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April 14, 2014

Supreme Court of California
Office of the Clerk
Automatic Appeals Unit
350 McAllister St.
San Francisco, CA 94102

Re: *People v. John Leo Capistrano*, Case No. S067394

To the Honorable Tani Cantil-Sakauye, Chief Justice of California, and to the Honorable Associate Justices of the Supreme Court of the State of California:

Appellant files this letter brief in reply to respondent's letter brief filed on March 28, 2014 pursuant to this Court's order of March 19, 2014 to answer the following question:

> Did the admission of Michael Drebert's statement to Gladys Santos regarding defendant's role in the killing of Koen Witters violate appellant's confrontation right in light of the United States Supreme Court's conclusion in *Crawford v. Washington* (2004) 541 U.S. 36 [(*Crawford*)], that the Sixth Amendment's confrontation clause applies only to testimonial statements?

This Case Is Not an Appropriate Vehicle for Answering the Court's Question Because the Facts Necessary to its Resolution Were Not Litigated at Trial

Respondent did not address whether this case was the proper vehicle for answering the court's question. Appellant argues that it is not, because the facts necessary for its resolution were not litigated at trial. (Appellant's April 1, 2014 letter brief at pp. 1-3.) Respondent's letter brief supports appellant's argument.

Respondent cites to several facts in the record in arguing that Drebert's statement to Santos was not "testimonial" under *Crawford* because "Drebert had no reason to believe his statement to Santos would be used later in future judicial proceedings. No objectively reasonable witness would view Drebert's statement as an 'interrogation' within the meaning of *Crawford*" – that Santos was a civilian, that Drebert initiated the conversation, and that no one in "the group" had been apprehended for the Witters homicide or the crimes against E.G. and J.S. "and probably the Weirs." (Respondent's

March 28, 2014 letter brief at pp. 4-5.)

Had trial counsel, acting as a competent and zealous advocate, been on notice that this issue needed to be litigated, he would have, at a minimum: (1) investigated Santos' relationship with law enforcement in order to determine whether she provided evidence against other defendants in return for leniency, as she did in this case; (2) litigated whether Santos initiated the discussion; and (3) developed evidence regarding the circumstances leading up to the conversation.

For example, contrary to respondent's suggestion that Drebert had no concerns about being apprehended by authorities when he conversed with Santos, even the undeveloped facts in the record show that Drebert may very well have been concerned about having been identified as a perpetrator of the crimes against the Weirs, which occurred on December 23, 1995. (8RT:3052-3057.) Santos testified that she had the conversation with Drebert around Christmastime, when he came over her house in a drunken state on his birthday. (5RT:2547-2549, 2552.) Drebert turned 18 years old on Christmas day. (3CT:790.) Clearly, Drebert's statement to Santos was after the Weir crimes. An eyewitness to the Weir crimes saw the driver and a passenger of the getaway car. (8RT:3102.) Drebert may very well have been concerned that apprehension of the group was near and decided to tell his story implicating Capistrano as the leader and the killer of Witters. In sum, evidence at trial may very well have shown that the statement was "testimonial" under *Crawford* as Drebert may have had a reason to believe his statement to Santos would be used in future legal proceedings to cast appellant as the killer and minimize his own criminal liability.

In a similar vein, respondent argues that Drebert's statement was admissible against appellant under Evidence Code section 1230. (Respondent's April 1 letter brief at pp. 5-6.) Again, the admissibility of the statement under Evidence Code section 1230 was not litigated below because, as the state and the trial court acknowledged, *Drebert's statement incriminating appellant was inadmissible under Bruton* at the time of trial. If reasonably competent trial counsel had had knowledge that the admissibility of Drebert's statement incriminating appellant had to be litigated, he would have (1) argued that the portion of Drebert's statement incriminating appellant was not a statement against Drebert's penal interest as it did not inculpate Drebert[1] and (2) developed facts, such as those set forth above regarding why Drebert confessed to Santos, to show that the statement was not sufficiently reliable.

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[1] Appellant has not conceded that Drebert's statement was admissible against *appellant* under section 1230. (Respondent's letter brief, page 5, fn. 2.) Appellant acknowledges that portions of Drebert's statement that were *self-incriminating* were admissible against Drebert.

Santos testified before appellant's jury that she was told by someone (clearly, albeit inferentially, identified as Drebert) who had been present at a homicide about the circumstances of that homicide, and that she later confronted appellant with what she had been told – that appellant had killed someone with a belt. (5RT:2433-2438.) Nothing in what Drebert's said about Capistrano's involvement was against Drebert's penal interest; thus, Drebert's self-serving statement inculpating appellant was inadmissible at trial. (*People v. Duarte* (2000) 24 Cal.4th 603, 611-613, and cases cited therein.)

Criteria for admission under Evidence Code section 1230 to be examined by the trial court include whether the declarant was unavailable, the statement was against the declarant's penal interest when made and the statement was sufficiently reliable to warrant admission. (*People v. Lucas* (1995) 12 Cal.4th 415, 454.) To determine whether the statement is trustworthy, the trial court "'may take into account not just the words but the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant.'" (*People v. Duarte, supra,* 24 Cal.4th at p. 614, citation omitted.) None of these facts were litigated below.

In sum, these factual determinations are not properly made for the first time on appeal. (See *Jackson v. Denno* (1964) 378 U.S. 368, 393 [case remanded to state court for determination of voluntariness of confession].) For all these reasons, as well as those set forth in Appellant's April 1, 2014 letter brief, this issue should not be reached because it was not litigated below.

Crawford Does Not Abrogate the *Bruton* Doctrine

Appellant asserts that under clearly established United States Supreme Court authority, the admission of Drebert's statement against appellant violated appellant's rights under the Sixth and Fourteenth Amendments.

Each of the lower courts and several federal court cases that respondent cites that have held that the Confrontation Clause has no application to out-of-court nontestimonial statements by codefendants (Respondent's April 1, 2014 letter brief at pp. 3-4) fail to address the constitutional concerns of *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), concerns which extend beyond the Confrontation Clause, as argued in appellant's April 1 letter brief.

Bruton's holding is based in part on *Jackson v. Denno* (1964) 378 U.S. 368 and its concerns about the ability of a defendant to get a fair trial from an impartial jury where jurors were instructed to disregard a confession if the jury determined the confession was coerced. In holding that it is a denial of due process to rely on a jury's presumed ability to disregard inadmissible evidence, the court relied in part on the inherent untrustworthiness of a coerced confession. (*Id.* at p. 383.)

Similarly, in Bruton the court recognized that statements of codefendants which incriminate a nondeclarant codefendant are "inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination." (*Bruton, supra,* 391 U.S. at pp. 135-136.) The risks attendant to the admission of statements by a codefendant shifting blame to the defendant remain, no matter to whom the statements were made. (See also *People v. Duarte, supra*, 24 Cal.4th at pp. 611-613 [section 1230's exception to the hearsay rule "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant," citations omitted.) Thus, contrary to the premise postulated by respondent, *Bruton* has not been overruled by *Crawford* and Drebert's statements inculpating appellant were inadmissible at trial.

Appellant Objects To The Procedure Imposed Upon Him To Put This Issue Before The Court

Appellant filed his reply brief on October 14, 2008. On February 7, 2014, appellant received notice that his case may be scheduled for oral argument as early as the first week in April 2014. On March 19, 2014, the court required the parties to brief an issue, heretofore not briefed by either party, which has not yet been decided by the United States Supreme Court. Appellant was given until April 1 for his letter brief and until April 14 for the reply, with no extensions for either letter. Appellant respectfully requests that the parties be afforded more time to fully brief this important issue of federal constitutional law so that it may be presented to this court in a manner that comports with appellant's constitutional right to the effective assistance of appellate counsel, to meaningful review of his claims and to due process of law.

Very truly yours,

Kathleen M. Scheidel

KATHLEEN M. SCHEIDEL
Assistant State Public Defender

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano* No.: KA 034540
Calif. Supreme Ct. No. S067394

I, Neva Wandersee, declare that I am over 18 years of age, and not a party to the within cause; that my business address is 1111 Broadway, 10th Floor, Oakland, California 94607. I served a true copy of the attached:

LETTER BRIEF DATED APRIL 14, 2014

on each of the following, by placing same in an envelope addressed respectively as follows:

Office of the Attorney General
Margaret Maxwell, D.A.G
300 South Spring St., 5th Floor
Los Angeles, CA 90013

Michael Satris
P.O. Box 337
Bolinas, CA 94924

Mr. John L. Capistrano
E-43412 1-EB-67
San Quentin State Prison
San Quentin, CA 94974

Each said envelope was then, on April 14, 2014, sealed and deposited in the United States mail in the city of Oakland, County of Alameda, California in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed this April 14, 2014, at Oakland, California.

DECLARANT