IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE,	)	**Supreme Court No.**
	)	**S228193**
Plaintiff and Respondent,	)	
	)	**(Court of Appeal No.**
v.	)	**D066684)**
	)	
RUTHETTA LOIS HOPSON,	)	**(Superior Court No.**
	)	**RIF1105594)**
Defendant and Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF ON THE MERITS

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By Appointment of the Supreme Court
under the Appellate Defenders, Inc.
Assisted Case System

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TOPICAL INDEX

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutions

Statutes

Court Rules

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STATEMENT OF THE ISSUE

By its order dated October 14, 2015, this court has ordered that the issue to be briefed and argued in this case is limited to the following:

> Was defendant's right to confrontation under the Sixth Amendment violated when the trial court permitted the prosecution to introduce out-of-court statements made by her deceased codefendant?

(Order Granting Review, Oct. 14, 2015.)

STATEMENT OF THE CASE

On May 2, 2012, the Riverside County District Attorney filed a one-count felony information charging appellant Ruthetta Lois Hopson with the deliberate and premeditated murder of Laverna B., in violation of Penal Code

section 187, subdivision (a). (1 CT 51-52.)[1] The information further alleged that Ms. Hopson committed the murder while lying in wait (Pen. Code, § 190.2, subd. (a)(15)) and while she was engaged in the commission or attempted commission of robbery (Pen. Code, § 190.2, subd. (a)(17)(A)). (1 CT 51-52.)[2]

This matter proceeded to jury trial. (1 CT 104.) The jury found Ms. Hopson guilty of first degree murder and found both special circumstances to be true. (2 CT 355-359.) On April 26, 2013, the trial court denied probation and sentenced Ms. Hopson to life imprisonment without the possibility of parole. (2 CT 420-421, 441-443.)

On May 1, 2013, Ms. Hopson filed her timely notice of appeal. (2 CT 444-445.) On June 24, 2015, in an unpublished opinion, the Court of Appeal (Fourth Appellate District, Division One) affirmed the judgment. (Opinion, D066684 (hereafter "Opn.").)

On October 14, 2015, this court granted review and limited the issue to be briefed and argued as specified in the Statement of the Issue (*ante*, p. 1).

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[1] Except as noted, all statutory references are to the Penal Code.

[2] Although the information also charged an enhancement under section 12022, subdivision (b)(1), for personally using a deadly and dangerous weapon, to wit, a machete/knife (CT 51), that enhancement was not presented to the jury. The original complaint had charged codefendant Julius Thomas, who later died, with the same premeditated murder and special allegations. (1 CT 1.)

STATEMENT OF FACTS

Prosecution Case-in-Chief Evidence

1. The Residents of the House on Gedney Way

Laverna Brown was a 66-year-old registered nurse who, in October 2011, was living at 11530 Gedney Way in Riverside. (2 CT 176-177; 1 RT 57-58.)[3] Ms. Brown rented a room there from Darcy Timm, who lived in the back of the house and rented three rooms to traveling nurses. (1 RT 57-59, 66-67.) Ms. Hopson, a 39-year-old nurse's aide who worked for a company that contracted nursing services, was also living at Timm's house then. (2 CT 164-167, 177; 1 RT 58-59.) Ms. Hopson had trouble paying her rent and had given Timm notice that she planned to move at the end of October. (1 RT 63-64.)

2. The Events of October 28th

On Friday, October 28th, Ms. Brown was scheduled to take a 6:45 a.m. flight from California to Georgia to visit her son. (1 RT 32-33.) Ms. Brown did not arrive in Georgia as scheduled and her family learned that Ms. Brown had not arrived to take her flight that morning. (1 RT 34.)

Timm woke up around 5:15 a.m. that day to do laundry in the garage of her home, before she left for work. (1 RT 70-71.) When Timm went to the

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[3] Unless otherwise specified, all relevant events occurred on or about October 28 and 29, 2011.

garage, she noticed that it was "askew" and that a machete she kept there was missing, but its sheath was there; she also noticed that a large butcher knife was missing from the kitchen. (1 RT 47, 72-73.)

Though Timm had thought Ms. Hopson was sleeping, Ms. Hopson suddenly came into the house. (1 RT 73-75.) Ms. Hopson told Timm that she was going to spend the day with her boyfriend, Julius Thomas, and that she was returning to the house to change her clothes. (1 RT 48, 75-78, 80-81, 101-102.) It was around 5:45 a.m. and still dark, but Timm could see Thomas's car parked outside her house. (1 RT 76-78, 82.)

Timm asked Ms. Hopson about the missing knife and machete and Ms. Hopson said that she did not know anything about them. (1 RT 75-77.) Sometime after that, while Timm was getting ready for work, Ms. Hopson came to the door of Timm's suite and said that she had spilled Coke on the side of the garage and had hosed it down. (1 RT 80-82.) Ms. Hopson was at the house for 10 or 15 minutes and then was gone again. (1 RT 80.)

Shortly thereafter, before leaving for work, Timm found a blood-soaked blanket in what she called "Ruthetta's trash can" in the garage (1 RT 83-85.) Timm immediately called 911 and reported that she had a machete and a knife missing and had found "'a newly soaked blanket of blood.'" (1 RT 86-87.) Riverside Police Officer Jorge Sepulveda responded, found the bloody blanket

in the garbage can, and observed what may have been bloody human or animal tissue on the walkway outside the house; there was no evidence of a break-in or forced entry. (1 RT 40-46.)[4] Timm gave Sepulveda the telephone numbers for Ms. Hopson and Thomas. (1 RT 48-49.)

Timm called Ms. Hopson several times while Sepulveda was at her house, but was unable to reach her. (1 RT 48, 87-88.) When Timm and Ms. Hopson finally talked, sometime around 8:30 a.m., Timm again asked about the missing knife and machete, and Ms. Hopson still had no explanation; Timm did not say anything about finding the bloody blanket or calling the police. (1 RT 87-88.) Ms. Hopson did say she had moved things around in the garage and also said that she and Thomas had seen a long-haired, homeless man lurking around the neighborhood that night. (1 RT 88-89.)

Timm went to work and returned home about 5:00 p.m. (1 RT 90.) When she opened the garage, she saw Ms. Hopson standing inside. (1 RT 90-91.) Ms. Hopson approached her and said she had washed down the side of the house again. (1 RT 91.) As Ms. Hopson was talking, the phone rang, and Timm went inside the house to answer it. (1 RT 92.) It was Mistie Williamson, Ms. Brown's daughter, who was alarmed and "hysterical," telling

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[4] Except as noted, all law enforcement personnel referenced in this factual summary worked for the Riverside Police Department.

Timm that her mother could not be located. (1 RT 35-36, 92-93.) Timm told Mistie that her mother's room was in order and her van was gone. (1 RT 36.)

While Timm was talking with Mistie, Ms. Hopson followed Timm around the house, listening to the conversation. (1 RT 92-95.) When the phone call ended, Timm went back to the driveway to wash her car. (1 RT 95.) Ms. Hopson told Timm that Thomas would be picking her up to take her to work. (1 RT 95-96.) Thomas drove up and parked while Ms. Hopson was inside, and Timm spoke with him briefly. (1 RT 96.) Timm was very scared, and when Ms. Hopson and Thomas drove away, Timm called 911 again. (1 RT 96-97.)

In the second 911 call, Timm informed the dispatcher what had happened that day and explained that Laverna Brown's family had called and reported that Ms. Brown never got on her flight to Georgia and was missing. (1 CT 99-101) Timm told the dispatcher, "there's something going on at my house that's really bad" and "I am scared to death." (1 CT 101-102.)

Officer Jayson Jahinian came to Timm's home in response to the second 911 call. (1 RT 103-105.) Before he arrived at the house, Jahinian had spoken on the phone with Mistie Williamson, who provided information regarding her missing mother. (1 RT 104-105.) Jahinian learned from Timm about "the third roommate, Ms. Hopson," and went to the hospital where she was working to speak with her. (1 RT 106-107.)

Officer Jahinian arrived at the hospital around 8:00 p.m. and spoke with Ms. Hopson about Laverna Brown's disappearance. (1 RT 107-109.) Ms. Hopson explained her activities during the hours when Laverna Brown went missing; during most of that time, Ms. Hopson said, she was not at the Timm residence. (1 CT 78-88, 107-112.)[5]

Ms. Hopson indicated shock that Ms. Brown did not make her airline flight and was missing. (1 CT 88.) Jahinian confronted Ms. Hopson about the bloody blanket found in the garage; Ms. Hopson told him that she had spilled a can of soda in the garage, and stated she hosed down the side of the garage, but said she had "no idea" that there was any blood there. (1 CT 89-92.)

Following that interview, Officer Jahinian spoke with his supervisor, Sergeant Warren, and told Warren that he "believed Ms. Hopson killed the victim and [Ms. Hopson] was lying to me and that the detectives needed to respond immediately." (1 RT 110-111.)

3. Forensic Evidence at Timm's Home

Around 12:10 a.m. on October 29th, Tim Ellis, a forensic technician, arrived at Timm's home, where he observed possible blood inside the trash can

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[5] Officer Jahinian's interview with Ms. Hopson was recorded, and a CD of that recording was played at trial and marked as People's Exhibit 156; a written transcript was marked as People's Exhibit 156A. (1 CT 74-97.)

and on the sidewalk; Ellis found a pair of blue rubber gloves and a pair of yellow gloves inside the trash can. (1 RT 115-117, 121-122, 126-127.)

Many areas in the garage, on the side of the house, and in the driveway had possible blood stains. (2 RT 167.) Selena McKay-Davis, another forensic technician, performed tests to determine if the various stains were blood. (2 RT 155-156, 159-162.) It appeared that something violent had happened in the garage. (2 RT 167.)

Lourdes Petersen, a California Department of Justice criminalist, examined the inside and outside of the garage and identified areas where blood may have been cleaned up. (2 RT 181-185, 194.) She determined that there was a large amount of possible blood in an area which had been hosed down and that there was a blood trail from the interior of the garage to the outside of the garage, where the trash cans were located. (2 RT 193-194.)

4. Ms. Hopson Is Interviewed at the Police Station

Detectives Rick Wheeler and Rick Cobb met with Ms. Hopson at the hospital after she had been interviewed by Officer Jahinian. (2 RT 250-253.) The detectives told Ms. Hopson they wanted to talk with her about Laverna

Brown and Ms. Hopson agreed to go to the police station, where she was interviewed around 2:00 or 3:00 a.m. on October 29th. (2 RT 253-254.)[6]

Detective Wheeler told Ms. Hopson that she was not under arrest, even though they were talking at the police station. (2 CT 170-171.) Detective Wheeler testified that, in the beginning of the interview, Ms. Hopson was "very open and seemed pretty easy to speak to for the most part." (2 RT 257.) As the interview went on and Wheeler asked her about matters such as the blood and the cleanup at Timm's house, her demeanor changed and she became "less bubbly . . . almost completely shut down." (2 RT 257-258.)

Ms. Hopson described Ms. Brown as "so nice," "awesome," and "really wonderful." (2 CT 172-173.) Ms. Hopson told the detectives that she had "chatted" with Ms. Brown on Thursday night and that Ms. Brown "seemed fine" and "very excited" about her trip. (2 CT 173, 187.)

Ms. Hopson woke up on Friday after her boyfriend texted her. (2 CT 199-200.) Thomas came over to the house around 2:00 or 2:30 Friday morning and Ms. Hopson and Thomas went outside by his car because he smokes. (2 CT 204-206.) While there, they saw some guy standing in front of a house

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[6] The recorded CDs of that interview were played at trial and marked as People's Exhibits 181 and 182. (1 RT 255-256.) The written transcript was marked as People's Exhibit 182A. (2 CT 162 to 303-1.)

smoking a cigarette; Ms. Hopson had seen him in the neighborhood a couple of days earlier and described it as "kind of weird." (2 CT 209.)

Ms. Hopson said that between 3:00 and 4:30 a.m., she and Thomas drove to a nearby park and parked on the street. (2 CT 214-215.) Around 4:30 a.m., they returned to the house, where Ms. Hopson got a different shirt; then they left and ended up at a McDonald's, before again returning to the house, around 6:00 or 6:30 a.m., so Ms. Hopson could change her clothes. (2 CT 216-220.)

Ms. Hopson said that when they returned that time, Ms. Brown's car was gone. (2 CT 220.) Ms. Hopson went inside, where she spoke with Timm, who was saying some "weird things" about items having been moved around in the garage and her missing machete and knife. (2 CT 222-227.) While Timm was talking about the missing machete, Ms. Hopson grabbed a Coke from the refrigerator in the garage. (2 CT 229-232.)

According to Ms. Hopson, as she was leaving the garage, she tripped and spilled her Coke "all over the place." (2 CT 232-233.) She asked Timm if there was a hose she could use to squirt down the area. (2 CT 233-234.) Ms. Hopson could tell the Coke had stained the ground, which she cleaned with the hose, before leaving with Thomas. (2 CT 235-236.)

Thomas, who had been parked outside the house, dropped Ms. Hopson off at a bus stop, and she did some shopping. (2 CT 236-238.) Timm had left

Ms. Hopson a couple of voice mails about things being moved in the garage and the missing machete. (2 CT 238-239.) While shopping, Ms. Hopson called Timm back. (2 CT 238.)

That afternoon, Ms. Hopson took the bus back to her house and arrived there around 2:30 p.m. (2 CT 257.) Everything seemed normal; she mopped the floor in the kitchen, vacuumed the living room rug, and went outside and again cleaned the area where she had spilled her soda. (2 CT 258-260.) Ms. Hopson went to bed for a couple of hours, then got up and got ready for work. (2 CT 263-264.) Around 5:30 p.m., after Timm had returned home, Thomas picked Ms. Hopson up and took her to work. (2 CT 265, 269.) Ms. Hopson was at work until the detectives picked her up there. (2 CT 270.)

Detective Wheeler told Ms. Hopson that no one had seen Ms. Brown since Thursday night and that Ms. Brown's car was missing, which was very shocking to Ms. Hopson. (2 CT 271-273.) Wheeler told Ms. Hopson that officers found some things in the area near where Ms. Hopson had been cleaning that raised "some major concerns." (2 CT 273.) When the officers told Ms. Hopson there was blood in the area she had cleaned twice that day, Ms. Hopson replied with comments like "'Holy cow'" and "'Oh, my gosh.'" (2 CT 274-275.) When Detective Cobb said that someone had used the hose for a long time, Ms. Hopson denied doing that. (2 CT 296.)

Detective Wheeler told Ms. Hopson that officers found, in one of the garbage cans, a blanket with "a large amount of blood on it." (2 CT 275.) Wheeler believed the blood was Ms. Brown's, and the police were going to have it tested. (2 CT 277.) Ms. Hopson had no explanation for the bloody blanket or other evidence of blood in the area of the garage she had been hosing down and cleaning. (2 CT 275-277, 295-296.)

Detective Wheeler told Ms. Hopson that she had been referring to Ms. Brown in the past tense during the interview. (2 CT 294-295.) Detective Cobb noted she had said, "'she was awesome.'" (2 CT 294.) Ms. Hopson said that she "didn't mean to" refer to Ms. Brown in the past tense. (2 CT 295.)[7]

In her earlier interview with Officer Jahinian, Ms. Hopson had identified her boyfriend as Julius Thomas, whom she described as a black man about 30 years old, about 6 feet 1 inch tall, and weighing 330 to 350 pounds, "just a big snugly Teddy Bear." (1 CT 90-91, 96.) Ms. Hopson the detectives that she loved Thomas and was not concerned about anything with him and that he "didn't do anything." (2 CT 297.)

Near the end of the interview, Detective Cobb asked Ms. Hopson, "What's bothering you, Ruth?" and Ms. Hopson replied, "Just this whole

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[7] Tedra Rutabana, a nurse assistant at the hospital where Ms. Hopson worked, testified that after Ms. Hopson had been interviewed there by the police, she was referring to Ms. Brown in the past tense. (2 RT 273-279.)

situation. . . . it sucks." (2 CT 296-297.) Ms. Hopson told the detectives that it sounded "like you already have me, like, tried and convicted," and Cobb told her, "I don't have you doing anything." (2 CT 303-1.)

5. Laverna Brown's Van and Body Are Found

At approximately 9:30 a.m. on October 29th, Detective Cobb contacted Verizon Wireless and requested a remote location for Julius Thomas's cell phone number, which cell phone companies are able to locate through a process called "pinging." (1 RT 113.) Cobb learned that the last time Thomas's cell phone was used within range of a cell tower was at 3:20 a.m. on October 29th, near 5850 Republic Street in Riverside. (1 RT 113-114.) Patrol officers were sent there to search for Laverna Brown's van, which was discovered in an empty parking lot in that area. (1 RT 114.)

Tim Ellis was called to process Ms. Brown's van, where he found "a female looking deceased laying the middle area of the van facedown." (1 RT 115, 127, 131.) Ellis thought the body might have been pulled into the van from the driver's side. (1 RT 132.) Detective Cobb searched the van and found Ms. Brown's suitcase, which contained women's clothing and toiletries, but no purse or cell phone. (1 RT 114.)

Parts of the van were swabbed for DNA. (1 RT 136-138.) DNA collected from the steering wheel of the van was a mixture from at least two

people. (2 RT 196.) The major DNA donor profile matched Laverna Brown; Ms. Hopson's DNA profile was included as a possible minor donor. (2 RT 196.) Both Julius Thomas and Darcy Timm were excluded as possible donors to the minor DNA. (2 RT 196-197.)

On October 31st, Dr. Joanna Young, a forensic pathologist, performed an autopsy on Ms. Brown's body. (1 RT 144-146.) Dr. Young determined that Ms. Brown died from a "[s]harp force injury of neck." (1 RT 151.) Ms. Brown's right carotid artery had been severed; both the esophagus and the trachea had been "completely severed" by some sharp instrument which cut open Ms. Brown's neck. (1 RT 149-150.) Ms. Brown's death was consistent with a death caused by the use of a machete or a butcher's knife. (1 RT 151.)

6. Cell Phone Records

Shawn Green, a crime analyst for the Riverside County District Attorney's Office, analyzed cell phone records obtained in this case and testified about calls and texts between Ms. Hopson's and Thomas's cell phones from October 27th to October 29th. (2 RT 213-221, 228.) In that three-day period, 33 calls were made on Ms. Hopson's phone to Thomas, and her phone received 28 calls from his. (2 RT 221-222.) Ms. Hopson sent 25 text messages to Thomas and received 13 messages from him. (2 RT 223-224.)

At 1:49 a.m. on October 28th, there was a call from Thomas's cell phone to Ms. Hopson's cell phone which lasted over 11 minutes; then there was another call between those phones at 2:09 a.m. that lasted only 27 seconds. (2 RT 226-227.) Between 2:10 and 6:30 a.m., there was no activity on Ms. Hopson's phone. (2 RT 227-228.) At 7:16 a.m., there was a call from Thomas's phone to Ms. Hopson's phone that lasted a little more than four minutes. (2 RT 228-229.) Calls between the phones belonging to Thomas and Ms. Hopson continued that day. (2 RT 229-231.)

7. Julius Thomas

On November 1st, Detectives Cobb and Wheeler interviewed Julius Thomas. (2 RT 203-205.) After that interview, Thomas accompanied Cobb and Wheeler to two locations. (2 RT 205.) At the first location, where the detectives hoped to locate some clothing, the dumpster which was supposed to contain the clothing had been emptied by the time they arrived. (2 RT 205-207.) The second location was a fenced-off area next to a canal, where the detectives returned the following day and found a machete. (2 RT 172-175, 207-209.) The machete was processed for a possible blood stain on the blade and latent fingerprints. (2 RT 175, 177-179.) Swabs taken from the handle and the blade of the machete matched Laverna Brown's DNA profile. (2 RT 197.)

Thomas was jailed and became a codefendant in this case. (2 RT 248.) Thomas committed suicide in his jail cell on December 15, 2011. (2 RT 248.) As Detective Wheeler understood it, Thomas "hung himself." (2 RT 268.)

In the course of the jail investigation of Thomas's suicide, a letter dated December 10th from Ms. Hopson to Thomas was discovered. (2 RT 264.) Detective Wheeler read from the letter at trial. (2 RT 265-266.) Wheeler testified that the upper left part of the letter read, "'My love.' And then it says, 'I love you. I need you. I want you. I desire you. I miss you.'" (2 RT 265.) The letter continued:

> "I haven't heard back from you so I can only assume that you don't forgive me. I can only say that I am sorry for hurting you. I love you with all my heart, mind, body, and soul. I wanted you to know that even though you don't write me, I will still write you until you tell me not to. [¶] I don't blame you for being mad, angry, or even hating me. I hate myself for my weakness, for my fear and for my doubt. All I can say is that I am sorry and I hope that one day you will forgive me. [¶] I have to go for now. It has been a long day, and I feel physically and emotionally exhausted. . . . ."

(2 RT 265-266.)

The letter was signed, "'All my love,'" with a heart, 'Ruth.' And then 'PS: Good night, my love. Rest well.'" (2 RT 266.)

8. Other Prosecution Evidence

On October 25th, Ms. Hopson filled out an application to rent a two-bedroom apartment for $995 a month starting on November 4th and made a

$100 holding deposit. (2 RT 280-286.) The manager set the apartment deposit at $800. (2 RT 286-287.)

On October 27th, the property manager spoke with Ms. Hopson and told her she could move in on October 29th if she was able to come up with the additional deposit of $700. (2 RT 289-290.) Ms. Hopson texted the manager and said she thought she would have the money and could move in on the 29th. (2 RT 291.) Ms. Hopson never produced the additional funds. (2 RT 291-292.)

It was stipulated that Ms. Hopson had $16.05 in her checking account on October 27th and $17.11 in her savings account on that date. (2 RT 246.) The checking account showed a $76.46 transaction at Big John's Military Surplus in Riverside on October 27th, when Ms. Hopson bought a knife and a can of pepper spray. (2 RT 199-202, 246.)

Defense Evidence

Ms. Hopson testified on her own behalf. (2 RT 303-304.) Her occupation was as a certified nursing assistant. (2 RT 305.) She had a 21-year-old son, who lived in Norwalk. (2 RT 320.)

Ms. Hopson met Thomas when he was a bus driver and she took his bus to work. (2 RT 306.) They had known each other for two years before they started dating in 2008. (2 RT 306-309.) Ms. Hopson and Thomas did not go on frequent dates, and she saw him a couple of hours each week, usually at her

home. (2 RT 309-310.) Thomas had told Ms. Hopson that he was divorced, and she believed him. (2 RT 307-308, 312.) She had never been at his house and did not have his address. (2 RT 307-309, 312-313, 386-387.) Ms. Hopson loved Thomas, but was not sure whether he loved her. (2 RT 313.) She was nine years older than Thomas. (2 RT 313.)

Though Thomas never hit Ms. Hopson, she described him as a threatening and sometimes violent man who had been a member of a motorcycle club, which sometimes engaged in "shady" activities. (2 RT 314-315, 377-379, 382, 385-386.) Ms. Hopson testified that Thomas told her that he once beat to death a man who had disrespected his grandmother and that he had beaten up other people. (2 RT 314-315, 382.) She continued to see Thomas after learning these things because he had threatened to hurt her, and possibly kill her, if they broke up. (2 RT 315-316, 383-384.)

Ms. Hopson moved into Timm's house on July 11, 2011. (2 RT 310, 317.) Thomas would visit her there about once a week, usually around 1:00 or 2:00 a.m. (2 RT 309-311.) Thomas would text Ms. Hopson that he was outside the house and come in to spend 45 minutes to a couple of hours with her, usually in her bedroom, though sometimes they would just sit outside together in his car. (2 RT 310-311, 318.)

Ms. Hopson testified that she had told Thomas that Ms. Brown was going on a trip to Georgia, leaving on an early morning flight. (2 RT 318-319.) Around 2:00 a.m. on October 27th (*sic*), Ms. Hopson received a couple of phone calls from Thomas; when he called the first time, he said "he was on his way"; in his second call, Thomas told Ms. Hopson that "he was there." (2 RT 321-322, 330-331, 379.) Ms. Hopson got dressed and went outside, leaving the house by the usual route she would take to meet him, which went through the back door that led to the garage. (2 RT 316, 322.)

When Ms. Hopson opened the garage door, "what I saw was like a scene from a horror movie." (2 RT 322-323.) She saw Ms. Brown lying in the pool of blood on the garage floor and Thomas standing over her. (2 RT 323.) Thomas told Ms. Hopson that she needed to "help him clean it up" and if she did not help, she "would be next, but before he did anything to me, he would harm my son." (2 RT 323, 384-385.) Ms. Hopson was scared, and she did what he told her to do. (2 RT 326, 394-395.)

Thomas told Ms. Hopson that he killed Ms. Brown because he thought she would have money on her for her trip and he needed money. (2 RT 323.) Thomas told her that he sliced Ms. Brown's throat with Timm's machete, which he had taken, and he also told her that he had taken a butcher knife from the kitchen, because the blade on the machete was too dull. (2 RT 324-325.) Ms.

Hopson had told Thomas that there was a machete at Timm's house. (3 RT 426.)

Ms. Hopson testified that Thomas forced her to clean up the blood and help put Ms. Brown's body in a blanket and move it to her van. (2 RT 326-335, 340-345.) Ms. Hopson stated the cleaning in and around the garage took up to 45 minutes, while Thomas stood next to her with the machete and the butcher knife in his hand, telling her to hurry. (2 RT 335-336, 342-343.)

Ms. Hopson helped Thomas load Ms. Brown's body into the van and did as she was told; when they were finished, they went to a McDonald's, where he got her some food. (2 RT 332-333, 348; 3 RT 437-438.) Ms. Hopson drove the van, following Thomas in his car. (2 CT 344.) Ms. Hopson was very scared throughout this entire incident, fearful of what might happen to her son if she did not do what Thomas told her to do. (2 RT 345-346, 351, 375-376, 382.) Thomas had warned her when they were at the McDonald's after the killing that, if she was ever questioned by the police and she did not tell the police exactly what he had told her to say, she and her son would die. (2 RT 348.) That was why Ms. Hopson told the detectives what she did when they interviewed her. (2 RT 349-350.) Ms. Hopson testified that, when she was being interviewed by the officers, she wanted to tell them what really happened,

but she was afraid that Thomas "would follow through on his threat." (2 RT 356-358, 367.)

During the killing, Thomas wore clothing Ms. Hopson had purchased, which she had thought was for Thomas's sister. (2 RT 337-339, 365; 3 RT 423-424.) Ms. Hopson had also given Thomas the gloves and booties which he wore when he killed Ms. Brown, though she had done so long before the killing. (3 RT 424, 436.) At some point, Thomas told Ms. Hopson to go back to her house and change her clothes and give the ones she had been wearing to him, which she did. (2 RT 351.) Thomas put the bloody clothes he had been wearing, along with the clothes Ms. Hopson had been wearing, in a trash bag which he put in the trunk of his car. (2 RT 350-352.) Thomas also put the weapons he had used in the trash bag. (2 RT 351.) He put the slippers he had been wearing in the trash at a park, where he went into the restroom. (2 RT 350, 397.) Ms. Hopson did not know what Thomas ever did with the machete; she was never at the area where the machete was later found. (2 RT 364-365, 400-401.)

When Thomas took Ms. Hopson back to Timm's house around 5:00 a.m., so that she could change her clothes, Ms. Hopson encountered Timm and told her that she was going to go back outside with Thomas; that was when Timm first told Ms. Hopson about the missing machete and butcher knife. (2

RT 351-353, 360.) Before they returned to Timm's house, Thomas had stopped at a 7-Eleven, where he told Ms. Hopson to buy a Coke, which he told her would clean up the blood, which Ms. Hopson used for that purpose when they returned to the house, while Thomas waited outside in the car. (2 RT 353-354, 358-360, 398-399.)

Ms. Hopson had bought the pepper spray at the military surplus store for her own protection. (2 RT 362-364, 406-407.) She bought a small folding knife around the same time. (2 RT 363, 406-407.) Ms. Hopson wrote Thomas while she was in jail even though she was aware that her letters would be read by jail officials. (2 RT 369-373.)

The prosecutor asked Ms. Hopson on cross-examination why, if she was telling the truth at trial, she did not say anything before. (2 RT 390-391.) Ms. Hopson responded that she did not say anything because she had been afraid. (2 RT 391-392.) Even though Thomas had killed himself on December 15, 2011, she did not know if somebody else would still hurt her son or herself. (2 RT 391.) Ms. Hopson did not tell the truth about the threats because she did not know "how to tell what I needed to tell." (2 RT 391-392.) Ms. Hopson testified, "I'm innocent. I didn't harm Laverna. I didn't plan to harm her. I didn't intend to harm her. I didn't want her to be harmed." (3 RT 431.)

On redirect examination, Ms. Hopson testified that, sometime after her arrest, she learned that Thomas had talked with the police; his statement that Ms. Hopson had planned the killing was untrue. (3 RT 434-436.)[8] Ms. Hopson never told Thomas that the two of them should rob Ms. Brown for her money or that Ms. Brown would have a good amount of money on her when she left on her trip. (3 RT 435.) Ms. Hopson never agreed to lure Ms. Brown into the garage where Thomas was hiding. (3 RT 435-436.) She did not plan or participate in other acts relating to the robbery and murder of Ms. Brown, other than what Thomas directed her to do. (3 RT 435-439.)

Prosecution Rebuttal Evidence

Called as a rebuttal witness, Detective Wheeler testified that he became aware of codefendant Thomas's involvement in the death of Laverna Brown through his interview with Ms. Hopson and that Ms. Hopson provided him with Thomas's telephone number. (3 RT 444.)

Wheeler interviewed Thomas on November 1st. (3 RT 444-445.) Wheeler described Thomas as being "a complete mess" during the interview, "talking, crying, almost couldn't catch his breath, apologizing profusely for not

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[8] Defense counsel elicited testimony from Ms. Hopson about Thomas's statements to the police *after* the trial court had ruled, over Ms. Hopson's confrontation clause objection, that the prosecution would be allowed to introduce evidence of those statements to rebut other testimony Ms. Hopson had given. (3 RT 422-423, quoted *post*, p. 32.)

being honest initially." (3 RT 445.) Thomas told the detectives that "he wanted to make it right for Laverna's family" and he "wanted to tell [Wheeler] the truth about what happened, and then he proceeded to do so." (3 RT 445.) Wheeler described Thomas as being "[c]onciliatory. . . . upset, apologetic" and testified that Thomas asked Wheeler to apologize to Ms. Brown's family for what had happened. (3 RT 449.)

Thomas said that "the entire plan was created and brought about because Ruthetta knew that her next-door roommate, Laverna, was going to be leaving cross-country on a trip and because she knew she had a good job and she would have money. They were both out of money and they would put together a plan to rob her and that Ruthetta would make it happen." (3 RT 445, 453.)

Thomas told the detectives that the plan had been put together a few days prior to its execution. (3 RT 445-446.) On the actual night it was to go down, "the 27th into the 28th," Thomas told Ms. Hopson that he did not feel comfortable about it anymore and asked her not to continue. (3 RT 446.) But Ms. Hopson said that "[Ms. Brown] would be an easy target, it would not be a problem, and convinced him to continue on with it." (3 RT 446.) The plan had Thomas inside the garage, wearing clothing Ms. Hopson had bought for him, waiting for Ms. Hopson to bring Ms. Brown; then they would rob her. (3 RT 446.)

Thomas admitted that he hit Ms. Brown with the machete. (3 RT 446.) He told the detectives that he saw Ms. Hopson with the bloody knife in her hand kneeling over Ms. Brown. (3 RT 446, 453.) The plan to get rid of Ms. Brown's body was Ms. Hopson's, who had Ms. Brown's car keys and who went to Ms. Brown's room and took the suitcase and put it in the front passenger seat. (3 RT 446-447.)

According to Wheeler, Thomas said that, as soon as he realized that Ms. Brown was dead, he told Ms. Hopson that they had to call the police because "'[t]his isn't the way I expected it to go down.'" (3 RT 447.) Ms. Hopson said that no one would expect to see Ms. Brown for a few days. (3 RT 447.) Ms. Hopson said, "'We need to get rid of the body'" and take Ms. Brown's van and suitcase and "'make it look like she just left on her trip.'" (3 RT 447.)

Ms. Hopson took control of what was happening. (3 RT 447-448.) Both of them cleaned up the blood and pieces of Laverna Brown's flesh, which they put in a couple of garbage bags and put the cleaning materials they used in the van. (3 RT 447-448.) Ms. Hopson drove the van; Thomas followed her in his car. (3 RT 447-448.) After parking the van, Thomas and Ms. Hopson went to McDonald's; she had something to eat, but Thomas told the police "he was so sick to his stomach he didn't order anything." (3 RT 448.) Thomas said that it was Ms. Hopson's idea to buy the Coke to break up the blood and make it

easier to clean, an idea she got from watching something on television. (3 RT 448-449.)

Thomas took the detectives to the locations where he had disposed of the bloody clothing, the machete, and the knife. (3 RT 449-450.) The clothing had been put in a dumpster, which had been emptied by the time the detectives got there. (3 RT 450.) The detectives were able to find the machete the next day, which Thomas said he had thrown from his car into a flood control area, but they could not find the knife which Thomas said he had also thrown away there. (3 RT 450.) Ms. Brown's wallet and purse were never found. (3 RT 455.)

Thomas's common-law wife, Veronica Franklin, was not aware that Thomas had been involved with another woman. (3 RT 451-452.) Ms. Franklin described Thomas as "a Christian man and a decent person, a good husband." (3 RT 452.) Franklin testified that Thomas was her fiancé and that they had been together for about five and a half years, beginning in 2006. (3 RT 455-456.) They had a four-year-old daughter together. (3 RT 456-457.) Both Franklin and Thomas worked full-time as bus drivers. (3 RT 457.)

Franklin testified that the motorcycle club Thomas belonged to, Sons of Genesis, was a Christian-based club, whose emblem was a cross with wings. (3 RT 458.) Throughout the time that Franklin knew Thomas, he was never violent towards her and never told her that he had beaten someone to death. (3

RT 459.) She believed him to be honest and she trusted him. (3 RT 460, 462-464.) Even after learning that Thomas committed a murder in this case, Franklin did not believe that he was a violent person. (3 RT 462-464.) Franklin still loved Thomas at the time she testified at trial. (3 RT 464.)

Until this case, Thomas had no arrests or convictions. (3 RT 465-467.) Another letter Ms. Hopson had written to Thomas while he was in jail was read to the jury. (3 RT 468-469.) A letter Thomas wrote to Ms. Hopson was retrieved from Ms. Hopson's jail cell on January 30, 2011. (3 RT 470.) In that letter, Thomas called Ms. Hopson "a hypocrite" and asked her not to write to him again. (3 RT 470-471.) He wrote, "You did this, not me .... Don't waste my time no more." (3 RT 471.)

Defense Surrebuttal Evidence

Ms. Hopson never knew that Thomas had a fiancée and never saw her before she testified at trial. (3 RT 474.) She was shocked and confused when she learned of the things Thomas had said about her. (3 RT 474-477.) She admitted writing Thomas "a goodbye letter" while she was in jail, before she received the letter from Thomas. (3 RT 476-477.)

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ARGUMENT

I. THE ADMISSION AT TRIAL OF DETECTIVE WHEELER'S TESTIMONY CONCERNING THE STATEMENTS MADE BY JULIUS THOMAS VIOLATED MS. HOPSON'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Introduction

Though Julius Thomas was not alive at the time of Ms. Hopson's trial, his presence nevertheless loomed large over the courtroom. His words and actions were the most powerful components of the prosecution case against Ms. Hopson.

As the Court of Appeal stated, Ms. Hopson testified that Thomas had "forced her to participate in the robbery and killing, by repeatedly threatening her and her adult son." (Opn. 12.) The trial court, overruling Ms. Hopson's "confrontation clause objections to the detectives' accounts of what Thomas said to them" (Opn. 14), permitted Detective Wheeler to testify on rebuttal that Thomas had "told detectives that it was Hopson who planned the robbery-murder and persuaded him to participate in it, and that she was the leader in cleaning up the scene and hiding the evidence" (Opn. 23).

The Court of Appeal held that Thomas's statements to the detectives were admissible for the nonhearsay purpose of impeaching Ms. Hopson, who "'opened the door'" to the admission of Thomas's testimonial, out-of-court

statements when she testified that she participated in the murder of Ms. Brown out of her fear of Thomas. Therefore, the Court of Appeal held, the admission of those statements did not violate her Sixth Amendment right to confront the witnesses against her. (Opn. 4, 35.)

Ms. Hopson respectfully contends that the Court of Appeal erred. The admission of the evidence of Thomas's statements to the detectives violated her rights under the confrontation clause of the Sixth Amendment and the due process clause of the Fourteenth Amendment.[9]

B. The Confrontation Clause: Governing Principles

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The confrontation clause forbids admission of testimonial statements of a witness who does not appear at trial unless the witness is unavailable to testify and the defendant has had a prior opportunity to cross-examine the witness. (*Crawford v. Washington* (2004) 541 U.S. 36, 53-54, 59, 68-69 (hereafter *Crawford*).)

Prior to the decision in *Crawford*, the controlling United States Supreme Court authority on the confrontation clause as applied to out-of-court statements

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[9] The confrontation clause is enforced against the states by virtue of the due process clause. (*Pointer v. Texas* (1965) 380 U.S. 400, 405-406.)

made by an unavailable witness against a criminal defendant was *Ohio v. Roberts* (1980) 448 U.S. 56, which held that such statements were admissible if they were supported by sufficient "indicia of reliability," which would be found if the evidence either fell within a "firmly rooted hearsay exception" or bore "particularized guarantees of trustworthiness." (*Id.* at p. 66.)

Crawford overruled *Roberts*. (*Crawford, supra*, 541 U.S. at pp. 60-69.) *Crawford* held that the confrontation clause "commands, not that evidence be reliable, but that reliability [of testimonial out-of-court statements must] be assessed in a particular manner: by testing in the crucible of cross-examination." (*Id.* at p. 61.) "Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." (*Id.* at pp. 68-69.)

C. Trial Court Proceedings

Ms. Hopson's trial counsel moved in limine "under the Sixth Amendment that any mention of the codefendant's statements not be heard throughout this trial." (1 RT 8; see also 1 RT 12.) Relying on *Crawford* and other confrontation clause cases, defense counsel noted that Thomas was dead and thus "not here for me to cross-examine him." (1 RT 8-9.) The trial court ordered that "neither party shall introduce any evidence with respect to Mr. Thomas' statements to the police on either occasion," referring to the two

police interviews with Thomas. (1 RT 17.) Over defense objection, however, the court allowed the prosecution to introduce evidence that Thomas took the police to a location where they found the machete used in the killing of Laverna Brown. (1 RT 17-18.)

Ms. Hopson's attorney (Mr. Roach) then asked whether the trial court's exclusion of evidence of Mr. Thomas's statements to police would stand in the event Ms. Hopson exercised her right to testify in her own defense:

> MR. ROACH: . . . [¶] I just wanted to make sure even then if my client testifies that the codefendant's statements still can't come in at the police station, at the Banning jail, and so on and so forth. Would that be Your Honor's ruling?
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> THE COURT: I think so. I can't see them as adoptive admissions or any other --
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> [Prosecutor] MR. KERSSE: I think it depends on how she testifies. If I see that she's opened any doors, and if she does and if I want to go there, then I'll ask for a sidebar before we discuss that.
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> THE COURT: All right. Well, it will be the order then that no reference to Mr. Thomas' statements given on either occasion, including, but not limited to, the polygraph, absent further order of the Court following a sidebar in the event that the prosecution believes that Ms. Hopson may have opened the door with her testimony.

(1 RT 18-19.)

After the prosecution's case-in-chief was completed, the trial court denied a defense motion for acquittal pursuant to section 1118; then Ms.

Hopson testified on her own behalf. (2 RT 301-304.) As summarized in the Statement of Facts, *ante*, Ms. Hopson's trial testimony was very different from what she had previously told Officer Jahinian and Detectives Cobb and Wheeler about what she knew concerning the murder of Laverna Brown.

On March 28, 2013, with the prosecution's cross-examination of Ms. Hopson in progress, the court and counsel spoke outside the jury's presence about the prosecutor's plans to present rebuttal evidence. One proposed item of rebuttal evidence was Julius Thomas's statements to police:

> MR. KERSSE: Yes, Your Honor. We spoke briefly in chambers regarding some scheduling issues and also some witnesses I have this morning. [¶] . . . [¶]
>
> Third, we spoke about the statements of Julius Thomas made to Detective Wheeler, and I am asking for those to be admitted under 1202 of the hearsay exception to impeach the hearsay declarations that came in through the defendant under 1215 [*sic*].
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> THE COURT: Mr. Roach, you'd like to state your objections for the record?
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> MR. ROACH: Yes, Your Honor. Just under *Crawford*, I believe that just because my client testifies to her state of mind as to what happened in the garage, what she heard the killer say, I don't think allows us to bring in his statements that he told police days later. That was my objection under *Crawford*. . . .
>
> THE COURT: All right. I indicated in chambers and I'm still of the opinion that under 1202 that the prior inconsistent statements would be admissible for that limited purpose.

(3 RT 422-423.)

Following the trial court ruling, the prosecutor resumed his cross-examination of Ms. Hopson. (3 RT 423-433.) When that was completed, her counsel conducted redirect examination and, in light of the trial court's ruling, asked her about Thomas's statements to the police. Ms. Hopson testified that she did not learn about Thomas's statements, which accused her of planning the murder of Laverna Brown, until after she had been arrested and jailed in this case, and she denied numerous things which Thomas had told the officers as to her involvement in the murder, including her purported role in planning the crime. (3 RT 434-439.)

Following the conclusion of Ms. Hopson's redirect examination, the defense rested. (3 RT 443-444.) The prosecution then presented its rebuttal case, beginning with Detective Wheeler's testimony about the police interviews with Julius Thomas. The statements by Thomas introduced through Wheeler are summarized in the Statement of Facts, *ante*, at pages 23-26.

D. The Court of Appeal's Ruling

The Court of Appeal acknowledged that, contrary to the trial court's ruling, the hearsay exception set forth in Evidence Code section 1202 did not apply to Wheeler's testimony about Thomas's statements, because they were not introduced to impeach *other* hearsay statements of Thomas. As the appellate court noted, the defense did not introduce Ms. Hopson's testimony

about statements of Thomas in order to prove that what Thomas said to Ms. Hopson was true. (Opn. 24-26.)

Rather, as the Court of Appeal stated, the purpose of the prosecution's introducing Thomas's out-of-court statements to the police "was to *attack the credibility of Hopson* as a testifying defendant, with regard to her fear of Thomas as supposedly motivating her to cooperate with him in covering up the killing of Brown. According to Detective Wheeler, Thomas's statements to him blamed Hopson, which was markedly different from how Hopson described the events in court." (Opn 26, emphasis added.) However, as the appellate court also noted, the salient question on appeal is not whether Wheeler's testimony about Thomas's statements was admissible under *California* law; it is whether their admission was "consistent with confrontation clause principles." (Opn. 27.)

The Court of Appeal concluded that the introduction of that testimony was "[w]ithin the scope of" *Tennessee v. Street* (1985) 471 U.S. 409 (hereafter *Street*) in that "the jury was properly given the opportunity to compare the two versions by the two participants about what happened in the garage the night that Brown was killed, to decide whether Hopson was telling the truth about 'the immediate issue of coercion,' which was her theory of defense." (Opn. 36,

quoting *Street*, at p. 416.)[10] Thomas's statements "were not presented for their truth, but to show that her version was not believable, when considered with the rest of the evidence." Thus, Ms. Hopson's "confrontation clause protections were not violated." (Opn. 36.)

The Court of Appeal further wrote that, even if Thomas's statements *were* admitted for their truth, the fact that Ms. Hopson testified differently from what she had told the police "invoked the duty" of the trial court to "promote 'truth-seeking.'" (Opn. 36, quoting *People v. Reid* (N.Y. 2012) 971 N.E.2d 353, 357 (hereafter *Reid*).) The court wrote: "Even if we assume there were [*sic*] a confrontation clause problem posed by Thomas's reported testimonial statements, in the nature of 'bleeding over' from impeachment into substantive evidence about the identity of the killer, we conclude the rebuttal testimony from Detective Wheeler was properly admitted because Hopson 'opened the door to its admission.'" (Opn. 36-37, quoting *Reid*, at p. 357.)[11]

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[10] In Part E-2 of this argument, Ms. Hopson explains why the Court of Appeal's reliance on *Street* was misplaced. (*Post*, at pp. 37-41.)

[11] In Part E-3 of this argument, Ms. Hopson explains why the Court of Appeal's reliance on *Reid* was misplaced. (*Post*, at pp. 48-50.)

E. The Admission of the Prosecution Evidence of Thomas's Statements to Police Violated Ms. Hopson's Sixth Amendment Right to Confront the Witnesses Against Her.

1. Thomas's Statements to the Police Were Testimonial.

In *Crawford*, the Supreme Court stated that "[s]tatements taken by police officers in the course of interrogations are . . . testimonial under even a narrow standard." (*Crawford, supra*, 541 U.S. at p. 52.) Like the statements at issue in *Crawford*, made by the defendant's wife under police interrogation, Thomas's statements to the detectives in this case were "testimonial under any definition." (*Id.* at p. 61.) Detective Cobb testified that he and his partner, Detective Wheeler, interviewed Thomas on November 1, 2011, *after* Thomas was arrested as part of the detectives' investigation into the death of Laverna Brown four days earlier. (2 RT 204-205; see also 3 RT 444-450 [Wheeler testifies about circumstances and content of interview with Thomas].)

It is "entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct--as, indeed, the testifying officer[s] expressly acknowledged." (*Davis v. Washington* (2006) 547 U.S. 813, 829.) Thus, Thomas's statements were testimonial, as the Court of Appeal agreed. (Opn. 16 ["it is clear on this record that Thomas's statements to detectives, created during a postarrest, more or less formalized interview, must be characterized as testimonial in nature"]; *ibid.* ["On this record, we are able

to conclude that Thomas's statements were testimonial under the usual definitions"].)

2. Thomas's Statements to the Police Were Introduced at Ms. Hopson's Trial to Prove That What Thomas Told the Police Was True.

The confrontation clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 9, citing *Street*, *supra*, 471 U.S. at p. 414.) As Ms. Hopson now explains, that rule is inapplicable to the instant case, because Thomas's statements *were* used to establish the truth of the matters which Thomas (according to Detective Wheeler) asserted.

In *Street*, *supra*, defendant Street confessed to police about the roles which he, a man named Peele, and two others played in the murder of Street's neighbor during the course of a burglary. (*Street*, 471 U.S. at p. 411.) At trial, Street testified that his confession had been coerced and was derived from Peele's previous written statement to the sheriff. Street claimed that the sheriff had read from Peele's statement and directed Street to say the same thing. (*Ibid.*)

In rebuttal, the State called the sheriff, who testified that Street was neither read Peele's statement nor pressured to repeat its terms. (*Street*, *supra*, 471 U.S. at p. 411.) To corroborate that testimony and to rebut Street's claim

of coercion, the sheriff read Peele's statement to the jury, and a copy of it was introduced as an exhibit. (*Id.* at pp. 411-412 & fn. 2.) "Before Peele's statement was received, however, the trial judge twice informed the jury that it was admitted '*not for the purpose of proving the truthfulness of his statement*, but for the purpose of rebuttal only.'" (*Id.* at p. 412, emphasis added.) Later, in jury instructions, the trial court told the jury:

> "The Court has allowed an alleged confession or statement by Clifford Peele to be read by a witness.
>
> "I instruct you that such can be considered by you for rebutable [*sic*] purposes only, and *you are not to consider the truthfulness of the statement in any way whatsoever.*"

(*Street*, *supra*, 471 U.S. at p. 412, emphasis added.)

After the jury found Street guilty of murder, a state appellate court reversed, holding that the introduction of Peele's confession denied Street his Sixth Amendment right to confront witnesses, even though it was not admitted to prove the truth of Peele's assertions. (*Street*, *supra*, 471 U.S. at pp. 412-413.) The United States Supreme Court reversed that appellate judgment. (*Id.* at p. 417.) The high court summarized its holding as follows:

> The State introduced Peele's confession for the legitimate, nonhearsay purpose of rebutting respondent's testimony that his own confession was a coerced "copy" of Peele's statement. The jury's attention was directed to this distinctive and limited purpose by the prosecutor's questions and closing argument. In this context, we hold that the trial judge's instructions were the

> appropriate way to limit the jury's use of that evidence in a manner consistent with the Confrontation Clause.

(*Street*, *supra*, 471 U.S. at p. 417.)

The Court of Appeal held that "[w]ithin the scope of *Street* . . . , the jury was properly given the opportunity to compare the two versions by the two participants about what happened in the garage the night that Brown was killed, to decide whether Hopson was telling the truth about 'the immediate issue of coercion,' which was the theory of her defense." (Opn. 36, quoting *Street*, *supra*, 471 U.S. at p. 416.) According to the Court of Appeal, Thomas's "statements were not presented for their truth, but to show that her version was not believable, when considered with the rest of the evidence." (Opn. 36.)

What the Court of Appeal apparently failed to appreciate is that the out-of-court statements of the cohort, Peele, in *Street* rebutted the defendant's testimony about being coerced *regardless of whether or not what Peele said was true*, whereas Thomas's statements rebutted Ms. Hopson's testimony about being coerced *only if the jury believed that what Thomas said was true.* In *Street*, the State used Peele's confession "not to prove what happened at the murder scene but to prove what happened when [Street] confessed," i.e., that he was not coerced by the sheriff and told to mimic Peele's confession. (*Street*, *supra*, 471 U.S. at p. 414.) The prosecutor did not argue to the jury that what Peele told the police about Street's role in the murder was true; instead, "the

prosecutor recited the details that appeared only in [Street's] confession, and argued that [Street] knew these facts because he participated in the murder." (*Id.* at p. 416.) The truth or falsity of Peele's assertions to the authorities was irrelevant to the purpose for which the State used that evidence.

In the instant case, by contrast, Detective Wheeler's testimony about what Thomas told him would have had *no* value to the prosecution unless the jury accepted it as evidence that Thomas's story was true. The prosecutor, in his closing arguments, urged the jurors to do just that—to use Wheeler's testimony about Thomas's statements as evidence that Thomas had told the truth about Ms. Hopson's role in the murder. (See, e.g., 3 RT 516 ["she had the bloody knife, the butcher knife in her hand while she was leaning over the body of Laverna Brown. You heard that through the statements of Julius Thomas that Detective Wheeler told us about"]; 3 RT 519 ["We heard from Detective Wheeler that Julius Thomas actually told Detective Wheeler . . . it was her plan that he would hide in the garage, and she would create some secret plan to get Laverna out of her room and into the garage"]; 3 RT 547 ["But what did [Thomas] do? He admitted his role. He came clean with the police . . ."]; 3 RT 548 ["And then you have Julius Thomas who breaks down, tells the police the truth, understands the weight of the enormity of what he had done, explains it

was the defendant's plan and takes the police to the evidence that would bury him"].)

Far from approving the use of an unconfronted declarant's out-of-court statements against a defendant in that manner, the Supreme Court in *Street* was careful to note that such use—unlike the way Peele's confession was used in *Street*—would implicate the Sixth Amendment. The court stated: "If the jury had been asked to infer that Peele's confession proved that [Street] participated in the murder, then the evidence would have been hearsay; and because Peele was not available for cross-examination, Confrontation Clause concerns would have been implicated." (*Street*, 471 U.S. at p. 414.)

In the instant case, the jury *was* asked to infer that Thomas's confession proved that Ms. Hopson participated in (indeed, planned) the murder. (3 RT 516, 519, 547, 548 [prosecutor's closing arguments], quoted *ante*, pp. 40-41.) Thus, the evidence was hearsay, and because Thomas was not available for cross-examination and his hearsay statements were testimonial, Ms. Hopson's confrontation clause rights were implicated.

The Court of Appeal disagreed, asserting that Thomas's statements "were not presented for their truth" because they were admitted to show that Ms. Hopson's version of the killing of death of Laverna Brown "was not believable, when considered with the rest of the evidence." (Opn. 36.) The

court did not, however, explain how Thomas's statements could impeach Ms. Hopson's testimony *even if Thomas's statements were not true.* The value of Thomas's statements for the prosecution case depended on the jury's accepting those statements as true—which the prosecutor repeatedly, and successfully, urged the jury to do.

Appellate courts in several other jurisdictions have recognized that hearsay evidence does not escape confrontation clause scrutiny merely because the prosecution offers it to impeach the trial testimony of a defendant or another witness. If the impeaching effect of the declarant's statement depends on whether or not the statement is true, then the Sixth Amendment forbids introduction of the statement unless the confrontation guarantee is satisfied.

In *People v. Thompson* (Ill.Ct.App. 2004) 812 N.E.2d 516, for example, the defendant was charged with aggravated domestic battery of his fiancée, LeKeisha, whom police had found walking, naked and with numerous injuries. (*Id.* at p. 517.) A detective testified that the defendant had admitted that he punched LeKeisha in the mouth, bound her arms and torso with duct tape, repeatedly taped and untaped her mouth to torture her, and struck her with a belt, among other things. (*Id.* at pp. 518-519.) The defendant, however, testified that he had *not* told police these things; he also testified that he had

never threatened to physically hurt LeKeisha and never had a domestic violence issue with her. (*Id.* at p. 519.)

Over a defense objection, the prosecution was allowed to cross-examine the defendant using allegations made by LeKeisha in an order of protection issued against the defendant. (*People v. Thompson*, *supra*, 812 N.E.2d at pp. 519-520.) After the jury convicted the defendant, he asserted on appeal that "the trial court improperly allowed the State to impeach his testimony with the unsubstantiated hearsay allegations contained in the petition for an order of protection." (*Id.* at p. 520.) The Appellate Court of Illinois found that "LeKeisha's statements not only were inadmissible hearsay, but were admitted in violation of defendant's rights under the confrontation clause of the sixth amendment." (*Ibid.*) The court explained:

> Here, the [trial] court admitted LeKeisha's written statements made in the course of obtaining an order of protection from the court. Defendant had no opportunity to cross-examine her. Under *Crawford*, those statements are testimonial. They would not be admissible under the confrontation clause unless LeKeisha were unavailable to testify and defendant had a prior opportunity for cross-examination. LeKeisha was not unavailable to the State. She did testify at the sentencing hearing. In addition, the defendant did not have a prior opportunity for cross-examination. Therefore, the admission of the hearsay statements made by LeKeisha violated defendant's sixth amendment right to confront the witnesses against him.

(*People v. Thompson*, *supra*, 812 N.E.2d at p. 521.)

Another example is *United States v. Hall* (C.A.A.F. 2003) 58 M.J. 90, in which an Army sergeant was charged at court-martial with wrongful use of cocaine. (*Id.* at p. 90.) She had given urine samples in January and February of 1999, and both had tested positive for cocaine. (*Id.* at p. 91.) The accused raised "an innocent ingestion defense"; she testified that her mother had sent her "'Trimate tea'" to assist with weight control and that she had drunk some of the tea prior to giving both urine samples. A defense expert testified that "'Trimate'" tea was "made from 'decocainized' coca leaves" and that the "'decocainizing' process was only about 99% effective," so that urinalysis after drinking the tea could reveal cocaine. (*Id.* at p. 92.)

The prosecution was unable to subpoena the sergeant's mother, Mrs. Boyd, but proffered the testimony of one Special Agent Mills, who would testify that Mrs. Boyd "told him she had not given her daughter any teas." (*United States v. Hall*, *supra*, 58 M.J. at p. 92.) The military judge ruled that this testimony was admissible to determine the sergeant's credibility. (*Ibid.*) Mills testified about what Mrs. Boyd had told him, and the judge instructed the court-martial members "that they could only consider the testimony 'for the limited purpose to determine what impeachment value it has only concerning the accused's testimony that her mother sent her the tea. *You may not consider*

it for the truth of Mrs. Boyd's statement that she did not send tea to the accused.'" (*Id.* at pp. 92-93, emphasis added.)

The sergeant was convicted; the Army Court of Criminal Appeals affirmed; and the U.S. Court of Appeals for the Armed Forces granted review. (*United States v. Hall*, *supra*, 58 M.J. at pp. 90-91.) That court held that the admission of the hearsay evidence of Mrs. Boyd's statement to the special agent violated the Sixth Amendment: "the Government pitted Appellant against her own mother without affording Appellant the opportunity to test the reliability or trustworthiness of her mother's statements by cross-examination. Appellant was denied her constitutional right of confrontation through cross-examination." (*Id.* at pp. 93-94.)

Especially noteworthy in *Hall* is the Court of Appeals' rejection of the fiction that admitting the hearsay evidence for "impeachment by contradiction" was somehow different from admitting it "for the truth of the matter asserted" by the hearsay declarant. (*United States v. Hall*, *supra*, 58 M.J. at p. 93.) As the *Hall* opinion explained:

> We find that the statements attributed to Appellant's mother were inescapably considered for the truth of the matter stated therein. . . . The members could not have found contradiction of Appellant's testimony without considering the hearsay as fact contrary to Appellant's in-court testimony. The manner in which this evidence was put before the members would inevitably cause it to be considered for the truth of the matter stated.

(*United States v. Hall*, *supra*, 58 M.J. at p. 94.)

The Court of Appeal in the instant case held that using the hearsay evidence of Thomas's statements to impeach Ms. Hopson's testimony by contradicting it was somehow different from using Thomas's statements to prove the truth of what he asserted. The court stated: "His statements were not presented for their truth, but to show that her version was not believable, when considered with the rest of the evidence." (Opn. 36; see also Opn. 4 ["the codefendant's out-of-court 'actual statements,' as reported by the detective in rebuttal, were admissible for the nonhearsay purpose of impeaching Hopson's account at trial of the codefendant's threats and controlling conduct, before, during and after the killing"].) As *Hall* explained, impeaching a witness's testimony by contradicting it with evidence of out-of-court statements is not a "nonhearsay" purpose. (*United States v. Hall*, *supra*, 58 M.J. at p. 93.)

The Georgia Supreme Court found that impeachment evidence violated the confrontation clause in *Soto v. State* (Ga. 2009) 677 S.E.2d 95. In that case, defendant Soto allegedly helped a friend, Wiedeman, to kill a girl with whom Wiedeman was romantically involved. (*Id.* at p. 97.) Wiedeman pled guilty and then was called by the prosecution to testify at Soto's trial. Wiedeman testified that he alone had killed the victim, while Soto waited elsewhere. Wiedeman then refused to answer any more questions from either the

prosecution or the defense. (*Ibid.*) Later, the trial court allowed the prosecution to impeach Wiedeman through the hearsay testimony of a police officer and a fellow prisoner, each of whom testified that Wiedeman had stated that Soto helped him commit the murder. (*Id.* at p. 97 & fn. 2.)

After being convicted, Soto argued on appeal that the trial court had violated his Sixth Amendment confrontation rights by admitting those hearsay statements, since Soto "was unable to cross-examine Wiedeman as to whether, or why, he made them." (*Soto v. State*, *supra*, 677 S.E.2d at pp. 97-98.) The Georgia Supreme Court agreed. (*Id.* at pp. 98-99.) Specifically, as to the police officer's testimony relating a statement by Wiedeman which implicated Soto, the court stated:

> Wiedeman's in-custody statement to police was testimonial inasmuch as it was made during the course of an investigation, [citation], and it is clear that Soto did not have an "opportunity to cross-examine [Wiedeman] because [Wiedeman] refused to testify. [Citation.]" [Citation.] It follows that Wiedeman's statement to police was admitted erroneously "and that the trial judge should have excluded [it] without engaging in a hearsay or reliability analysis."

(*Soto v. State*, *supra*, 677 S.E.2d at p. 98.)

The trial court in the instant case should have excluded the testimony about statements Thomas made to the police for the same reason the *Soto* and *Hall* courts explained, and for one of the reasons the *Thomas* court explained: Ms. Hopson never had an opportunity to cross-examine Thomas as to whether,

or why, he made those statements to Detective Wheeler. The fact that a defense witness (in this case, Ms. Hopson) had given testimony which Thomas's statements to Wheeler would contradict was irrelevant for Sixth Amendment purposes, just as it was in *Thomas*, *Hall*, and *Soto*. A defendant does not lose her right to confront the witnesses against her merely by presenting testimony which contradicts a hearsay statement the prosecution has obtained from an unavailable witness.

3. The Nation's Appellate Courts Are Divided as to Whether, and How, a Defendant Can "Open the Door" to the Admission of Testimonial Out-of-court Statements over Her Confrontation Clause Objection; However, Even If a Defendant Can Lose Her Sixth Amendment Rights by Opening That "Door," the Defense Did Not Open it in this Case.

As an alternative to its holding that the admission of Thomas's testimonial out-of-court statements into evidence did not implicate the confrontation clause because they were not introduced to prove the truth of the matter asserted (Opn. 35), the Court of Appeal held that Detective Wheeler's testimony recounting Thomas's statements was admissible "because Hopson 'opened the door to its admission'" (Opn. 35-36). Relying on the decision of New York's high court in *Reid*, *supra*, 971 N.E.2d 353, the Court of Appeal wrote that Ms. Hopson's trial testimony that Thomas planned the murder and coerced her to help, which contradicted what she had previously told the police,

"properly invoked the duty of the court to make rulings that would promote 'truth-seeking.'" (Opn. 36, quoting *Reid*, at p. 357.)

Contrary to the Court of Appeal's implication, the *Reid* court did not announce a "truth-seeking" exception to the confrontation clause, a tool the prosecution could use whenever a defendant testifies to a version of the facts which differs from the version given by an unavailable declarant in a testimonial out-of-court statement. The court mentioned "truth-seeking" in the context of a defense lawyer's attempting to introduce a favorable portion of a testimonial out-of-court statement while relying on the confrontation clause to prevent the prosecution from introducing the unfavorable part. (*Reid, supra*, 971 N.E.2d at p. 357; see also *People v. Rogers* (Colo.Ct.App. 2012) 317 P.3d 1280, 1282-1284 [where defendant introduced police testimony about hearsay statement by vehicle driver which tended to exonerate defendant, he "opened the door" to prosecution's introducing police testimony about other statements by driver that incriminated defendant, which otherwise would have been barred by confrontation clause].)

Unlike the defendants in *Reid* and *Rogers*, Ms. Hopson did not introduce evidence of a portion of Thomas's testimonial hearsay statements and then try to keep the prosecution from introducing other portions. She consistently sought to exclude *all* of Thomas's statements to the police. (1 RT 8, 12; 3 RT

422-423.) Nothing in the defense testimony, or in defense counsel's cross-examination of prosecution witnesses, presented any danger of giving the jury a misleading impression about what Thomas told the police.

Furthermore, although the Court of Appeal cited *Reid* as part of an "emerging consensus, that a defense strategy or tactic can open the door to admitting evidence that could otherwise be prohibited by the confrontation clause" (Opn. 33), appellate courts do not unanimously subscribe to that view. The Sixth Circuit Court of Appeals rejected it in *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662 (hereafter *Cromer*), which the Court of Appeal acknowledged parenthetically (Opn. 33).

In *Cromer*, "[d]uring defense counsel's cross-examination of [one of the investigating officers], defense counsel indicated to the court that [defendant] Cromer wanted to participate in the cross-examination of [the officer], and possibly the examination of other witnesses and closing argument. While Cromer's participation was being discussed, the government's counsel stated, 'Unless his questions are scripted and defense counsel has looked at them, it could open doors to other evidence that he might not want to have come in.'" (*Cromer*, *supra*, 389 F.3d at pp. 668-669.) The court permitted the defendant to personally conduct "a large portion of the cross-examination" of that officer. (*Id.* at p. 679.)

Cromer and his trial counsel then "introduced the existence of an informant and a description provided by that informant in an attempt to discredit the government's case." (*Cromer, supra*, 389 F.3d at p. 679.) "Even after [the defendant] was warned that this line of questioning would open the door to allow the government to question [the officer] about the exact content of the informant's statements, [the defendant] continued in his attempt to establish that the informant's statement did not describe him. On redirect examination, the government [through the testimony the officer] . . . clarified the precise nature of the description provided by the [informant]." (*Ibid.*)

The Sixth Circuit Court of Appeals stated that "[a]s a matter of modern evidence law, the district court may well have been correct in admitting [the officer's] redirect testimony about the description provided by the informant since Cromer, on cross-examination, had opened the door to the subject by asking about that description." (*Cromer, supra*, 389 F.3d at p. 678.) As the court explained, however, that did not resolve the constitutional question:

> The pertinent question, however, is not whether the CI's statements were properly admitted pursuant to "the law of Evidence for the time being." (*Crawford*, 124 S.Ct. at 1364.) Rather, the relevant inquiry is whether Cromer's right to confront the witnesses against him was violated by [the officer's] redirect testimony. If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the

> testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation.

(*Cromer*, *supra*, 389 F.3d at p. 679.)

As the Michigan Supreme Court has observed, "the [state] rules of evidence cannot override the Sixth Amendment and cannot be used to admit evidence that would otherwise implicate the Sixth Amendment." (*People v. Fackelman* (Mich. 2011) 802 N.W.2d 552, 568; see also *Crawford*, *supra*, 541 U.S. at p. 61 ["Where testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . ."].) Thus, assuming arguendo that Ms. Hopson's testimony somehow "opened the door" to the introduction of Thomas's hearsay statements as a matter of the California law of evidence, that could not override her Sixth Amendment right to confront the witnesses against her.

The confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, *supra*, 541 U.S. at pp. 53-54.) Ms. Hopson respectfully submits that "opening the door" is not an exception to the rules set forth by the Supreme Court in *Crawford*—and that, even if it is, she did not open the door.

Ms. Hopson did not give up her constitutional right to confront witnesses against her when she exercised her constitutional right to testify on her own

behalf at trial. The Court of Appeal therefore erred when it held that the trial court did not violate Ms. Hopson's Sixth Amendment right to confront the witnesses against her when it permitted the prosecution to introduce evidence of the statements made to police interrogators by Thomas, whom Ms. Hopson had no opportunity to cross-examine.

F. The Improper Admission of Thomas's Statements to the Police, in Which He Inculpated Ms. Hopson and Essentially Accused Her of Masterminding the Murder of Laverna Brown, Was Not Harmless Beyond a Reasonable Doubt.

This court applies the "harmless beyond a reasonable doubt" standard adopted in *Chapman v. California* (1967) 386 U.S. 18 to confrontation clause violations. (*People v. Cage* (2007) 40 Cal.4th 965, 991-992.) Under that standard, the prosecution must "prove that the defendant was not prejudiced by the error." (*Kimmelman v. Morrison* (1986) 477 U.S. 365, 382, fn. 7.) Before the error can be held to be harmless, a reviewing court "must be able to declare a belief that it was harmless beyond a reasonable doubt." (*Chapman*, at p. 24.)

As the United States Supreme Court has stated: "The inquiry [under *Chapman*] is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) In the case before this court, the prosecution can not demonstrate, beyond a reasonable doubt, that the

improperly admitted testimony of Detective Wheeler concerning the statements made by Thomas did not contribute to Ms. Hopson's conviction.

There was no overwhelming evidence presented in the prosecution case-in-chief against Ms. Hopson which compelled *by itself*, absent the challenged Thomas evidence, a verdict of first degree murder with special circumstances. Without the Thomas statements, the remaining prosecution case against Ms. Hopson rested almost exclusively upon circumstantial evidence, which may have proven that she had some involvement with Ms. Brown's death—perhaps as an accessory after the fact, perhaps more—but not that she intended to kill Brown, an element of the lying-in-wait special circumstance, or that she acted with reckless indifference to human life, an element of the felony murder special circumstance. (See 2 CT 406, 408.)

The evidence showed that "two people" and "two weapons" were involved in the murder of Laverna Brown, which, as the prosecutor noted, was "circumstantial evidence that the defendant had the butcher knife taken from the kitchen and Thomas had the machete." (3 RT 516-517.) There were numerous telephone calls between Ms. Hopson and Thomas prior to the killing. (3 RT 518 ["many, many, many phone calls"].) Ms. Hopson texted her future landlord on October 29th that she would have her money "'tomorrow.'" (3 RT

518-519.) She purchased a knife and the clothing which was worn during the murder. (3 RT 518.)

The prosecutor pointed out how Ms. Hopson was aware of Laverna Brown's planned trip to Georgia and that people who go on trips "have money." (3 RT 519.) The evidence presented at trial indicated that Ms. Brown was getting ready to leave on her trip when she was "interrupted" by something and ended up walking into the garage, where she was killed. (3 RT 520.)

There was, of course, other circumstantial evidence pointing to Ms. Hopson's knowledge of the murder of Ms. Brown, which the prosecutor did not highlight in his closing arguments, such as the amount of time Ms. Hopson spent cleaning up Timm's garage, where Ms. Hopson had supposedly spilled her Coke. (1 RT 82, 90-92.) Ms. Hopson's DNA profile was included as a possible minor donor of the DNA found on the steering wheel of Ms. Brown's van. (2 RT 196.)

While all of that circumstantial evidence may have demonstrated that Ms. Hopson was guilty of *something* relating to the death of Laverna Brown, it is nothing as harmful as the statements of the dead Julius Thomas which the prosecution presented in court. There was no other evidence like the confession Thomas made to the police and the statements he made inculpating Ms.

Hopson in Laverna Brown's murder and describing her as the virtual mastermind behind the entire robbery-murder plot.

The prosecutor cited Thomas's statements in arguing that it was Ms. Hopson's idea for Thomas to hide in the garage while Ms. Hopson would "create some secret plan to get Laverna out of her room and into the garage." (3 RT 519.) "So right there," the prosecutor argued, "you have lying in wait, and you have the surprise attack upon the poor person of Laverna Brown who had no idea that when she walked out into that garage, she was going to be set upon by these evil people." (3 RT 520.) As the prosecutor argued to the jury, Thomas told the officers that Ms. Hopson was "the direct perpetrator, that she had the bloody knife, the butcher knife in her hand when she was leaning over the body of Laverna Brown." (3 RT 516.)

The prejudicial impact of Detective Wheeler's testimony concerning what Thomas told the officers was enormous. Without the admission of that evidence, the jurors might have credited Ms. Hopson's defense at least enough to establish reasonable doubt as to whether she was guilty of first degree murder and the special circumstances of lying in wait and murder in the commission of a felony, even if her involvement rendered her guilty of a different or lesser crime.

Ms. Hopson respectfully submits that this court cannot conclude with confidence that the verdict of first degree murder and the true findings as to the special circumstances would have been reached had the trial court not permitted the prosecution to introduce Thomas's statements inculpating Ms. Hopson during the prosecution rebuttal. Therefore, the judgment should be reversed. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.)

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CONCLUSION

For the foregoing reasons, the Court of Appeal erred when it held that the admission at her trial of the out-of-court statements made by Ms. Hopson's deceased codefendant to the police did not violate her rights under the Sixth Amendment. Ms. Hopson respectfully asks this court to reverse the judgment of conviction.

DATED: March 1, 2016

/s/ Gordon S. Brownell
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Attorney for Defendant and Appellant
RUTHETTA LOIS HOPSON

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court, rule 8.520(c), I certify that my word-processing program indicates that this brief on the merits consists of 13,168 words, excluding the tables, the caption, signature blocks, and this Certificate of Compliance.

/s/ Gordon S. Brownell
GORDON S. BROWNELL, ESQ.
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RUTHETTA LOIS HOPSON

PROOF OF SERVICE BY MAIL

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On March 1, 2016, I served a copy of the attached Opening Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Court of Appeal, 4th District, Division 1
Clerk of the Court
750 B Street, Suite 300
San Diego, CA 92101

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Hall of Justice
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Riverside, CA 92501

Gregory Roach
Office of the Public Defender
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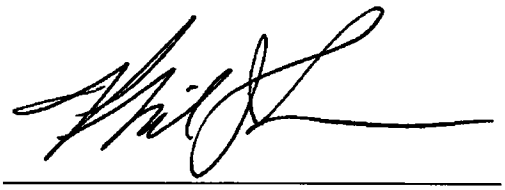
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 1st day of March, 2016.

Phil Lane
(Name of Declarant)



(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On March 1, 2016 a PDF version of the Opening Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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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 this 1st day of March, 2016 at 09:13 Pacific Time hour.

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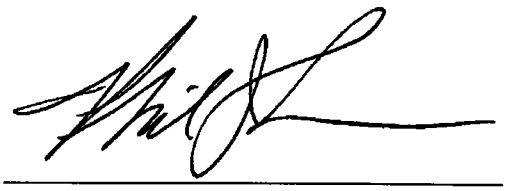

(Signature of Declarant)