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## Danville Hit-And-Run Nanny To Appeal Conviction To Supreme Court

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**DANVILLE** -- A lawyer for a former nanny convicted of the second-degree murder of two Danville children by running over them said Thursday she will appeal the case to the California Supreme Court.

The continued appeal by Jimena Barreto, 47, of Walnut Creek, comes in the wake of a ruling by the state Court of Appeal in San Francisco Wednesday upholding her conviction.

Barreto's attorney, George Schraer, said, "We will petition to the state Supreme Court for review" of Barreto's claim of erroneous jury instructions in her 2005 Contra Costa County Superior Court trial.

Barreto killed Troy Pack, 10, and Alana Pack, 7, when she struck them with her Mercedes-Benz as they rode on their scooter and bicycle on the sidewalk of Camino Tassajara in Danville just before dark on Oct. 26, 2003.

The children's mother, Carmen Pack, who was walking next to them, was injured in the accident. Barreto was on her way to a night job taking care of an infant in another Danville family.

Barreto was convicted of two counts of second-degree murder; driving under the influence of alcohol, prescription drugs or both; leaving the scene of an accident; and driving with a suspended license.

Contra Costa County Superior Court Judge Mary Ann O'Malley sentenced her to 30 years in prison. Barreto is now serving the sentence at Valley State Prison for Women in Chowchilla.

Prosecutors contended that Barreto, who had three previous drunken driving convictions, was drunk when she hit the Pack children. Barreto admitted during the trial to having taken prescription drugs but denied being drunk.

In her appeal, Barreto challenged O'Malley's instructions to the jury on implied malice, which is an element of second-degree murder and is defined as a conscious disregard for human life.

Barreto argued that O'Malley erred when she told the jury that being intoxicated by alcohol or prescription drugs could be found to be exhibiting a conscious disregard for the safety of others.

Barreto said the jury should have considered only whether there was disregard for human life, as opposed to safety of others.

But a three-judge panel of the Court of Appeal said that while the reference to the safety "may have engendered a bit of confusion on the part of the jury," other parts of the instructions adequately explained that that the jurors had to find conscious disregard for human life in order to reach a second-degree murder conviction.

Justice Douglas Swager wrote, "When considered along with the remaining instructions on murder and malice we do not find any error. ... Disregard for safety was never equated with implied malice."

The appeals panel also rejected Barreto's challenge to O'Malley's instruction that the mental state of implied malice "may be measured over a period of time."

The appeals court said O'Malley correctly explained that implied malice had to exist at the moment of the accident, although it also may have developed over a period of time.

The court said that a number of previous court rulings in vehicular homicide cases "have observed that the state of implied malice may indeed exist for a protracted period of time while the defendant consumes alcohol and then engages in a course or pattern of dangerous driving while impaired."

Schraer said the issues in Barreto's appeal have some similarity to questions in case of San Francisco attorney Marjorie Knoller, who was originally found guilty of second-degree murder when her Presa Canario guard dogs fatally mauled lacrosse coach Dianne Whipple in 2001.

The state Supreme Court is currently considering Knoller's appeal of an appeals court ruling that all but reinstated the second-degree murder conviction after a trial judge reduced the verdict to involuntary manslaughter.

The issue in Knoller's case is whether the legal standard for second-degree murder can include a conscious disregard for a likely risk of death or serious bodily injury, or whether the standard is met only when there is disregard for human life.

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