

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION TWO**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

Petitioner,

*v.*

**SUPERIOR COURT OF CALIFORNIA,  
COUNTY OF SAN BERNARDINO,**

Respondent.

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**ANDREW GIRVAN,**

Real-Party-in-Interest.

Case No.

San Bernardino County  
Superior No. FWV702712

**PETITION FOR WRIT OF  
MANDATE OR PROHIBITION;  
REQUEST FOR IMMEDIATE  
STAY; BRIEF IN SUPPORT;  
EXHIBITS**

Petition for Writ of Mandate Regarding a Decision of the Superior Court of California, County of San Bernardino, to Grant a Motion to Dismiss a Murder Charge Under Penal Code § 995

(Hon. Mary Fuller, III, Judge of the Superior Court, presiding)

**IMMEDIATE STAY REQUESTED BEFORE  
NOVEMBER 14, 2008**

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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

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<b>THE PEOPLE OF THE STATE OF CALIFORNIA,</b>	)	Case No.
	)	
Petitioner,	)	
	)	
<i>v.</i>	)	(San Bernardino Superior Court
	)	Case No. <b>FWV702712</b> )
<b>SUPERIOR COURT OF CALIFORNIA</b>	)	
<b>COUNTY OF SAN BERNARDINO,</b>	)	<b>PETITION FOR WRIT OF</b>
Respondent,	)	<b>MANDATE AND BRIEF IN</b>
	)	<b>SUPPORT OF PETITION FOR</b>
<hr/>	)	<b>WRIT OF MANDATE; REQUEST</b>
<b>ANDREW GIRVAN,</b>	)	<b>FOR STAY BEFORE</b>
	)	<b>NOVEMBER 14, 2008;</b>
Real Party in Interest.	)	<b>EXHIBITS</b>
<hr/>	)	

**PRELIMINARY STATEMENT**

Defendant gave his girlfriend illegal street drugs, watched her overdose on multiple such toxins, held help at bay for ten (10) hours, and then watched her die.

This is **not** a case where defendant simply supplied illegal drugs and his girlfriend overdosed on them. (Cf. *People v. Patterson* (1989) 49 Cal.3d 615; *People v. Poindexter* (1958) 51 Cal.2d 142.) This is a case where defendant supplied illegal drugs, his girlfriend overdosed, **and** defendant **actively prevented others from rescuing her** and instead watched her die. Thus, the preliminary hearing transcript supports a charge of murder because of defendant's conscious disregard of his girlfriend's well being by both action and inaction.

The People raised the charge from manslaughter to "implied malice" murder after a preliminary hearing. The Superior Court dismissed the murder count under Penal Code § 995.

Consequently, defendant faces, *inter alia*, trial on a manslaughter count on **November 14, 2008**.

The People request this court stay the matter before defendant's next appearance on **November 14, 2008**, review the issues we raise, and reverse the lower court's decision.

### **PETITION**

The People allege:

1. They are the plaintiff in *People v. Andrew Girvan, et al*, case number FWV702712,<sup>1</sup> and the petitioner before this court.

2. Respondent is the Superior Court of the State of California, for the County of San Bernardino, sitting in Rancho Cucamonga, California, Judge Mary Fuller, presiding.<sup>2</sup>

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<sup>1</sup> A copy of the superior court clerk's case print for this case is attached as **Exhibit 1**.

<sup>2</sup> Judge Fuller's clerk's number is (909) **945-4477**, her bailiff's number is (909) **945-4478**, and her secretary's number is (909) **945-4460**.

3. Real party in interest is defendant Andrew Girvan. (For ease of reference, we refer to Girvan by his surname or as “defendant” hereafter.)

4. On November 5, 2007, a felony complaint was filed alleging that defendant committed involuntary manslaughter,<sup>3</sup> illegally possessed methamphetamine and cocaine for retail purposes,<sup>4</sup> and possessed a rifle while a felon<sup>5</sup> on August 12, 2007. (**Exhibit 2.**)

5. On February 21 and 22, 2008, a preliminary hearing was held before the Honorable Raymond P. Van Stockum. (**Exhibit 3.**) At the conclusion of the preliminary hearing, defendant was held to answer for each of the counts alleged above.

6. On February 29, 2008, an Information was filed. Murder<sup>6</sup> was added as the top count. The Information also realleged the counts for which defendant was held to answer. (**Exhibit 4.**)

7. On October 10, 2008, defendant filed a Penal Code § 995 Motion to Dismiss the Information regarding the homicide charges. (**Exhibit 5.**)

8. On October 23, 2008, the People filed an Opposition to Defendant’s Penal Code § 995 Motion. (**Exhibit 6.**)

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<sup>3</sup> See Penal Code § 192(b).

<sup>4</sup> See Health and Safety Code § 11378 [Possession of Methamphetamine for Sale]; Health and Safety Code § 11351 [Possession of Cocaine for Sale].

<sup>5</sup> See Penal Code § 12021(a)(1) [Possession of a Rifle by a Felon].

<sup>6</sup> See Penal Code § 187(a) [Murder].

9. On October 31, 2008, the trial court granted the Motion to Dismiss with regard to the murder charge and denied it concerning the manslaughter count.<sup>7</sup> (**Exhibit 1**, p. 2.)

### **SUPERIOR COURT'S RULING**<sup>8</sup>

10. Judge Fuller ruled that an implied malice theory did not apply to these facts. Judge Fuller mentioned that charging murder under these circumstances had not really been tried before in California and that there were no cases on point for murder in California. Judge Fuller mentioned that all the cases she found revolved around a charge of involuntary manslaughter. She also pointed out that the second-degree felony-murder rule does not apply because the courts have ruled that furnishing drugs are not inherently dangerous to human life for the felony-murder rule.

11. As Judge Fuller construed those rulings, she believed that an implied malice theory of murder did not apply here because such a theory of murder requires an act the natural consequences of which are dangerous to human life. She reasoned that if furnishing drugs is not inherently dangerous to human life for felony-murder, the same act could not qualify as "dangerous to human life" for an implied malice murder.

12. The case is presently set for readiness calendar on November 14, 2008, and trial on November 17, 2008. (**Exhibit 1**, p. 2.)

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<sup>7</sup> The October 31, 2008, hearing was reported. We are unable to provide a copy of the transcript at this time as Court Reporter Georgia Bracamonte is on vacation this week. When she returns, a transcript will be obtained and a copy provided to this court as **Exhibit 7**.

<sup>8</sup> Because we have not yet seen a transcript of the October 31, 2008, ruling, we rely on our colleague's description of Judge Fuller's ruling.



13. This is **not** a case where defendant simply supplied illegal drugs and his girlfriend lethally overdosed on them. (Cf. *People v. Patterson* (1989) 49 Cal.3d 615; *People v. Poindexter* (1958) 51 Cal.2d 142.) This is a case where defendant supplied illegal drugs, his girlfriend overdosed, **and** defendant **actively prevented others from rescuing her**. He choose to watch her die instead of acting or at least getting out of the way of potential rescuers. These actions and inactions reflect an implied malice because of defendant's conscious disregard of his girlfriend's well being by both action and inaction.

14. The People thus seek a writ of mandate from this court reversing the lower court's decision on the murder count and ordering it to reinstate the murder count. (See, e.g., *People v. Superior Court (Day)* (1985) 174 Cal.App.3d 1008 [writ review from granting of Penal Code § 995 motion appropriate].)

**PRAYER FOR RELIEF**

The People therefore request that:

a. The court issue a stay **on or before November 14, 2008**, in order that proceedings do **not resume before Judge Fuller** before these issues are resolved;

b. A writ be issued vacating the superior court's order granting defendant's Penal Code § 995 motion and ordering the lower court to enter an order **denying that motion or to show cause before this court** why it should not or will not issue such an order; and

c. Such other relief be granted as this court may deem appropriate.

Done November 13, 2008, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS,**  
District Attorney,

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**GROVER D. MERRITT,**  
Lead Deputy District Attorney,  
Appellate Services Unit

**VERIFICATION**

I, Grover D. Merritt, declare under penalty of perjury:

1. I am a lawyer licensed in California under California State Bar license number 116019, and have been since December 4, 1984.

2. I am a deputy of the Office of the District Attorney of the County of San Bernardino, and the lead deputy of the Appellate Services Unit there. I make this verification in my official capacity.

3. I am one of the district attorney's lawyers in this case. I have reviewed the contents of this petition and the exhibits, and know the contents thereof, and I verify on information and belief that the contents herein are true and accurate to the best of my knowledge.

Done November 13, 2008, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS,**  
District Attorney,

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**GROVER D. MERRITT,**  
Lead Deputy District Attorney,  
Appellate Services Unit

## **BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE**

### **STATEMENT OF FACTS**<sup>9</sup>

During the night of August 11, 2007, Miranda Daly died slowly, from an overdose of illegal street drugs as Andrew Girvan, her boyfriend, watched, despite knowing she was close to death. He also prevented others from rescuing her and obtaining medical treatment for her. In other words, he gave her drugs, watched her overdose, and prevented others from saving her. (R.T. 91: 17-28.)

On August 12, 2007, Ontario Police Department officers went to a residence in their city and found Miranda Daly, the victim of a drug overdose who had recently died. (R.T. 132: 1-7.) Officers actually responded to a previous call at the same residence, about four hours earlier, but were greeted by what the officers believed to be an empty house. (R.T. 130: 5-10.) The second time that officers responded, officers found the victim lying on a bed in the master bedroom, dead. (R.T. 132: 1-7.)

Upon looking at the body position of the victim on the bed, officers noticed that lividity was inconsistent with the position of the body. (R.T. 132: 17-21.) At that time, homicide detectives were notified. (R.T. 133: 1-9.) An officer interviewed defendant at the scene. He initially stated that he had kicked in the door to the room out of concern for the victim and found her dead. R.T. 145: 18-23.) He never told the officer about any other location where the victim had been when she died. (R.T. 146: 2-6.)

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<sup>9</sup> “R.T.” refers to the Reporter’s Transcript of the preliminary hearing. (**Exhibit 3.**)

Police obtained a search warrant for the premises and for a vehicle parked outside in front of it. (R.T. 164: 23-25.) While conducting the search, police found cocaine, weapons, ammunition, and ecstasy pills belonging to the defendant in the residence and the vehicle. (R.T. 165: 10-26; 166: 4-13.) Police also found baggies, scales and pay/owe sheets in the residence and the vehicle. (R.T. 165: 10-26; 166: 4-13.)

Defendant changed his story multiple times over the course of his interview at the police station. (R.T. 157: 15-18.) In the first story, the defendant stated that the victim was his girlfriend of five to six months and that she had taken ecstasy and morphine. (R.T. 158: 11-13.) Defendant said the victim had been on the couch, she got mad at defendant, went into the bedroom, shut the door and he later found her dead on the bed. (R.T. 157: 19-24.) The second story was that the victim also did cocaine. (R.T. 158: 4-8.) Defendant said that the victim was in the bedroom, he went in and put clothes on her and put her on the couch. (R.T. 159: 5-9.) The victim then went back to the bedroom, shut the door, and he later found her dead on the bed. (R.T. 159: 5-9.) The third story was that he brought the victim out of the bedroom and put her on the couch because he wanted to keep an eye on her, she then passed away, at which time he took her body and put it on the bed. (R.T. 159: 11-16.)

Defendant further admitted that he heard officers come to the residence the first time earlier in the evening and did not answer the door or acknowledge them. (R.T. 163: 25-26.) He stated that the victim was already dead at that time. (R.T. 164: 1.)

Defendant at no time mentioned anything about Sean Clancy, Chad Donato or Jennifer Dyer *ever* being at the residence. The police

were unaware of their existence until they came forward to police. These witnesses could have stayed completely anonymous.

Police also interviewed Shannon Sharp, who stated that she came by the defendant's residence in the early afternoon of August 12, 2007, and asked about the victim. (R.T. 171: 6-11.) Defendant denied that the victim was even there. (R.T. 171: 10-11.)

Police also found out that the defendant had previously been involved in an incident where a friend died of an overdose in Barstow, California. (R.T. 149: 16-26.) This incident shows that defendant is aware of the consequences of ingesting and furnishing controlled substances, and that people do die from ingesting such substances.

Sean Clancy testified that the defendant is a drug dealer and he went to the residence of the defendant to buy cocaine in the late evening hours of August 11, 2007, and early morning hours of August 12, 2007. (R.T. 5: 6-17.) He did buy cocaine and then did drugs with Chad Donato and the defendant. (R.T. 5: 19-20.) Clancy noticed that the victim was unconscious on the bed in the room when the defendant showed Clancy fireworks that were available for purchase. (R.T. 6: 5-13.) Defendant proceeded to slap the victim on the face in front of Clancy. (R.T. 7: 21-22.) Later, the defendant again entered the room and Clancy heard more slaps. (R.T. 8: 18-25.) Defendant then came out with the victim and threw her onto the couch, although the victim hit her head on the end of the couch and simply rolled off onto the floor. (R.T. 10: 6-9.) Clancy helped the victim onto the couch. (R.T. 16: 21-26.) The victim never woke up, moved, or had any reaction after being violently tossed onto the couch. (R.T. 10: 12-18.) Defendant told Clancy that the victim had taken his ecstasy and the last of his morphine, which defendant sells.

(R.T. 10: 16-18.) **Clancy told defendant repeatedly that the victim was going to die if she did not get help.** (R.T. 11: 13-23.) Defendant retorted that **she was not going anywhere and that no one touches her.** (R.T. 12: 3-4.) Defendant was also handling firearms all night at the residence, specifically a handgun and a M-16 type rifle. (R.T. 12: 8-9.) Clancy kept checking on the victim. (R.T. 13: 19-20.) Defendant further stated, “When she stops breathing, that’s when we have a problem.” (R.T. 16: 2-4.)

Chad Donato testified that he had bought drugs from defendant in the past. (R.T. 33: 21-22.) When they arrived at the residence, they saw the victim’s car outside and saw the victim on the bed, nude, and not moving. (R.T. 35: 1-27.) The defendant told him that the victim had taken a lot of Ecstasy. (R.T. 37: 10-12.) He stated that defendant told him that he had thrown a bag of drugs to the victim earlier. Donato believed that these were the drugs that the victim had ingested. (R.T. 38: 8-12.) Donato also heard slapping sounds coming from the bedroom. (R.T. 39: 13-15.) Defendant brought the victim out of the bedroom and threw her in the direction of the couch. (R.T. 41: 1-4.) The victim was unconscious; Donato believed that she was overdosing. (R.T. 42: 3-11.) Donato told defendant that he wanted to take the victim to the hospital on several occasions. (R.T. 43: 16-18.) Defendant told him that **nobody was going anywhere.** (R.T. 43: 21-25.) Donato also saw the defendant with numerous weapons throughout the night. (R.T. 46: 18-25.) He specifically saw the defendant with a handgun and a M-16 looking rifle. (R.T. 46: 26-27.) Defendant said, “If they were to fucking touch her, [he would] kill them.” (R.T. 50: 21-24.)

Jennifer Dyer testified that the victim was on the couch when she arrived and was unconscious. (R.T. 85: 1-11.) She was told that the victim had taken morphine and ecstasy. (R.T. 86: 18-22.) Dyer told defendant that the victim needed to go to the hospital. (R.T. 87: 8-10.) She also said that they needed to call the cops. (R.T. 87: 11-13.) The defendant stated, “nobody is going anywhere.” (R.T. 89: 13-17.) Defendant never helped the victim, nor allowed anyone else to help. (R.T. 90: 12-15.) The victim eventually died. (R.T. 92: 11-13.) Dyer stated that she felt threatened the entire time she was at the residence. (R.T. 95: 3-21.)

### **PROCEDURAL HISTORY**

On November 5, 2007, the district attorney of the County of San Bernardino filed a felony complaint alleging that defendant committed involuntary manslaughter (Penal Code § 192(b), possessed drugs for resale (Health and Safety Code § 11378; Health and Safety Code § 11351); and illegally possessed firearms while a felon (Penal Code § 12021(a)(1)).

On February 21 and 22, 2008, the Honorable Raymond P. Van Stockum held a preliminary hearing. At its conclusion, defendant was held to answer for each of the counts in the felony complaint.

On February 29, 2008, the People re-alleged the counts in the felony complaint in an Information, along with a violation of Penal Code § 187(a), Murder, based on facts raised during the preliminary hearing.

On October 10, 2008, defendant filed a Motion to Dismiss the Information under Penal Code § 995 regarding the homicide charges (Penal Code § 187(a); Penal Code § 192(b)).



On October 23, 2008, the People filed an Opposition to Defendant's Motion to Dismiss.

On October 31, 2008, the trial court granted the Motion to Dismiss with regard to the murder charge, and denied it with regard to the manslaughter charge. Judge Fuller ruled that **an implied malice theory of second degree murder did not apply to these facts**. Judge Fuller mentioned that charging murder under these circumstances had not really been tried before in California and that there were no cases on point for murder in California. All the drug overdose cases she found revolved around a charge of involuntary manslaughter. She also pointed out that the second-degree felony-murder rule does not apply because the courts have ruled that furnishing drugs are not inherently dangerous to human life for the felony-murder rule.

As Judge Fuller construed those rulings, she believed that an implied malice theory of murder did not apply here because such a theory of murder requires an act the natural consequences of which are dangerous to human life. She reasoned that if furnishing drugs is not inherently dangerous to human life for felony-murder, the same act could not qualify as "dangerous to human life" for an implied malice murder.

**I.**  
**THE STANDARD OF REVIEW OF A COUNT REFILED UNDER PENAL CODE § 739 IS THE SAME ORDINARILY UTILIZED ON PENAL CODE § 995 REVIEW.**

The standard ordinarily employed in a motion to dismiss pursuant to Penal Code § 995 is also used to test the sufficiency of the evidence supporting counts added to the information by the district attorney

under Penal Code § 739. Thus, “ [a]n information will not be set aside or a prosecution thereon prohibited if there is some rational ground for assuming the possibility that an offense has been committed and the accused is guilty of it.’ ” (*People v. Slaughter* (1984) 35 Cal.3d 629, 637, 642 [italics added]; see also *People v. Superior Court (Grilli)* (1978) 84 Cal.App.3d 504, 510-511.)

A reviewing court should not reweigh the evidence. If there is **some** evidence to support the information, the court will not inquire into its sufficiency. (*Buck v. Superior Court* (1965) 232 Cal.App.2d 153, 160-161; *People v. Azevedo* (1963) 218 Cal.App.2d 483, 488-489.) **Every** legitimate inference that may be drawn from the evidence **must be** drawn in favor of the information. Thus, this court reviews the evidence in the preliminary hearing transcript to determine whether as a matter of law it will support a charge of murder under the circumstances presented, not whether the trial court’s ruling on the Penal Code § 995 motion was correct. (*People v. Superior Court (Grilli)*, *supra*, 84 Cal.App.3d at p. 511.)

**II.**  
**DEFENDANT VIOLATED PENAL CODE § 187(A) BY ACTION AND**  
**INACTION IN CONSCIOUS DISREGARD TO HUMAN LIFE.**

Murder is defined under Penal Code § 187 as the “unlawful killing of a human being, or a fetus, with malice aforethought.” Penal Code § 188 explains the difference between express and implied malice. It states, “[Malice] is implied, when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart.” (Penal Code § 188.)

Second-degree murder “is the unlawful killing of a human being with malice aforethought but without the additional elements, such as

willfulness, premeditation, and deliberation, that would support a conviction of first degree murder.” (*People v. Knoller* (2007) 41 Cal.4th 139, 151.)

“Express malice” is an unlawful intent to kill. (Penal Code § 188.) Malice is express when the defendant manifests a deliberate intention unlawfully to take away the life of a fellow human being. (*People v. Blakeley* (2000) 23 Cal.4th 82, 87.) “Implied malice” requires a defendant’s awareness of engaging in conduct that endangers the life of another. (*People v. Knoller, supra*, at p. 143.) “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.’ ” (*Id.*; see *People v. Blakeley, supra*, at p. 87 [“juries should be instructed that malice is implied ‘when the killing results from an intentional 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’ [citation]”].)

In *People v. Dellinger* (1989) 49 Cal.3d 1212, 1215, the California Supreme Court defined “implied malice” as,

“when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that this conduct endangers the life of another and who act with conscious disregard for life.”

As the California Supreme Court recently noted in the *Knoller* decision:

[W]e reaffirm the test of implied malice we set out in *People v. Phillips* (1966) 64 Cal.2d 574 ... 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.’ ” (*People v. Phillips, supra*, at p. 587.) In short, implied malice requires **a defendant’s awareness of engaging in conduct that endangers the life of another—no more, and no less.**

The elements of second-degree murder thus are (1) an unlawful killing; (2) accomplished with malice aforethought, whether express or implied. (*People v. Malfavon* (2002) 102 Cal.App.4th 727, 735.) Malice is expressed when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature. Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart. More specifically, malice is implied when the killing results from an intentional act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his or her conduct endangers the life of another and who acts with conscious disregard for life. (*People v. Robertson* (2004) 34 Cal.4th 156, 164.) In such circumstances, it is not necessary to establish that the defendant

intended his or her act would result in the death of a human being. (*People v. Bohana* (2000) 84 Cal.App.4th 360, 368.)

In the instant case, the defendant's actions clearly show "an abandoned and malignant heart." He supplied the victim with Ecstasy and morphine, which directly lead to her overdose. (**Exhibit 3**, R.T., 10:16-18; 158: 11-13.) Defendant was well aware that the victim consumed copious amounts of different drugs and was overdosing. (**Exhibit 3**, R.T., 42:3-11.) Defendant knew what a drug overdose looked like, as he had witnessed a friend overdose and die in the past. (**Exhibit 3**, R.T., 149:16-26.) Yet defendant **forcibly ignored the pleas of all the other individuals** to offering to help the victim and/or drive the victim to the hospital. (**Exhibit 3**, R.T., 12:3-4; 43:21-25; 90: 12-15.)

Defendant thus acted maliciously by knowing that the victim was overdosing from a significant amount of drugs, and **directly stopping others** from intervening by either calling the authorities or driving the victim to the hospital. In other words, defendant's unwillingness to allow others to help his dying girlfriend over a ten-hour-span constituted "intentional act[s], the natural consequences of which are dangerous to life, which act[s] were] deliberately performed by a person who knows that this conduct endangers the life of another and who act with conscious disregard for life." (*People v. Knoller, supra*, at 143; *People v. Dellinger, supra*, at 1215.) Defendant knew from prior experience that the natural consequence of his actions (and inactions) would be the victim's death. Yet he did nothing for her and he prevented others from getting her help. This conscious disregard for the victim's well-being reflects the malicious state of mind dividing second degree murder from manslaughter.

**III.**  
**WHILE FURNISHING DRUGS WILL NOT SUPPORT A FELONY**  
**MURDER COUNT, IT DOES NOT PRECLUDE A MURDER COUNT**  
**BASED ON IMPLIED MALICE.**

The law of this state is clear: simply supplying street drugs to an individual who subsequently overdoses will not support a second-degree felony murder count. (See, e.g., *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1099-1100.) This result stems from the California appellate courts' determination that statutes prohibiting such furnishing (e.g., Health & Safety Code §§ 11352, 11379, and 11379.5) are not "inherently dangerous felonies" carrying a "high probability of death" in the abstract. (*People v. Taylor, supra*, at 1099.)

However, this determination **does not** preclude the prosecution from charging a defendant with murder on a theory of implied malice where a defendant supplied copious illegal drugs to his girlfriend, saw her overdose, prevented rescue, and watched his girlfriend die. (Cf. *People v. Howard* (2005) 34 Cal.4th 1129, 1139-1140 [while Vehicle Code § 2800.2 is not an "inherently dangerous felony" in the abstract for purposes of the second degree felony murder rule, "[n]othing here should be read as saying that a motorist who kills an innocent person in a hazardous, high-speed flight from a police officer should not be convicted of murder. A jury may well find that the motorist acted with malice by driving with conscious disregard for the lives of others, and thus is guilty of murder."]; *People v. Calderon* (2005) 129 Cal.App.4th 1301, 1311 [accord].)

As we have previously noted, defendant's malicious conduct here consisted of furnishing the drugs, watching her overdose, doing nothing, **and preventing rescue**. While no previous California case appears to confront **precisely** this fact pattern, the application of settled principles

to it compels a finding of second-degree murder on these facts. For example, in *People v. Phillips* (1966) 64 Cal. 2d 574, a doctor was charged with and convicted of second degree murder for convincing the parents of a young cancer victim not to have their daughter's eye cancer removed surgically. The victim was terminally ill and in a hospital, but the victim's death was accelerated, and her life shortened, by the defendant removing her from the hospital for a quack treatment for the cancer. (*Id.* at p. 579.) The doctor was convicted of second-degree murder for **not caring whether the ill child lived or died.**

In *People v. Burden* (1977) 72 Cal.App.3d 603, the defendant was convicted of second-degree murder after his five-month-old son died from malnutrition and dehydration. (*Id.* at p. 606.) The defendant was aware during the last two weeks of the child's life that the child was starving to death. (*Id.* at p. 609.)

On appeal, the court of appeal affirmed Burden's second-degree murder conviction. (*Id.* at p. 621.) "The common law does not distinguish between homicide by act and homicide by omission." (*Id.* at p. 618.) In *Burden*, the evidence demonstrated that the defendant failed to feed the infant despite his awareness that the baby was starving. (*Id.* at p. 609.) Applying the subjective awareness element to the Burden case, the court of appeal observed, a law-abiding person in the defendant's situation, aware that his child was starving, would not take the unjustified risk of withholding food from the child. The defendant was aware that his child could starve or become extremely malnourished. His **lack of concern demonstrated recklessness and was substantial evidence of an extreme indifference to human life,**

making him liable for second-degree murder under an implied malice murder theory.

In *People v. Bohana* (2000) 84 Cal.App.4th 360, the Court of Appeal upheld a second-degree murder conviction and determined that a rational trier of fact could and did draw a logical and reasonable inference that the victim, who drowned, did not voluntarily enter the deep end of defendant's pool but was instead forced into the water by defendant, either before or after he beat her to unconsciousness. The Court of Appeal held that a rational jury could find that defendant acted with implied malice when he forced an injured, unconscious nonswimmer to remain in the deep end of his swimming pool until she drowned. (*Id.* at p. 369.)

Here, defendant's actions and inactions manifested a similar indifference to human life. By those actions and inactions, defendant murdered his girlfriend. His failure to act and his prevention of rescue show us the malicious intent necessary to force him to face of jury of his peers on a murder charge.

### **CONCLUSION**

Defendant maliciously allowed his girlfriend to die slowly of an overdose. Others present could have taken the victim to the hospital. Defendant prevented such life-saving actions on their part. This is conscious disregard for the girlfriend's well-being. This is implied malice and thus murder.



This Petition for Writ should be granted, and the lower court ordered to reinstate the murder charge against defendant Andrew Girvan.

Done this November 13, 2008, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS**

District Attorney

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**GROVER D. MERRITT**

Lead Deputy District Attorney

Appellate Services Unit

**CERTIFICATE OF COMPLIANCE**

I certify that the attached **PETITION FOR WRIT OF MANDATE OR PROHIBITION; BRIEF IN SUPPORT**; uses a 13 point Bookman Old Style font and contains 5, 765 words.

Done this November 13, 2008, at San Bernardino, California.

Respectfully submitted,

**MICHAEL A. RAMOS**

District Attorney

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**GROVER D. MERRITT**

Lead Deputy District Attorney

Appellate Services Unit



SAN BERNARDINO COUNTY  
OFFICE OF THE DISTRICT ATTORNEY

**PROOF OF SERVICE BY UNITED STATES MAIL**

STATE OF CALIFORNIA                    )  
  )  
COUNTY OF SAN BERNARDINO        )       ss.    **ANDREW GIRVAN**  
  )                    **FWV702712**

Sheila Rappleye says:

That I am a citizen of the United States and employed in San Bernardino County, over eighteen years of age and not a party to the within action; that my business address is 412 W. Hospitality Lane, San Bernardino, California 92415-0042.

That I am readily familiar with the business' practice for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence would be deposited with the United States Postal Service that same day in the ordinary course of business.

That on November 13, 2008, I served the within:

**PETITION FOR WRIT OF MANDATE AND BRIEF IN SUPPORT OF  
PETITION FOR WRIT OF MANDATE; REQUEST FOR STAY BEFORE  
NOVEMBER 14, 2008; EXHIBITS**

on interested parties by depositing a copy thereof, enclosed in a sealed envelope for collection and mailing on that date following ordinary business practice at San Bernardino, California, addressed as follows

Office of Attorney General  
P.O. Box 85266  
San Diego, CA 92186-5266

I certify under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at San Bernardino, California, on November 13, 2008.

\_\_\_\_\_  
Sheila Rappleye

