance on *Anderson* is misplaced.

In fact, *Anderson* actually supports defendant's argument. In *Anderson*, this Court again recognized that Penal Code section 192's enumerated list of nonmalicious homicides is not exclusive. (*People v. Anderson, supra,* 28 Cal.4th at p. 783.) Because it is not exclusive, diminished capacity was appropriately recognized as a nonenumerated form

of voluntary manslaughter, until the Legislature opted to abolish that doctrine. (*Ibid.*) Additional nonenumerated forms remaining today include voluntary manslaughter based on imperfect self-defense and involuntary manslaughter based on the commission of a noninherently dangerous felony. (See *People v. Flannel, supra,* 25 Cal.3d 668 [imperfect self-defense]; *People v. Burroughs, supra,* 35 Cal.3d at pp. 834-836 [involuntary manslaughter based on a noninherently dangerous felony].) Although section 192 does not make explicit reference to a felony assault without malice, this form of manslaughter is well grounded within the controlling definition of manslaughter, which is an unlawful killing without malice.

Finally, the analytical weakness of respondent's position is also demonstrated by the fact that respondent does not attempt to explain what offense is committed under the circumstances at issue herein, if not manslaughter.

Respondent claims only that it is not manslaughter. However, respondent does not contend that it is murder. Of course, contending it was murder would be impossible if malice does not exist. Yet, all unlawful homicides are either murder or manslaughter. (*People v. Rios, supra,* 23 Cal.4th at p. 460.) Respondent's failure to explain what crime is committed underscores the logical and legal weakness of its argument.

For all of the above reasons, respondent's separation of powers argument should be rejected.

B. Respondent Has Made No Showing That Recognizing The Form Of Manslaughter At Issue In This Case Does Not Comport With Legislative Intent

Respondent next argues that 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" and "may be due to the fact that this crime is already sufficiently encompassed in the existing Penal Code." (RBM pp. 18-22.)

In support of this claim, respondent offers only speculation, and does not cite any legislative history or other materials evidencing any legislative intent. Respondent has made no showing that recognizing the form of manslaughter at issue in this case is contrary to the Legislature's intent.

Respondent may be correct, however, that the failure to define a crime in the manner suggested by respondent is unnecessary. But this is so because the Legislature has already provided that an unlawful killing without malice is manslaughter.

Respondent cites to Penal Code section 273ab as a reason to find that the Court of Appeal's decision in both this case and *Garcia* were incorrect and contrary to legislative intent. (Resp. Brief pp. 18-20.) Penal

Code section 273ab is a specific statute which addresses the subject of assault on a child under the age of eight years who is in the care and custody of the defendant by means of force that to a reasonable person would be likely to produce great bodily injury, and provides for a specific severe penalty of 25 years to life in prison if the assault results in death, or life with the possibility of parole if the assault results in the child becoming comatose due to brain injury or suffering paralysis. (Pen. Code § 273ab, subds. (a), (b).) This statute does not purport to supplant the general law of murder and manslaughter. Moreover, even in cases that do involve a qualifying victim under the age of eight years old and a qualifying caretaker defendant, the prosecution retains discretion to prosecute under a general statute which may provide a less severe sanction (such as second degree murder, Pen. Code, §190, subd. (a)) than that called for under the specific statute.

Finally, contrary to respondent's suggestions (see RBM pp. 20-21), the fact that a hypothetical jury would likely find at least implied malice in the vast majority of cases in which a defendant unlawfully kills in the commission of an assault with a deadly weapon does not mean that this Court should not recognize a manslaughter theory in those relatively few cases, such as this one, in which malice is absent. Similarly, the fact that the prosecutor could choose to instead charge only assault in cases in which

malice is questionable does not mean that this Court should refuse to recognize a manslaughter theory in cases in which the prosecutor charges murder.

C. There Was Sufficient Evidence To Support An Instruction That A Felony Assault Without Malice Is Manslaughter

Respondent next contends there was insufficient evidence to support an instruction on manslaughter based on the commission of a felony assault without malice. Instead, respondent contends that the Court of Appeal "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." (Resp. Brief p. 23.)

For the reasons stated in the Court of Appeal's Opinion not only finding the evidence sufficient but finding the lack of an instruction on this theory prejudicial (Slip Opn. pp. 26-30, 32-34), which will not be repeated here in the interests of brevity, respondent is mistaken.

Respondent's argument effectively boils down to a contention that because defendant committed an assault with a deadly weapon, she had to have had at least implied malice. As aptly stated by the Court of Appeal in this case, "[i]n most cases in which the jury finds that the defendant killed the victim in the course of committing a felony that is inherently dangerous to human life, the jury will likely also conclude that the defendant is guilty of

second degree murder. However, there are cases, such as this, in which it is not clear from the circumstances of the offense that in committing an inherently dangerous felony, the defendant acted in conscious disregard for life. In such a case, the defendant is entitled to a jury instruction based on the *Garcia* theory of voluntary manslaughter. [fn.]" (Slip Opn. p. 34.)

D. The Trial Court Had A Duty To Instruct On This Theory Of Law

Respondent's final contention is that the trial court had no duty to instruct on this principle of law because it was unforeseeable, and that if this Court agrees with the Court of Appeal's decision on the law, it should not be applied retroactively to this case. (RBM pp. 25-28.) This final argument should also be rejected.

Initially, defendant notes that principles prohibiting retroactivity are generally applied to prevent violations of a defendant's due process rights, not to abrogate them as respondent urges. (See, e.g., *Nixon v. Administrator of General Services* (1977) 433 U.S. 425, 468 [97 S.Ct. 2777, 53 L.Ed.2d 867] [the retroactive application of decisional law may violate due process when a new judicial interpretation of a criminal statute renders previously legal conduct unlawful]; accord, *California State Employees Association. v. Flournoy* (1973) 32 Cal.App.3d 219, 224; *Marks v. United States* (1977) 430 U.S. 188, 191 [97 S.Ct. 990, 51 L.Ed.2d 894 [an unforeseeable judicial enlargement of a criminal statute to the defendant's detriment can act like

an ex post facto law]; *Darnell v. Swinney* (9th Cir. 1987) 823 F.2d 299, 300 [if a judicial enlargement is foreseeable, and the defendant had fair warning his or her contemplated conduct was criminal, then the enlargement is permissible and does not deny due process]; *In re Chavez* (2004) 114 Cal.App.4th 989, 999 [if a statute is amended to lessen punishment, in the absence of clear legislative intent to the contrary, a criminal defendant should be accorded the benefit of any mitigation of punishment adopted before his criminal conviction became final. [Citation.]"].)

Moreover, the rule set forth herein was both foreseeable and reasonably established. Penal Code sections 187 and 192 have long provided that murder is an unlawful killing with malice, while manslaughter is an unlawful killing without malice. The rule set forth herein stems directly from these statutes. It is also clear that manslaughter is a lesser included offense of murder, and that the trial court has a sua sponte duty to instruct on every lesser included offense supported by the evidence. *People v. Breverman, supra,* 19 Cal.4th at pp. 154-155.) In addition, this Court long ago announced that an unlawful killing committed in the course of a noninherently dangerous felony constitutes involuntary manslaughter. (*People v. Burroughs, supra,* 35 Cal.3d at pp. 834-836.) Moreover, prior to trial in this case, the Court of Appeal in *Garcia* further clarified that an unlawful killing in the course of an inherently dangerous

felony is voluntary manslaughter. (*People v. Garcia, supra,* 162 Cal.App.4th at pp. 24-33.)

Thus, the foundation for the Court of Appeal's decision was laid. Respondent's argument that the rule in this case was unforeseeable should be rejected.

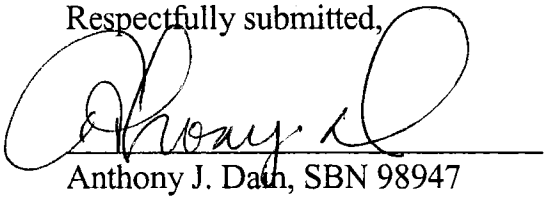
IV

CONCLUSION

For the foregoing reasons, and in the interests of justice, defendant respectfully requests the judgment of the Court of Appeal be affirmed in its entirety, or be modified to provide that instruction on involuntary manslaughter was required.

Dated: 4/16/2011

Respectfully submitted,



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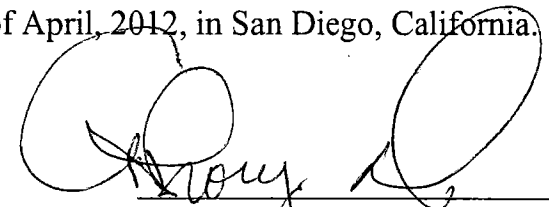
CERTIFICATE OF WORD COUNT

I, Anthony J. Dain, hereby certify pursuant to California Rules of Court, rule 8.520(c)(1), that according to the Microsoft Word Microsoft Word computer program used to prepare this document, Defendant's Opening Brief On The Merits contains a total of 10,420 words.

Executed this 16th day of April, 2012, in San Diego, California.



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Supreme Court No.: S196365
Court of Appeal No.: D057570

DECLARATION OF SERVICE BY MAIL

I, Anthony J. Dain, declare as follows:

I am over the age of eighteen (18), a citizen of the United States, am employed in the County of San Diego, and not a party to the within action. My business address is 330 J Street, # 609 San Diego, California, 92101. I further declare that I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business. On this 16th day of April, 2012, I caused to be served the following document(s):

DEFENDANT'S BRIEF ON THE MERITS

of which a true and correct copy of the document(s) filed in the cause is affixed, by placing a copy thereof in a separate sealed envelope, with postage fully prepaid, for each addressee named hereafter, addressed to each such addressee respectively as follows:

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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 on April 16, 2012, at San Diego, California.

Anthony J. Dain