In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

RUTHETTA LOIS HOPSON,

Defendant and Appellant.

Case No. S228193

Fourth Appellate District, Division One, Case No. D066684
Riverside County Superior Court, Case No. RIF1105594
The Honorable Jeffrey J. Prevost, Judge

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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INTRODUCTION

Appellant and her boyfriend, Julius Thomas, killed appellant's roommate, Laverna Brown, while trying to rob her. Thomas confessed his role to the police and led them to a machete that was used during Brown's murder. He later committed suicide.

At trial, appellant testified that she had no advance knowledge of any plan to rob Brown, that Thomas attacked Brown on his own, that Thomas admitted to her that he killed Brown during a botched robbery, and that Thomas coerced her cooperation in covering up the crime. The trial court allowed the prosecution to rebut appellant's testimony with Thomas's statements to the police. Thomas told the police that he and appellant jointly planned the deadly assault on Brown, and that appellant called the shots both before and after.

The Court of Appeal rejected appellant's claim that the trial court's admission of Thomas's police statements violated the Sixth Amendment right of confrontation. This Court granted appellant's petition for review, and should now affirm.

It is well settled that the confrontation clause does not prohibit out-of-court statements offered for nonhearsay purposes – i.e., out-of-court statements not offered for their truth. Here, the Court of Appeal correctly determined that there was no confrontation clause problem with Thomas's statements because they were not offered for their truth.

In particular, the prosecution introduced Thomas's police statements for the nonhearsay purpose of challenging Thomas's credibility. Appellant herself had introduced for their truth Thomas's out-of-court statements in which he took sole responsibility for the murder. Thomas's contrary out-of-court statements were, therefore, admissible to impeach Thomas's admissions to appellant.

Thomas's police statements were also independently admissible to impeach appellant's credibility. The statements cast doubt on appellant's explanation for why her story at trial was different from what she initially told the police. They also impugned appellant's claim that Thomas had really confessed to her.

Moreover, even if Thomas's police statements went beyond the bounds of impeachment, they were still admissible. Appellant's testimony that Thomas made statements exculpating her opened the door to evidence that Thomas also made statements inculpating her. Otherwise, the jury would have been left with an incomplete and misleading understanding of what Thomas said about the crime.

Finally, to the extent the admission of Thomas's police statements was error, it was harmless beyond a reasonable doubt. Notwithstanding Thomas's statements, the evidence of appellant's guilt was overwhelming.

STATEMENT OF THE CASE AND FACTS

Appellant needed money for a security deposit on a new apartment. She believed her roommate, Laverna Brown, had money. So appellant and her boyfriend, Julius Thomas, decided to rob Brown. During the robbery, Brown's neck was stabbed and sliced to the point that she was nearly decapitated.

After Brown died, appellant and Thomas moved the body and tried to cover up the crime. It did not work. Police found Brown's corpse and discovered evidence linking appellant and Thomas to the murder.

At her trial, appellant blamed Thomas for killing Brown and claimed that she knew nothing about it until it was already done. She said Thomas murdered Brown by himself and then coerced her help after the fact. The jury convicted appellant of first degree murder.

A. Appellant's Roommate, Laverna Brown, Goes Missing Under Circumstances Suggesting Foul Play

Darcy Timm rented out three bedrooms of her house to travelling nurses employed at the Riverside County Hospital. (1 RT 58.) Sixty-six-year-old Laverna Brown was a regular tenant, and was living at Timm's house in the summer of 2011. (1 RT 58-59.) Brown never had trouble paying rent. (1 RT 64.)

In July 2011, appellant moved into a room at Timm's house for $500 per month. (1 RT 62-63.) Although she was a registered nursing assistant, appellant rarely worked and she routinely had problems making the rent. (1 RT 59, 63-64.) In October, appellant gave notice to Timm that she was moving out. (1 RT 64.)

On October 22, appellant contacted a manager at an apartment complex to discuss renting an apartment for $995 per month. (2 RT 281-282, 284.) The manager told appellant that she could move into the apartment on October 29 if she paid an $800 security deposit. (2 RT 290.)

Appellant did not have enough money to pay the security deposit. Between August 2011 and October 2011, the combined balance of appellant's checking and savings accounts ranged between approximately $15 and $33. (2 RT 246.) Her credit was also bad. (2 RT 287.)

Notwithstanding her financial difficulties, appellant made several curious purchases on October 27. Specifically, she spent $76.46 on a folding knife and pepper spray from a military surplus store. (2 RT 199, 202, 246.) Later, she went to Target and bought a burgundy hooded sweatshirt (size large), grey sweatpants (size large), a gray cap, and a scarf. (2 RT 198.) That night, appellant texted the apartment manager that "'I'll have the money and I'll be moving in on the 29th.'" (2 RT 291.)

The next morning, October 28, Timm woke up around 5:15 am. (1 RT 70-71.) Timm thought nothing of it when Brown's van was not in its

usual spot because Brown was supposed to be flying to Georgia that day to visit family. (1 RT 31-32, 83.) Brown planned on having money on her for the trip. (1 RT 38.)

Timm went out to the garage to do laundry and saw that things were out of place. (1 RT 71-72, 84.) Timm's son owned a machete that Timm kept hanging in a sheath on the garage wall. (1 RT 72, 74.) The empty sheath was lying on a workbench, but the machete was not there. (1 RT 72, 84.) Also, a rug had been moved against the garage door. (1 RT 84.)

Back inside the house, Timm noticed that the large knife in her butcher block was missing. (1 RT 69, 72.) She began writing a note to appellant about the machete and the knife. (1 RT 73-74.) Just then, around 5:45 a.m., appellant came home. (1 RT 74, 76.)

Appellant entered the garage from the side of the house where the trash cans were. (1 RT 75.) She was wearing a grey sweatshirt and jeans, and she told Timm that she had to change her clothes. (1 RT 75, 81.) Appellant explained that she was going to be spending the day with her boyfriend, Julius Thomas. (1 RT 72.)

When Timm confronted appellant regarding the knife and machete, appellant said she knew nothing about it. (1 RT 76-77.) Appellant did, however, mention that she had spilled some Coke on the side of the house and had washed it away. (1 RT 82.) Appellant was only in the house for a few minutes. (1 RT 80-81.)

After appellant left with Thomas, Timm began to clean the garage. (1 RT 83.) She saw that appellant's garage trash can was full and that it contained a Coca-Cola box. (1 RT 84.) Timm took appellant's trash can outside to empty it into a larger can. (1 RT 84-85.) When Timm opened the lid to the larger can, she discovered a blanket that was soaked in blood. (1 RT 85.) There were also globules of blood or chunks of flesh on the ground. (1 RT 87.)

Timm called 911. (1 RT 87.) An officer responded, collected the blanket, and took pictures of the scene. (1 RT 42-47.) Although there were no signs of forced entry, the wires on a motion-activated light on the side of the house had been detached. (1 RT 44, 80.) While the officer was there, Timm phoned appellant and left a voicemail. (1 RT 48, 87.)

Appellant returned Timm's call a couple of hours later, when Timm was at work. (1 RT 88.) Appellant was at the house. (1 RT 89.) She admitted moving things around in the garage, but denied knowing anything about the machete or knife. (1 RT 88.) Appellant also mentioned a blond, long-haired homeless man that she saw wearing a backpack and roaming the neighborhood. (1 RT 88-89.) Timm did not believe appellant's story, as Timm had not seen any homeless people in her neighborhood for at least 30 years. (1 RT 90.)

Timm came home from work around 5:00 p.m., a half hour earlier than usual. (1 RT 90.) Appellant was in the garage. (1 RT 90.) She told Timm that she had again washed the side of the house to remove the spilled soda. (1 RT 91.) Timm kept a bottle of cleaning solution in the garage, which was missing. (1 RT 91-92.) Appellant claimed she did not know where it went. (1 RT 91.)

While Timm and appellant were talking, Timm's house phone rang. (1 RT 92.) It was Brown's daughter, and she was hysterical. (1 RT 92-93.) Brown was not on the Georgia flight and nobody could find her. (1 RT 35-36, 93.) Until this point, Timm had assumed that Brown made her flight. (1 RT 93.)

Now, Timm was scared. (1 RT 93.) Appellant had trailed Timm into the house when the phone rang and stood right next to Timm during her conversation with Brown's daughter. (1 RT 92-93.) To escape from appellant, Timm made up a reason to go into her bedroom. (1 RT 94.) But appellant followed Timm there as well. (1 RT 94.)

Unable to shake appellant, Timm went out to the driveway to wash her car where she could be seen by neighbors. (1 RT 90-91, 95, 97.) As Timm was doing this, Thomas drove up to give appellant a ride to work. (1 RT 82, 96.) Appellant emerged from the house dressed in her scrubs and left with Thomas. (1 RT 96-97.)

As soon as appellant was gone, Timm ran into the house and called 911 again. (1 RT 97; 1 CT 99-103.) Officer Jayson Jahinian responded. (1 RT 104.) When Officer Jahinian contacted Timm, she looked scared. (1 RT 106.) Timm gave Officer Jahinian an overview of what she knew. (1 RT 106.) This was now a missing person case, as Brown's daughter had made a missing person report. (1 RT 105.)

B. Appellant Tells a Suspicious Story to the Police

Officer Jahinian left Timm's house and went to the hospital where appellant was working. (1 RT 107-108.) He interviewed appellant a little bit after 9:00 p.m. on October 28. (1 RT 109-110.)

During the interview with Officer Jahinian, appellant said that she went outside to visit Thomas when he came over that morning around 2:30 a.m. (1 CT 79.) She described Thomas as "a big, snuggly teddy bear." (1 CT 96.) Appellant said that when she returned home around 4:30 a.m. to get her sweater, Brown was in her room and "getting ready for w—to go." (1 CT 80-81, 93.)

Afterwards, appellant and Thomas went to McDonald's for some breakfast. (1 CT 82-83.) Appellant then ran some errands, and when she returned home around 6:00 or 6:30 a.m., Brown's vehicle was already gone. (1 CT 83.) Appellant later went to a couple of check cashing businesses. (1 CT 87.) She asked Thomas to drive over so she could use him as a reference. (1 CT 87.)

When Officer Jahinian mentioned the blood on the sidewalk, appellant denied having seen any. (1 CT 89-90.) She said that she hosed

down the ground on the side of the house because she spilled a soda and that she had no idea there was blood. (1 CT 89-90, 92.) Appellant also recounted having seen a "weird guy" walking down the street earlier in the week. (1 CT 94.) She described him as having "scraggly, black hair underneath a hat." (1 CT 94-95.)

After Officer Jahinian finished his interview and left, a co-worker asked appellant if she was okay. (2 RT 277.) Appellant said that Brown was missing and that she was concerned because she was unable to reach her "honey" by phone. (2 RT 277.) It struck appellant's co-worker as odd that appellant referred to Brown in the past tense and repeatedly said that Brown "was" a nice lady. (2 RT 278.)

Meanwhile, Officer Jahinian did not believe the story appellant told him. (1 RT 111.) He thought appellant killed Brown and was lying about it. (1 RT 111.) Therefore, he handed the investigation off to Detective Richard Wheeler in the robbery/homicide unit. (1 RT 111; 2 RT 250-251.)

In the early morning hours of October 29, Detective Wheeler and his partner went back to the hospital. (2 RT 252-253.) Appellant agreed to accompany them to the police station for another interview, which began around 2:00 a.m. (2 RT 253-254.)

At first, appellant was very open and talkative. (2 RT 257.) Again, appellant referred to Brown in the past tense. (2 CT 172, 176.)

Appellant's demeanor changed when she was asked about the blood at Timm's house. (2 RT 257-258; 2 CT 301-303.) She got quieter. (2 RT 258.) Instead of expressing concern, appellant became less responsive and more "emotionally closed in." (2 RT 258.)

Throughout the interview, appellant maintained that she did not know Brown's whereabouts. Appellant insisted that she had a good relationship with Brown, and said that she last saw Brown when Brown came home from work the night of October 27. (2 CT 187-188.)

Appellant described Brown as excited about her trip and getting ready to go. (2 CT 187-188.) She said that Brown's suitcase looked "pretty much packed," although she purported not to know what the suitcase looked like. (2 CT 191, 197.)

Appellant said she took a nap before Thomas came over around 2:00 a.m. (2 CT 199-200.) She described Thomas as her "big, snuggly teddy bear." (2 CT 208.) Appellant and Thomas went outside while Thomas smoked a cigarette. (2 CT 206.) They saw a "weird" guy with scraggly blond hair and a backpack walking the neighborhood. (2 CT 210-214.)

Appellant told the officers that she and Thomas went to a nearby park for about an hour, and then returned home because appellant was getting cold. (2 CT 216.) The light was on in Brown's room and appellant presumed that she was in there. (2 CT 217-218.)

Next, appellant put on a long-sleeved shirt and she and Thomas went to a McDonald's. (2 CT 219.) When they came home, appellant ran into Timm. (2 CT 220.) After Timm asked appellant about the missing machete and knife, appellant left through the back door. (2 CT 225-233.) Appellant did not know why she came in through the front door and left out the back. (2 CT 233.)

As she was going out the back door, appellant spilled a can of Coke she grabbed from a box in the garage. (2 CT 233.) She sprayed the ground with a hose before leaving with Thomas. (2 CT 233-234.)

Thomas dropped appellant off near a bus stop, and appellant went shopping for paint and furniture for her new apartment. (2 CT 237-238.) Appellant did not know where Thomas went. (2 CT 242-243.)

Later, Timm and appellant talked on the phone, and appellant admitted moving things around in the garage. (2 CT 251-252.) But appellant did not notice that the garage rug had been moved, and she denied taking the machete or the butcher knife. (2 CT 252-253.)

Appellant said that when she returned home from her errands around 2:30 p.m., she sprayed OxiClean on the soda spill, and used a broom to "scrub the spots." (2 CT 260-262.) She claimed she had no idea why there was blood in the exact same location where she supposedly dropped her soda. (2 CT 273-277.) Appellant repeatedly stated that she thought she was cleaning up soda, not blood. (2 CT 282-286, 296.) She also repeatedly denied having anything to do with the bloody blanket in the trash can. (2 CT 289-290, 292.)

C. The Police Find Brown's Nearly Beheaded Body Amidst Evidence Strongly Implicating Appellant and Thomas

While appellant was talking to the detectives, the police simultaneously continued their investigation at Timm's house. They observed blood, which someone tried to clean up, all over the garage, the side of the house, and in the driveway. (2 RT 167, 181-185, 194.)

It was evident that something violent happened in the garage, and there was a trail of blood from inside the garage to the side of the house where the trash cans were. (2 RT 167, 193-194.) In addition to the bloody blanket that Timm discovered in the trash, the police recovered two pairs of rubber gloves. (1 RT 126-127.) The blood around the house and on the blanket belonged to Brown. (2 RT 197.)

The police traced Thomas's movements by tracking the location of his cell phone. (1 RT 113.) Around 3:20 a.m. on October 29, Thomas was at or near 5850 Republic Street in Riverside. (1 RT 113-114.) Brown's van was found in an empty parking lot nearby. (1 RT 114.)

Brown's corpse was lying facedown in the middle of the van, and a spray bottle was on her back. (1 RT 131.) Her suitcase was in the front passenger's seat. (1 RT 114.) The suitcase contained women's clothing and toiletries, although Brown's shoes, cell phone, and purse were missing.

(1 RT 114.) Brown's body appeared to have been dragged into the van through the driver's side. (1 RT 132.)

Appellant's DNA – but not Thomas's – was on the van's steering wheel. (2 RT 196-197.) This, even though appellant never drove the van while Brown was alive. (1 RT 70)

Brown died from a sharp force injury to her neck. (1 RT 145-146.) Specifically, her neck was cut open and her carotid artery, trachea, and esophagus were severed. (1 RT 149-151.) The weapon used to slash Brown's neck went so deep that it left marks on her spinal cord; a little bit more and she would have been decapitated. (1 RT 149-151.) Brown's injuries were consistent with an attack using a machete or a butcher knife. (1 RT 151.) She did not have any defensive wounds. (1 RT 147.)

Upon finding Brown's body, the police arrested Thomas and Detective Rick Cobb interviewed him. (2 RT 204-205.) Thomas then took Detective Cobb to a dumpster where Detective Cobb searched for some clothing. (2 RT 205-206.) He did not find any, and the lot caretaker told Detective Cobb that the dumpster was recently emptied. (2 RT 206.)

Next, Thomas led Detective Cobb to a canal area, at which Detective Cobb located the machete from Timm's garage. (1 RT 73; 2 RT 207-208.) Brown's blood was on the machete. (2 RT 178, 197.)

Besides the physical evidence, the police obtained the message and call logs for the cell phones belonging to appellant and Thomas. (2 RT 216.) Between October 27 and October 29, appellant and Thomas exchanged numerous text messages and phone calls. (2 RT 222, 224.)

Of particular interest, Thomas called appellant on October 28 at 1:49 a.m. from near the 91 freeway in Riverside. (2 RT 232.) He called her again at 2:09 a.m., as he was moving west towards Timm's house in the La Sierra area. (2 RT 233.) Appellant received these calls at or near Timm's house. (2 RT 233.)

There was no activity at all on appellant's cell phone from 2:10 a.m. to 6:30 a.m. (2 RT 227-228.) At 7:42 a.m., Thomas called appellant from near where Detective Cobb discovered the missing machete. (2 RT 234-235.) Fourteen minutes later, at 7:56 a.m., Thomas called appellant from near where Brown's van was found. (2 RT 235.)

Right after the 7:56 a.m. call from Thomas, appellant phoned the apartment manager regarding the $800 security deposit. (2 RT 291.) Appellant told the apartment manager that she did not yet have all of the money and asked if she could move in anyway (the manager said no). (2 RT 291-292.)

D. Thomas Commits Suicide

On December 15, 2011, Thomas committed suicide in his jail cell. (2 RT 248.) There was a letter from appellant in Thomas's cell, dated December 10, 2011. In that letter, appellant wrote that she was "sorry," that she did not blame Thomas "for being mad, angry, or even hating" her, and that she "love[d]," "need[ed]," "want[ed]," "desire[d]," and "miss[ed]" him. (2 RT 265-266.)

E. A Jury Convicts Appellant of First Degree Murder with Special Circumstances

Appellant's trial began on March 25, 2013. (1 RT 28.) She testified in her own defense. (2 RT 304-420; 3 RT 423-443.)

In a nutshell, appellant claimed that, without her prior knowledge or involvement, Thomas alone killed Brown. (2 RT 322-326.) According to appellant, Thomas then used threats to coerce her assistance in covering up the crime. (2 RT 326.) On rebuttal, the prosecution offered Thomas's statements to the police that appellant masterminded Brown's robbery and murder, with appellant participating and giving orders every step of the way. (3 RT 445-450.)

The jury did not believe appellant's story. It convicted her of first degree murder and found true robbery and lying-in-wait special circumstances. (2 CT 357-359; Pen. Code §§ 187, subd. (a); 190.2, subd. (a)(15), (17)(A).)

F. The Court of Appeal Affirms

Appellant argued on appeal that the trial court violated her right of confrontation when it allowed the prosecution to introduce the evidence of Thomas's police statements. On June 24, 2015, the Court of Appeal rejected this argument in an unpublished decision. The court found that (1) Thomas's statements were not introduced for their truth, but rather to explain the police's actions or to impeach appellant's credibility, and (2) Thomas's testimony had opened the door to hearsay use of Thomas's statements anyway. (*People v. Hopson* (June 24, 2015, D066684) [nonpub. opn.], hereinafter "Opn.")

On October 14, 2015, this Court granted appellant's petition for review. The court's order limited the issue to be briefed and argued as follows: "Was defendant's right of confrontation under the Sixth Amendment violated when the trial court permitted the prosecution to introduce out-of-court statements made by her deceased codefendant?" (Oct. 14, 2015, Order.)

ARGUMENT

I. THE CONTOURS OF THE CONFRONTATION CLAUSE

The Sixth Amendment to the federal Constitution guarantees a criminal defendant the right "to be confronted with the witnesses against him." (U.S. Const., 6th Amend.)[1] In *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), the Supreme Court held that the confrontation clause bars the "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had a prior opportunity for cross-examination." (*Id.* at pp. 53-54.)

Whether a statement to police is testimonial depends on the context in which it is made. Statements are nontestimonial when made during police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. (*Clark v. Ohio* (2015) 135 S.Ct. 2173, 2179.) Conversely, statements are testimonial when the circumstances objectively indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution. (*Id.* at pp. 2179-2180.)

Respondent does not dispute that all of the statements at issue here are testimonial. But that a statement is testimonial does not end the inquiry. The purpose for which the statement is offered must also be evaluated.

Specifically, "[t]he [confrontation] [c]lause ... 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, italics added.) Indeed, "*Crawford* made clear that there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay*

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[1] The California Constitution has a similar confrontation clause. (Cal. Const., art. I, §15.)

purposes." (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6, citing *Crawford, supra*, 541 U.S. at p. 59, fn. 9; see also *United States v. Inadi* (1986) 475 U.S. 387, 398, fn. 11 ["[A]dmission of nonhearsay raises no Confrontation Clause concerns," internal quotation marks omitted]; *Tennessee v. Street* (1985) 471 U.S. 409, 414 (*Street*) [same]; *People v. Combs* (2004) 34 Cal.4th 821, 843 [same].)

II. THE STANDARD OF REVIEW

This Court independently reviews whether a trial court's ruling violated the confrontation clause. (*People v. Seijas* (2005) 36 Cal.4th 291, 304.)

III. THE REBUTTAL EVIDENCE OF THOMAS'S POLICE STATEMENTS DID NOT VIOLATE APPELLANT'S RIGHT OF CONFRONTATION

Appellant testified that she did not participate in Brown's murder and that Thomas admitted to her that he did it. According to appellant, Thomas conscripted her assistance in covering up the crime by threatening to kill her and her son. After appellant's testimony, the trial court allowed the prosecutor to submit rebuttal evidence that Thomas told the police that, at appellant's behest, he and appellant acted together to kill Brown and dispose of her body.

Appellant's opening brief argues that the rebuttal evidence violated her right of confrontation.[2] There was no such violation.

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[2] Appellant additionally argued below that evidence of certain "implied statements" admitted during the prosecution's case in chief violated her right of confrontation. (Opn. at pp. 18-22.) She does not renew that argument in her opening brief on the merits and has, thus, forfeited it. (*People v. Bryant* (2014) 60 Cal.4th 335, 408 [explaining that an appellant's argument was "forfeited by the failure to raise it in the opening brief"].)

Once appellant testified about what Thomas supposedly said to her about Brown's murder, the prosecution was constitutionally permitted to offer Thomas's contrary out-of-court statements to impeach both Thomas's credibility and appellant's credibility. Furthermore, even if the rebuttal evidence strayed beyond the bounds of impeachment, the evidence still properly came in through a constitutional door that appellant's testimony opened. In any event, the admission of Thomas's police statements was harmless beyond a reasonable doubt.

A. Proceedings Below

1. The trial court's pretrial ruling

Appellant moved before trial to bar the prosecution from introducing any of Thomas's statements to the police about the murder. (1 RT 12.) The prosecutor agreed, telling the court that "I think under *Crawford*, I don't believe I can play the statements of [Thomas] in terms of his interview, because there's a Sixth Amendment right." (1 RT 12.)

Defense counsel then asked the trial court to rule that Thomas's statements could not come in even if appellant testified. That led to this discussion:

[Defense counsel]:	I just wanted to make sure that even if my client testifies that [Thomas's] statements still can't come in .... Would that be Your Honor's ruling?
The court:	I think so. I can't see them as adoptive admissions or any other –
[Prosecutor]:	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.
The court:	All right. Well, it will be the order then that no reference to Mr. Thomas's statements ... absent further order of the

	Court following a sidebar in the event the prosecution believes that [appellant] may have opened the door with her testimony.
[Prosecutor]:	And one of the reasons for that is obviously through Thomas' statements, I have a good faith belief of how the crime went down. So I can follow those statements myself in terms of my theory of the case, and if she testifies, I can attack her with my understanding of the case.
The court:	I don't disagree with that.
[Prosecutor]:	I can't say, "Hey, Thomas told us this."
The court:	Right.

(1 RT 18-19.)

2. Appellant's testimony

a. Direct

Appellant testified at trial. (2 RT 304.) She said she met Thomas in 2006. (2 RT 306-307.) He drove the bus that she rode to get to work. (2 RT 306.) The two started dating in 2008. (2 RT 306-307.)

Thomas told appellant he was divorced and she believed him. (2 RT 307-308.) But Thomas would never allow appellant to come over to his house and she did not know his address. (2 RT 308, 311-312.)

While appellant was living at Timm's house, Thomas would typically visit once a week around 1:00 a.m. or 2:00 a.m. (2 RT 310.) Sometimes he would come inside the house and sometimes they would sit outside in his car. (2 RT 310-311.)

In 2011, Thomas told appellant that he beat a man to death for disrespecting his grandmother. (2 RT 314-315.) This was after he previously told her that he beat up other people in the past. (2 RT 315.) From time to time, Thomas also warned appellant that, if she broke up with

him, he would "take care of" her, which she took to mean that he would hurt or kill her. (2 RT 315-316.)

Appellant knew that Brown was taking a trip to Georgia. (2 RT 318.) She told Thomas about it and they discussed the time of Brown's flight. (2 RT 318-319.) Appellant also informed Thomas that Timm had a machete. (2 RT 320.) Thomas never mentioned any plan to rob Brown. (2 RT 321.)

Appellant explained that she bought the clothes from Target on October 27 because Thomas asked her to. (2 RT 337-338.) Thomas said his sister, a large woman, was coming to town and the clothes were for her. (2 RT 337-338, 365.)

Thomas called appellant at roughly 2:00 a.m. the morning of Brown's murder. (2 RT 322.) Appellant got dressed and went into the garage. (2 RT 322-23.) There, she saw Brown lying in a pool of blood with Thomas standing over her. (2 RT 323.) Thomas was wearing the clothes that appellant bought from Target, along with hospital foot covers that she gave him earlier. (2 RT 336-339.)

Appellant asked Thomas why he had done this. (2 RT 323.) According to appellant:

- "He told me that he thought she would have money and he needed money, and he felt that she would have been an easy target because she was going on a trip." (2 RT 323.)

- "He told me that she – he told me that she knew that it was him and that he had no choice but to kill her." (2 RT 324.)

- "He said that she screamed and was making noise, and he didn't want anybody to hear her, so he sliced her throat." (2 RT 324.)

- "He said that he had taken [Timm's] machete and he used the machete first." (2 RT 324.)

- "He had the machete, but he also had a butcher knife from the kitchen. ... And he said that the machete was too dull and he couldn't leave her alive." (2 RT 324.)

- He said "[s]he wasn't – she was just – he said she was just having sounds coming out of her throat, and I guess he said her eyes were like blinking." (2 RT 324.)

- "He said she was still alive from the machete slicing her, and he went into the kitchen and took the butcher knife and used the butcher knife to finish what he started." (2 RT 325.)

Thomas threatened to kill appellant and her adult son, Alexander, if she did not help clean up the evidence of Brown's murder. (2 RT 323, 326.) He told appellant that he had someone watching Alexander, who was living in Norwalk at the time. (2 RT 320, 345.)

Appellant helped Thomas drag Brown's body into the van using a blanket from Brown's bedroom. (2 RT 326-328.) Thomas had the van keys but he made appellant open the van, telling her it would not matter if she touched the van since she had ridden in it before. (2 RT 331-332.)

Thomas forced appellant to clean the blood in the garage and he instructed her to use Clorox wipes. (2 RT 334, 342.) To do this, appellant put on gloves that she already had. (2 RT 334-335.) While appellant was scrubbing, Thomas grabbed Timm's bottle of cleaning solution and sprayed the blood stains. (2 RT 335, 342.) The garage cleanup took about 30 to 45 minutes. (2 RT 335.)

Next, Thomas told appellant to drive Brown's van and leave it somewhere so it would look like Brown went on her trip. (2 RT 340.) She followed Thomas to a lot and left the van there. (2 RT 347.)

Appellant and Thomas then went to McDonald's, where Thomas ordered some food, but neither of them ate. (2 RT 348.) Thomas told

appellant what to tell the police, and to blame the murder on the long-haired homeless man. (2 RT 348-350.)

In addition, Thomas warned appellant that, if she did not do exactly as he said, "'Snitches will die, and even if you're locked up, they will get to you.'" (2 RT 348.) "He said that at first I would find out that my son was dead and then I would die myself." (2 RT 348.)

On the way back to Timm's house, they stopped at a 7-Eleven, where Thomas had appellant buy two Cokes. (2 RT 353.) Thomas believed that the Coke would clean up the blood on the side of the house. (2 RT 353-355.)

When they got back to Timm's house, appellant spilled the Coke on the blood like Thomas told her to. (2 RT 353-355.) Appellant also removed the clothes she was wearing and gave them to Thomas. (2 RT 351.) Thomas put the clothes in a trash bag, along with his clothes and the murder weapons. (2 RT 351.) Appellant did not know where Thomas dumped the bag, the machete, or the butcher knife. (2 RT 364-365.)

Appellant admitted buying a knife and pepper spray shortly before Brown's murder, but she insisted these items were for self-protection, and not for use on Brown. (2 RT 362-364.) As for her December 10, 2011, love letter to Thomas, appellant explained that she only wrote it because she did not want him to hurt her son. (2 RT 370-371.)

b. Redirect

During a break in the prosecutor's cross-examination of appellant, the court and counsel met in chambers to discuss several matters. (3 RT 422.) Following that meeting, the prosecutor put on the record that "we spoke about the statements of Julius Thomas made to Detective Wheeler, and I'm asking for those to be admitted under [Evidence Code section]1202 of the

hearsay exception to impeach the hearsay declarations that came in through the defendant under 1215."[3] (3 RT 422.)

Appellant objected under *Crawford*. (3 RT 422-423.) The trial court overruled the objection, explaining that "I indicated in chambers that I'm still of the opinion that under [Evidence Code section] 1202 the prior inconsistent statements would be admissible for that limited purpose." (3 RT 423.)

After the prosecutor finished his cross-examination, defense counsel used his redirect to make a preemptive effort at minimizing the evidence of Thomas's police statements. In particular, defense counsel asked appellant whether she knew that Thomas accused her of planning the events leading to Brown's death. (3 RT 434.) Appellant answered that she did know that, and that Thomas's statements were not true.[4] (3 RT 434-435.)

Further, appellant testified that she did not plot the attack on Brown, she did not tell Thomas they should rob Brown, and she did not tell Thomas to hide in the garage while she lured Brown inside. (3 RT 435-436.) Appellant also denied convincing Thomas to go through with the plan, denied telling Thomas to use his fingers in his sweatshirt to simulate a handgun, and denied telling Thomas to get rid of Brown's body instead of calling the police. (3 RT 436.) Appellant reiterated that she got the idea to pour Coke on the blood from Thomas, and not a television show. (3 RT

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[3] There is no section 1215 in the Evidence Code. The Court of Appeal surmised that the prosecutor was referring to section 1250 (declarant's existing mental or physical state). (Opn. at p. 24, fn. 4.)

[4] Appellant learned of Thomas's statements around December 2011, when her attorney read them to her. (3 RT 468-469.) The prosecutor made a hearsay objection as to appellant's knowledge of what Thomas told the police, but the trial court overruled it. (3 RT 434-435.)

437-438.) Finally, she said that she did not eat anything when they went to McDonald's. (3 RT 437-438.)

3. The prosecution's rebuttal evidence

In rebuttal, the prosecutor called Detective Wheeler to testify about a November 1, 2011, interview with Thomas. (3 RT 444.) During that interview, Thomas described the crime in a way that was directly at odds with what appellant described in her testimony.

This is what Thomas told Detective Wheeler:

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

- Thomas said he tried to talk appellant out of the plan but that "[s]he said that, no, [Brown] would be an easy target, it would not be a problem, and convinced him to continue on with it." (3 RT 446.)

- Thomas said the plan was for him to wear the clothes that appellant bought from Target and hide in the garage. Appellant would lure Brown into the garage where they would rob her. (3 RT 446.)

- Thomas said he hit Brown with the machete when she came in the garage. (3 RT 446.) He said he then saw appellant, with a bloody knife in her hand, kneeling over Brown's body. (3 RT 446.)

- Thomas said it was appellant who decided to get rid of Brown's body and that she had the keys to the van. (3 RT 447.)

- Thomas said that appellant took Brown's suitcase from her room and put it on the front passenger seat. (3 RT 447.)

- Thomas said that, when he realized Brown was dead, he implored appellant to call the police. She responded, "'No, we're not going to call the police. Nobody is going to expect her around for at least a few days. We need to get rid of the body. We'll take her van, suitcase, and so forth, and make it look like she just left on her trip.'" (3 RT 447.)

- Thomas said that appellant decided where to take the van. (3 RT 447.)

- Thomas said they both cleaned up the blood, at appellant's direction. (3 RT 447.)

- Thomas said that appellant put the spray bottle in the van with Brown's body. (3 RT 448.)

- Thomas said that appellant ate the food they bought at McDonald's and that she did not seem bothered by what they had just done. (3 RT 448.)

- Thomas said it was appellant's idea to pour Coke on the blood. She told him she had seen it on a television show. (3 RT 448-449.)

- Thomas said that he dumped the clothes in the dumpster and that he threw away the machete and the knife at the canal area where he took the police. (3 RT 449-450.)

Besides Detective Wheeler's testimony about what Thomas told him, the prosecutor introduced a letter from Thomas that was in appellant's jail cell. (3 RT 470). In that letter, Thomas called appellant "'a hypocrite'" and told her, "'You did this, not me.'" (3 RT 470-471.) In surrebuttal, appellant explained that "You did this, not me" referred to her ending the relationship with Thomas. (3 RT 477.)

B. Thomas's Police Statements Were Properly Admitted to Impeach His Credibility

1. This Court has held that the prosecution may constitutionally impeach a hearsay declarant's credibility with the declarant's inconsistent out-of-court statements

In her testimony, appellant pointed the finger at Thomas and said that he admitted to her that, on his own, he killed Brown during a botched robbery. The prosecutor's stated basis for seeking the admission of Thomas's contrary statements to the police was Evidence Code section 1202. (3 RT 422.) Section 1202 provides that "[e]vidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct." (Evid. Code, § 1202.)[5]

The trial court concluded, over appellant's *Crawford* objection, that Thomas's police statements were admissible for the "limited purpose" of attacking the credibility of his purported statements to appellant. (3 RT 423.) Under the law as this Court has articulated it, the trial court's ruling was correct.

Specifically, "*Crawford* made clear that there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes." (*People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6; see also *People v. Ervine* (2009) 47 Cal.4th 745, 775-776.) Therefore, using a declarant's inconsistent out-of-court statements for the nonhearsay

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[5] In federal courts, rule 806 of the Federal Rules of Evidence is comparable.

purpose of impeaching the credibility of the declarant's in-evidence hearsay statements does not implicate a defendant's right of confrontation.

People v. Blacksher (2011) 52 Cal.4th 769 (*Blacksher*) addressed and resolved this very issue. There, the trial court admitted the preliminary hearing testimony of the defendant's mother, Eva, who was unavailable to testify at trial. (*Id.* at p. 803.) During the preliminary hearing, Eva denied having obtained a restraining order against the defendant, said she did not remember signing an application for the order, and claimed she never wrote that she was afraid of the defendant. (*Id.* at pp. 803-804.) The prosecutor called Eva's daughter, Ruth, who testified that Eva said she was afraid of the defendant and did apply for a restraining order. (*Id.* at p. 804.)

On appeal, the defendant argued that the admission of Ruth's testimony about what Eva told her violated his right of confrontation. (*Blacksher*, *supra*, 52 Cal.4th at p. 805.) The Court held otherwise: "[W]e ... reject defendant's claim that Ruth's testimony impeaching Eva's former testimony was not admissible on confrontation grounds under either state or federal law." (*Id.* at p. 806.)

In particular, the Court explained that "Eva's statements to Ruth were admissible not for their truth but solely to impeach her former testimony." (*Blacksher*, *supra*, 52 Cal.4th at p. 806.) "Although the court did not admit the evidence under a specific Evidence Code section, the statements were admissible under Evidence Code section 1202, which governs the impeachment of hearsay statements by a declarant who does not testify at trial." (*Ibid.*) The Court explained that this is allowed under the confrontation clause as long as the prosecution does not offer the declarant's inconsistent statements for their truth. (*Id.* at p. 808; see also *People v. Osorio* (2008) 165 Cal.App.4th 603, 615-617; *People v. Marquez* (1979) 88 Cal.App.3d 993, 997-998.)

So it is here. Appellant testified that Thomas told her he alone plotted Brown's robbery and killed her when it went bad. Under *Blacksher*, the prosecutor's introduction of Thomas's police statements for the purpose of impeaching the statements he made to appellant was a proper application of Evidence Code section 1202, and did not run afoul of the confrontation clause. (See also *United States v. Jimenez* (3d Cir. 2008) 513 F.3d 62, 81 ["Nonhearsay use of evidence as a means of demonstrating a discrepancy does not implicate the Confrontation Clause"]; *State v. Nelson* (Or.Ct.App. 2008) 197 P.3d 1130, 1131 ["This case presents the question of whether the testimonial statement of a declarant, admitted for the purpose of impeaching the declarant ... is barred by the rule in [*Crawford*]. We hold that it is not"]; *Del Carmen Hernandez v. State* (Tex.Ct.App. 2006) 219 S.W.3d 6, 10-13 [finding no *Crawford* violation where, after defendant introduced accomplice's statements exculpating defendant, the prosecutor introduced accomplice's inconsistent statements inculpating defendant].)

2. The Court should find appellant's contrary arguments unpersuasive

Notwithstanding *Blacksher*, appellant contends that section 1202 did not apply because there was no hearsay to impeach in the first place. (ABOM 33-34.) That is, section 1202 comes into play only after hearsay – out of court statements offered for their truth – is admitted. (Evid. Code, § 1202.) Appellant says, and the Court of Appeal agreed, that Thomas's statements to her were not hearsay because she was not relying on them for their truth. (ABOM 33-34; Opn. at p. 26.) But of course she was.

Appellant, who was on trial for murdering Brown, took the stand and testified that Thomas told her how and why he killed Brown all by himself. She had to be offering these alleged statements for their truth. Given the avalanche of other damning evidence against her, appellant needed the jury

to believe Thomas's purported admission that he alone planned the robbery and killed Brown.

Alternatively, appellant asserts that the rebuttal evidence of Thomas's police statements could not have any impeachment value to the prosecution unless they were offered for their truth. (ABOM 41-42.) That is not so. The impeachment value of inconsistent statements necessarily derives from their inconsistency, and not their substance. That a declarant said different things at different times makes *all* of his statements unreliable, regardless of whether any of the statements is actually true. (See *United States v. Grant* (11th Cir. 2001) 256 F.3d 1146, 1156 ("Rule 806 [the federal equivalent of Evidence Code section 1202] made the statements admissible for impeachment purposes, and the point of admitting inconsistent statements to impeach is not to show that they are true, but to aid the jury in deciding whether the witness is credible; the usual argument of the party doing the impeaching is that the inconsistent statements show the witness is too unreliable to be believed on important matters"); *United States v. Graham* (5th Cir. 1988) 858 F.2d 986, 990, fn. 6 [explaining in the context of rule 806 of the Federal Rules of Evidence that "the hallmark of an inconsistent statement offered to impeach a witness's testimony is that the statement is not hearsay within the meaning of the term, i.e., it is not offered for the truth of the matter asserted ... rather, it is offered only to establish that the witness has said both 'x' and 'not x' and is therefore unreliable"].)

Still, appellant's theory suggests the possibility that the prosecutor's section 1202 argument was really a ruse to get Thomas's statements admitted for their truth, under the guise of being "inconsistent." Indeed, there is support for the notion that courts should look beyond the prosecutor's ostensible nonhearsay reason for seeking introduction of out-of-court statements to determine whether it is mere pretext. (See *Williams*

Illinois (2012) 132 S.Ct. 2221, 2256 (opn. of Thomas, J., conc. in judg.); *United States v. Cruz-Diaz* (5th Cir. 2008) 550 F.3d 169, 177.)

The Court should find no such chicanery here. Right up front, the prosecutor acknowledged that *Crawford* prevented him from introducing Thomas's police statements for their truth. (1 RT 13.) He also explained that, if appellant testified, he might want to cross-examine her using Thomas's statements as a roadmap to how the crime occurred, but that "I can't say, 'Hey, Thomas told us this.'" (1 RT 19.)

It was only after appellant put specific words in Thomas's mouth that the prosecutor raised the argument of introducing Thomas's police statements. The prosecutor specified that he was seeking admission of the statements solely "to *impeach* the hearsay declarations that came in through the defendant." (3 RT 422, italics added.) And the trial court agreed that "the prior inconsistent statements would be admissible for that limited purpose." (3 RT 423.)

Appellant notes that the trial court did not instruct the jury as to the limited purpose of the statements. (ABOM 38.) But that is nobody's fault but hers. Appellant never asked for such an instruction and she has explicitly disavowed any instructional error claim. (ARB 12-13 ["Ms. Hopson does not claim that the trial court made an error when it failed to give a limiting instruction in this case"]; see also *People v. Cowan* (2010) 50 Cal.4th 401, 479 ["Absent a request, a trial court generally has no duty to instruct as to the limited purpose for which evidence has been admitted"]; *People v. Hernandez* (2004) 33 Cal.4th 1040, 1052 ["Because defendants did not specifically request a limiting instruction at the appropriate time, the court had no sua sponte duty to give one"]; *United States v. Churchwell* (11th Cir. 2012) 465 Fed.Appx. 864, 865-866 [finding no violation of

confrontation clause where trial court did not give a sua sponte limiting instruction on evidence introduced for nonhearsay purpose].)[6]

Finally, appellant points to the prosecutor's closing. (ABOM 40.) She says that, during an argument that lasted over 20 transcript pages, the prosecutor made four fleeting references to the truth of Thomas's statements. (ABOM 40-41.) Again, however, appellant neither objected nor requested a limiting instruction. (*People v. Carter* (2003) 30 Cal.4th 1166, 1209, fn. 13 (*Carter*).) And, as the Court of Appeal observed, "[a]lthough the prosecutor talked about Thomas's confession to the detectives as showing that Thomas had a conscience and wanted to help Brown's family, his argument mainly dwelled on the lies that he believed Hopson had told, 'all the way through this case.'" (Opn. at p. 30.)

C. Thomas's Police Statements Were Properly Admitted to Impeach Appellant's Credibility

1. The controlling case law establishes that the prosecution may rebut a defendant's testimony with out-of-court statements introduced for nonhearsay purposes

Apart from being admissible to impeach Thomas's credibility, the Court of Appeal found that Thomas's police statements were admissible for the nonhearsay purpose of impeaching appellant's credibility. (Opn. at pp. 33-36.) This is correct for multiple reasons.

To begin with, Thomas's statements to the police impeached the credibility of appellant's claim that she hid the truth because she was afraid of him. They suggested a different explanation for appellant's morphing narrative, namely, that appellant changed her story because she had to account for what Thomas told the police.

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[6] The trial court did give a general limited purpose instruction later on, after the close of evidence. (3 RT 500; 2 CT 390.)

Carter, *supra*, 30 Cal.4th 1166 provides guidance on this point. There, the defendant and two accomplices were accused of murdering two victims. The defendant testified that he intended to rob the victims, but did not intend to, or actually, kill them. (*Id.* at p. 1206.) He said he admitted his role because he wanted the truth to come out. (*Ibid.*)

On cross-examination, the prosecutor established that the defendant had initially denied any involvement to the police, and only changed his story after he became aware that his accomplices had told the police that he was the shooter. (*Carter*, *supra*, 30 Cal.4th at pp. 1206-1207.) The defendant argued that the prosecutor's cross-examination "concerning [his accomplices'] extrajudicial statements ... constituted inadmissible hearsay, thereby depriving him of his constitutional right of confrontation." (*Id.* at p. 1208.)

The Court rejected the defendant's claim, holding that "the evidence did not constitute inadmissible hearsay." (*Carter*, *supra*, 30 Cal.4th at p. 1209.) Rather, "[t]he prosecutor's apparent aim in inquiring into defendant's knowledge of [the accomplices'] statements was not to establish the truth of the matters asserted therein but to shed light on defendant's state of mind in admitting his own involvement in the ... offenses and the credibility of his trial testimony that his admission was motivated by a desire to bring forth the truth." (*Ibid.*)

This case is a lot like *Carter*. Like the defendant in *Carter*, appellant initially denied any involvement in Brown's murder. Like the defendant in *Carter*, only after appellant learned of Thomas's statements fingering her as the mastermind did she acknowledge that her initial denial was untrue. And, as in *Carter*, the jury had to decide if appellant changed her story for the reason she said – that she was too scared to do so earlier – or for some other reason.

Therefore, it was important for the jurors to hear exactly what Thomas told the police so they could evaluate whether appellant was telling the truth at trial or whether she had crafted a story to match the details of Thomas's statements, which her attorney read to her in December 2011. (3 RT 468-469.) That, as the Court of Appeal explained, did not make Thomas's statements hearsay: "We also agree with respondent that Thomas' statements were admissible for the nonhearsay purpose of explaining why [appellant] apparently continued to stay friends with Thomas up until the weeks before his death, consistently claiming a homeless man must have done the killing, and why she did not start to blame Thomas for planning the killing until she became aware he had made statements against her. She then changed her tactics to accommodate his version of what happened." (Opn. at p. 36.)

Beyond impeaching the credibility of appellant's explanation for changing her story, Thomas's police statements also impeached the credibility of appellant's assertion that Thomas actually made the admissions that she ascribed to him. Unlike in *Blacksher*, *supra*, 52 Cal.4th. 769 – where there was no dispute that the declarant's hearsay statements had been made because they were transcribed in a preliminary hearing – in this case, the prosecutor had every reason to doubt that Thomas made the statements to which appellant testified. Thomas's statements to the police made it less likely that appellant was telling the truth about the statements Thomas allegedly made to her.

The Supreme Court's opinion in *Street* is instructive. In *Street*, the defendant was charged with murdering his neighbor. (*Street*, *supra*, 471 U.S. at p. 411.) At trial, the prosecutor submitted a confession that the defendant gave to the police, in which the defendant said that he and an accomplice (Peele) killed the victim during a burglary gone awry. (*Ibid.*)

The defendant testified that he was innocent and that the confession was coerced. (*Street*, *supra*, 471 U.S. at p. 411.) Peele had separately confessed and the defendant explained his confession by claiming that the sheriff forced him to adopt Peele's confession. (*Ibid.*) To rebut the defendant's claim that his confession was coerced, the sheriff read Peele's confession to the jury so the jury could see for itself that the defendant's confession contained details that Peele's did not. (*Id.* at pp. 411-412.) The jury convicted the defendant. (*Id.* at p. 412.)

On appeal, the defendant argued that the introduction of Peele's confession violated the confrontation clause. (*Street*, *supra*, 471 U.S. at p. 413.) The Supreme Court disagreed. (*Ibid.*) Specifically, "the prosecutor did not introduce Peele's out-of-court confession to prove the truth of Peele's assertions." (*Ibid.*) Rather, Peele's confession was read to impeach the credibility of the defendant's assertion that his own confession was coerced. (*Id.* at pp. 413-414.)

"The *nonhearsay* aspect of Peele's confession – not to prove what happened at the murder scene but to prove what happened when respondent confessed – raises no Confrontation Clause concerns." (*Street*, *supra*, 471 U.S. at p. 414.) "The Clause's fundamental role in protecting the right of cross-examination ... was satisfied by [the sheriff's] presence on the stand." (*Ibid.*) "If [defense] counsel doubted that Peele's confession was accurately recounted, he was free to cross-examine the Sheriff." (*Ibid.*)

Although the issue here is not identical to that in *Street*, *Street*'s analysis still applies. Appellant claimed that Thomas coerced her statements to the police the night of Brown's murder, in which she denied that she and Thomas had any involvement whatsoever in Brown's disappearance. (2 RT 348-349.) She testified that, in reality, Thomas admitted to her that he killed Brown on his own (2 RT 323-325.)

The prosecution's rebuttal evidence – that Thomas told the police something different from what appellant claimed Thomas told her – was introduced for the purpose of impeaching appellant's credibility. That is, Thomas's statements to the police that he and appellant both planned the crime made it less likely that Thomas really admitted to appellant that he committed the crime alone. Thus, as in *Street*, the issue was whether Thomas made the statements to the police and, as in *Street*, defense counsel was free to cross-examine Detective Wheeler about what Thomas told him. (*Street*, *supra*, 471 U.S. at p. 414.)

Moreover, because the impeachment was in the details, the prosecutor was not required to sanitize or abridge Thomas's statements to the police. In her testimony, appellant gave a very specific account of what Thomas supposedly told her he did – i.e., Thomas planned on his own to rob Brown, he sliced Brown's neck with the machete when she recognized him, and then he cut Brown with the knife to finish the job. (3 RT 323-325.) To impeach appellant's claim that Thomas said those things to her, it was necessary to show that he described the details of the crime very differently to the police. (*Street*, *supra*, 471 U.S. at p. 415 ["We do not agree with the Court of Criminal Appeals' suggestion that Peele's confession could have been edited to reduce the risk of jury misuse 'without detracting from the alleged purpose for which the confession was introduced'"].)

Appellant argues that *Street* is inapposite. (ABOM 39-42.) She says that, unlike the statements in *Street*, Thomas's statements to the police could impeach her "only if the jury believed that what Thomas said was true." (ABOM 39, italics removed.) Again, that is not so.

Thomas's police statements did not have to be true to impeach appellant's credibility, they just had to have been made. Jurors could decide that appellant changed her story because she felt like she had to explain what Thomas told the police. Or the jurors could decide Thomas

would not have told appellant something different from what he told the police. In either scenario, the truth of Thomas's police statements is irrelevant to the jurors' calculus – the jurors could disbelieve the substance of what Thomas said to the police but also disbelieve appellant's testimony about what Thomas supposedly told her.

2. Appellant's out-of-state cases do not help her

Appellant cites three cases in support of her assertion that the admission of Thomas's statements violated her right of confrontation. These cases do not assist her.

First, there is *People v. Thompson* (Ill.Ct.App. 2004) 812 N.E.2d 516. In that case, the defendant was charged with beating up his fiancée. (*Id.* at p. 517.) At trial, he testified that he never had any domestic violence issues with the victim. (*Id.* at p. 519.) The trial court permitted the prosecutor to cross-examine the defendant with statements the victim made about the incident in an order of protection. (*Id.* at pp. 519-520.) The court held that this was a prejudicial violation of the defendant's right of confrontation. (*Id.* at p. 522.)

The critical difference between *Thompson* and this case is that, in *Thompson*, "[t]he State *concede[d]* use of [the order of protection] to impeach defendant was improper," and the only issue was whether it was harmless. (*People v. Thompson*, *supra*, 812 N.E.2d at p. 520, italics added.) Thus, there was no argument in *Thompson* that the out-of-court statements were offered for a nonhearsay reason. *Thompson* obviously did not consider the viability of an argument that was not made. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 ["'It is axiomatic that cases are not authority for propositions not considered'"].)

Second, appellant cites a case from the Court of Appeals for the Armed Forces, *United States v. Hall* (C.A.A.F. 2003) 58 M.J. 90. There, a court martial convicted the defendant of wrongful use of cocaine after she

tested positive for the drug. (*Id.* at p. 90.) Her defense at trial was that she innocently ingested the cocaine from Central American tea that her mother sent to her. (*Id.* at p. 92.) As "impeachment," the military judge permitted a government special agent to testify that the defendant's mother told him she had never given her daughter any tea. (*Id.* at pp. 92-93.)

The government acknowledged that the admission of this testimony was error and the question before the court was whether the error was harmless. (*United States v. Hall*, *supra*, 58 M.J. at pp. 93-94.) During its discussion, the court explained that "[t]he members could not have found contradiction of Appellant's testimony without considering the hearsay as fact contrary to Appellant's in-court testimony." (*Id.* at p. 94.) Appellant predictably trumpets this language. (ABOM 45.)

Respondent does not dispute that *Hall* was correct based on the facts before it. But this avails appellant of nothing because the issue in *Hall* was not the same as the issue here. *Hall* would be like this case if the defendant in *Hall* had testified that her mother admitted sending her cocaine-laced tea. Under those circumstances, for the reasons discussed above, the mother's statement to the agent would have been admissible to impeach the mother's admission to her daughter and to impeach the daughter's testimony that the mother made the admission.

Finally, appellant relies on *Soto v. State* (Ga. 2009) 677 S.E.2d 95. It, too, is inapposite. In *Soto*, the murder defendant's accomplice testified that the defendant was innocent and then refused to answer any more questions. (*Id.* at p. 97.) At that point, the trial court allowed the prosecutor to admit the accomplice's out-of-court statements, in which he inculpated the defendant. (*Ibid.*) The court held that this violated the confrontation clause. (*Id.* at pp. 98-99.)

Soto might be right as far as it goes. It does not, however, address the issue presented here, where the defendant testified and offered her

accomplice's out-of-court statements for their truth. In this scenario, the prosecutor can introduce the accomplice's inconsistent out-of-court statements for the nonhearsay purpose of impeachment.

In sum, appellant cites three inapplicable cases that are not from either the United States Supreme Court or the California Supreme Court. Sound or not, the reasoning in these cases is of limited, if any, utility to the question in this case.

D. Appellant Opened the Door to Hearsay Use of Thomas's Police Statements

Even if the Court were to determine that the introduction of Thomas's police statements crossed the line from nonhearsay into hearsay, it should still hold that there was no violation of appellant's right of confrontation. Multiple courts have concluded that a defendant's trial strategy can open the door to the admission of evidence that the confrontation clause would normally bar. This Court should hold likewise, and find that appellant opened the Sixth Amendment door here.

1. There is a growing consensus of cases holding that a defendant can open the door to evidence that the confrontation clause would otherwise preclude

The Court of Appeal analyzed this issue through the prism of *People v. Reid* (N.Y. 2012) 971 N.E.2d 353 (*Reid*). (Opn. at pp. 32-33, 37.) *Reid* "raises the question whether a defendant can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause of the United States Constitution." (*Reid, supra*, 971 N.E.2d at p. 354.) "We hold that he can, and, in this case, he did." (*Ibid.*)

In *Reid*, the defendant (Reid) and his accomplice (Joseph) were charged with shooting a man to death. (*Reid, supra*, 971 N.E.2d at p. 354.) Joseph confessed that he and Reid committed the crime together. (*Ibid.*)

A theme of Reid's defense at trial was that the police investigation was inadequate. (*Reid, supra*, 971 N.E.2d at p. 355.) Reid's counsel developed this theme through questioning of some of the witnesses.

Specifically, the prosecutor called a witness who testified that Reid told him that he was with Joseph and another person (McFarland) the night of the shooting. (*Reid, supra*, 971 N.E.2d at p. 355.) Reid's counsel elicited from this witness that the police had not arrested McFarland. (*Ibid.*) Likewise, Reid's counsel got an investigating detective to admit that he received information of McFarland's potential involvement from multiple sources. (*Ibid.*)

In response, the prosecutor had the detective confirm that an "eye witness" – who could only be Joseph – told him that McFarland was definitely not there during the shooting. (*Reid, supra*, 971 N.E.2d at pp. 355-356.) Reid objected that this violated his right of confrontation. (*Id.* at p. 356.)

On appeal, "the People concede[] the admission of the testimony that a nontestifying eyewitness told the police who had been present at the murder violated the Confrontation Clause, unless the door was opened to that testimony by the defense counsel's questioning of witnesses." (*Reid, supra*, 971 N.E.2d at p. 356.) The court held that it could be.

In particular, the court explained that, "[i]f evidence barred under the Confrontation Clause were inadmissible irrespective of a defendant's actions at trial, then a defendant could attempt to delude a jury by selectively revealing only those details of a testimonial statement that are potentially helpful to the defense, while concealing from the jury other details that would tend to explain the portions introduced and place them in context." (*Reid, supra*, 971 N.E.2d at p. 357, internal quotation marks omitted.) "To avoid such unfairness and to preserve the truth-seeking goals of our courts [citation to *Street, supra*, 471 U.S. at p. 415], we hold that the

admission of testimony that violates the Confrontation Clause may be proper if the defendant opened the door to its admission." (*Ibid.*)

Reid hardly stands alone. To the contrary, *Reid* recognized that a "consensus" of "United States Courts of Appeals have held that 'a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause.'" (*Reid, supra*, 971 N.E.2d at pp. 356-357, quoting *United States v. Lopez-Medina* (10th Cir. 2010) 596 F.3d 716, 733 (*Lopez-Medina*).)

For example, in *Lopez-Medina, supra*, 596 F.3d at p. 726, defense counsel cross-examined an officer regarding the substance of certain statements a confidential informant made. On redirect, the prosecutor asked the officer about other statements from the confidential informant. (*Ibid.*) The Tenth Circuit held that defense counsel had opened the door to the officer's redirect testimony. (*Id.* at pp. 730-731.)

The court explained that "[t]he Confrontation Clause is a shield, not a sword." (*Lopez-Medina, supra*, 596 F.3d at p. 732.) "Where, as here, defense counsel purposefully and explicitly opens the door on a particular (and otherwise inadmissible) line of questioning, such conduct operates as a limited waiver allowing the government to introduce further evidence on that same topic." (*Id.* at p. 731; see also *Charles v. Thaler* (5th Cir. 2011) 629 F.3d 494, 503 ["Otherwise inadmissible hearsay evidence may be offered to impeach the defendant on a topic to which he has opened the door, and no violation of the Confrontation Clause arises"]; *United States v. Holmes* (8th Cir. 2010) 620 F.3d 836, 843 ["*Crawford* did not change the rule that a defendant can waive his right to confront witnesses by opening the door to the admission of evidence otherwise barred by the Confrontation Clause," internal quotation marks omitted]; *United States v. Acosta* (5th Cir. 2007) 475 F.3d 677, 684-685; *Ko v. Burge* (S.D.N.Y. Feb. 26, 2008, No. 06 Civ. 6826(JGK)) 2008 WL 552629 at pp. *12-13.)

It is not just *Reid* and these federal cases, either. There are also multiple state cases besides *Reid* that have reached the same conclusion.

People v. Rogers (Colo.Ct.App. 2012) 317 P.3d 1280 (*Rogers*) is particularly instructive. There, the defendant was convicted of unlawful firearm possession after the police found a gun in the back seat of a car in which the defendant and a driver were riding. (*Rogers*, *supra*, 317 P.3d at pp. 1281-1282.) The defendant denied the gun was his. (*Id.* at p. 1282.)

At trial, defense counsel got the arresting officer to testify that the driver admitted handling the gun. (*Rogers*, *supra*, 317 P.3d at p. 1282.) The prosecutor then had the officer explain that the driver also said that the defendant brought the gun with him into the car and threw it in the back seat when the car was pulled over. (*Ibid.*) The court held that, notwithstanding the confrontation clause, defense counsel's examination of the officer "opened the door to the prosecution's redirect examination and the admission of statements implicating defendant." (*Id.* at p. 1284; see also *State v. Fisher* (Kan. 2007) 154 P.3d 455, 481-483; *McClenton v. State* (Tex.Ct.App. 2005) 167 S.W.3d 86, 93-94; *Tinker v. State* (Ala.Crim.App. 2005) 932 So.2d 168, 187-88; *State v. Brooks* (Hawaii Ct.App. 2011) 264 P.3d 40, 51; *Lane v. State* (Ind.Ct.App. 2013) 997 N.E.2d 83, 93.)

In the face of this authority, appellant cites a single contrary case, *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662 (*Cromer*). (ABOM 50-52.) *Cromer* held that, even if a defendant opens the door to the admission of hearsay under the applicable rules of evidence, that does not permit introduction of evidence that the confrontation clause would otherwise exclude. (*Cromer*, 389 F.3d at pp. 678-679.)

Cromer has been repeatedly criticized and rejected. For example, the *Lopez-Medina* court carefully examined *Cromer* before concluding that "[w]e disagree with *Cromer*." (*Lopez-Medina*, *supra*, 596 F.3d at p. 733.) "'If the *Cromer* rule were correct, a defendant would be free to mislead a

jury by introducing only parts of an out-of-court statement, confident that the remainder of the statement could not be introduced because the Confrontation Clause would provide a shield.'" (*Ibid.*, quoting *Ko v. Burge*, *supra*, 2008 WL 552629 at p. *13.)

The court in *Ko v. Burge* went even further:

> The *Cromer* decision cited no authority for the proposition that a defendant cannot open the door to the admission of evidence otherwise barred by the Confrontation Clause. The decision has not been followed by any other Court of Appeals. It is inconsistent with other cases in which the Supreme Court has held that a defendant's statement, otherwise inadmissible under other constitutional provisions, can be introduced at trial to impeach a defendant's conflicting trial testimony. *See, e.g. Michigan v. Harvey*, 494 U.S. 344, 351-52 (1990) (statement taken in violation of the Sixth Amendment); *Harris v. New York*, 401 U.S. 222, 224-25 (1971) (statement taken in violation of the Fifth Amendment). ... [T]here is no basis for concluding that the Confrontation Clause can be used as a shield to allow a jury to be misled, particularly when the Supreme Court has refused to allow other constitutional rights to be used by defendants as a shield for misleading the jury.

(*Ko v. Burge*, *supra*, 2008 WL 552629 at p. *13; see also *Rogers*, *supra*, 317 P.3d at p. 1283; *State v. Brooks*, *supra*, 264 P.3d at p. 52.)

The Court should find *Cromer* unpersuasive for the same reasons other courts have. Instead, consistent with the overwhelming weight of authority, the Court should hold that a defendant can open the door to hearsay testimony that the confrontation clause would otherwise prohibit.

2. Appellant opened the door in this case

Assuming that a defendant can open the door to hearsay evidence, that raises the question of whether appellant did so in this case. The Court should conclude that she did.

The case law has not crystallized a single standard for determining whether a defendant has opened the door to hearsay evidence over her right of confrontation. In *Lopez-Medina*, defense counsel explicitly told the trial court that "'I don't care what door we open. If I open up a door, please feel free to drive into it.'" (*Lopez-Medina*, *supra*, 596 F.3d at p. 731.) The court held that, so long as this was a legitimate trial tactic from which the defendant did not dissent, the door was opened. (*Ibid.*) It did not resolve whether the door could be opened through counsel's inadvertence or neglect. (*Ibid.*)

The *Rogers* court concluded that "[a] court may assume that when an attorney fails to comply with relevant procedural rules, the attorney has made a decision to waive defendant's right of confrontation regardless of whether the attorney knew of or understood the rule or its requirements." (*Rogers*, *supra*, 317 P.3d at pp. 1283-1284.) Because "defendant's counsel introduced the driver's hearsay statement ... to elicit evidence that the driver knew of the gun and had tried to conceal it," which was "a strategic trial tactic designed to shift the jury's attention to the driver and away from defendant," the door was opened. (*Id.* at p. 1284; compare *United States v. Holmes*, *supra*, 620 F.3d at p. 844 [finding that defense counsel had not opened the door].)

Reid used a two-step test to deciding if the door was opened: (1) whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading and (2) what, if any, otherwise inadmissible evidence is reasonably necessary to correct the misleading impression. (*Reid*, *supra*, 971 N.E.2d at p. 357.)

Respondent proposes that the Court adopt *Reid*'s test. Specifically, if defense counsel offers hearsay evidence that is incomplete or misleading, then the door is opened for the prosecution to submit otherwise inadmissible evidence that is reasonably necessary to correct the misleading impression.

Even if, however, the Court were to use the *Lopez-Medina* test – i.e., defense counsel must make an intentional, strategic decision to introduce hearsay evidence – or to graft its requirements onto the *Reid* test, it would make no difference here. Either way, the Court should find that appellant's testimony about Thomas's alleged statements to her opened the door to the prosecutor's rebuttal evidence of Thomas's statements to the police.

To begin with, appellant's door-opening testimony did not come in through some inadvertent mistake. Defense counsel was on notice that, depending on how appellant testified, the prosecution might seek introduction of Thomas's police statements. (1 RT 18-19.) Yet counsel deliberately asked appellant question after question about what Thomas told her regarding the murder:

- Did he tell you what happened? (2 RT 323.)
- And what else did he tell you after he told you that it would be any easy target? What else did he tell you with respect to what happened in that garage and how Laverna ended up being dead? (2 RT 323-324.)
- Did Julius explain to you that there was a struggle, or what did he explain to you regarding the interaction between Laverna and Julius, which is what caused Julius to kill Laverna? (2 RT 324.)
- Did he tell you that at some point that Laverna was actually alive after he sliced her? (2 RT 324.)
- How did he describe to you that Laverna was alive? What did he say that Laverna was doing? (2 RT 324.)

- And did he say how many times he sliced her with the machete? (2 RT 325.)

- And he mentioned to you that [the machete] was dull? (2 RT 325.)

- Where did he say he finished what he started? What part of her body did Julius slice Laverna? Did he tell you? (2 RT 325.)

Furthermore, there was a manifest tactical reason for having appellant testify that Thomas admitted sole responsibility for – and described to her in detail – Brown's murder. Namely, defense counsel wanted to shift the blame to Thomas alone.

But, once defense counsel elicited this testimony from appellant, the jury had an incomplete and misleading understanding of Thomas's out-of-court statements. Without Detective Wheeler's rebuttal testimony, the jurors would have been left with the impression that the statements recounted by appellant – which implicated Thomas and no one else – were the only statements that Thomas made about the crime.

Simply put, a defendant should not be able to selectively reveal a witness's helpful out-of-court statements while concomitantly concealing the witness's other out-of-court statements on the same topic. (*Reid*, *supra*, 971 N.E.2d at p. 357.) To hold otherwise would sew unfairness and pervert the "truth-seeking goals" of our criminal justice system. (*Ibid.*)

Indeed, it is not hard to imagine the consequences of allowing a defendant to hide behind the confrontation clause in a situation like this. The defendant would have carte blanche to testify that any unavailable witness took credit for the crime, and there would be nothing the prosecution could do about it. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 300-302 [holding that a defendant has the right to present evidence that another person admitted guilt]; *People v. Spriggs* (1964) 60 Cal.2d 868,

875-876 [same]; Evid. Code, § 1230 [hearsay exception for declarations against interest].)

It is, of course, true that a defendant can do exactly this in cases where the prosecution does not have contrary out-of-court statements from the unavailable witness. But that should not bar the prosecution from introducing the witness's contrary out-of-court statements when they do exist. If the defendant elects to take the stand and put words in the mouth of an unavailable witness, then she should not be able to prevent the jury from hearing the rest of that witness's related statements. "The Confrontation Clause is a shield, not a sword." (*Lopez-Medina*, *supra*, 596 F.3d at p. 732.)

Therefore, the Court should hold that, under the circumstances of this case, appellant opened the door to the admission of Thomas's statements to the police when she testified that Thomas described to her how he alone killed Brown. To hold otherwise would only countenance appellant's attempt to delude the jury.

E. Any Error Was Harmless Beyond a Reasonable Doubt

Should the Court decide that the admission of Thomas's statements to the police was a violation of appellant's right of confrontation, reversal is not automatically required. Confrontation clause violations are subject to federal harmless-error analysis under *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Bryant* (2014) 60 Cal.4th 335, 395.) The reviewing court asks whether it is clear beyond a reasonable doubt that a rational jury would have reached the same verdict absent the error. (*Ibid.*)

Here, the Court should find that any error was harmless. Even without Thomas's police statements, there was a mountain of physical and circumstantial evidence establishing that appellant and Thomas killed Brown together.

In particular, the evidence showed that appellant needed money, which she did not have, to move into a new apartment on October 29. (2 RT 290.) Appellant knew that Brown would be travelling on October 28 and expected Brown to have cash on her. (2 RT 411-412.) Although appellant was destitute, on October 27, she bought a knife, pepper spray, and clothes in Thomas's size. (2 RT 198-199, 202, 246.) Then, she called the apartment manager and told her that she would have the move-in money by October 29. (2 RT 291.)

Brown went missing on October 28. (1 RT 35-36, 93.) That morning, Timm discovered that the machete and butcher knife were gone. (1 RT 69, 72, 74, 84.) Timm found blood on the side of the house and a bloody blanket in the trash can. (1 RT 85, 87.) There was also blood in the garage. (2 RT 167.) Appellant told Timm that she had spilled, and cleaned up, soda right where the blood was. (1 RT 82.) Later that day, appellant cleaned the area again. (1 RT 91.)

Brown's van, with her body inside and a bottle of cleaning solution on her back, was located close to where Thomas's cell phone put him after Brown was reported missing. (1 RT 113-114, 131.) Appellant's DNA, but not Thomas's, was on the van's steering wheel. (2 RT 196-197.) The suitcase in the van was not fully packed and there were no defensive wounds on Brown's body, suggesting she was interrupted by someone in the house while she was packing and lured into the garage where she was ambushed. (1 RT 114, 147.)

The cell phone records revealed constant communication between Thomas and appellant in the morning of October 28, with a conspicuous gap between 2:10 a.m. and 7:42 a.m. (2 RT 227-228, 232-235.) The gap ended when Thomas made calls to appellant from near where the machete was found and from near where the van was found. (2 RT 234-235.)

Although appellant mostly lied to the police about what happened the morning of October 28, she admitted that she had encountered Brown packing for her trip. (2 CT 187-188.) Appellant also repeatedly referred to Brown in the past tense before anyone knew that she was dead. (2 RT 278; 2 CT 172, 176.) And, during her trial testimony, appellant put herself at the murder scene with Thomas and confirmed that Thomas was wearing the clothes that she bought for him on October 27. (2 RT 323, 336-339.)

Against this crushing evidence, there was appellant's version of the murder. Appellant wanted the jury to believe that, Thomas – acting alone – somehow got Brown to leave her bedroom in the middle of the night and come into the garage where he was hiding. Since, according to appellant, Thomas just wanted to rob Brown, Thomas's one-man plan hinged on Brown serendipitously bringing money with her to the garage at 2:00 a.m. (2 RT 323.)

Appellant said Thomas told her he killed Brown after she recognized him, which meant that Brown saw her attacker coming yet made no effort to defend herself. (1 RT 147; 2 RT 324.) Then, after Thomas killed Brown, he supposedly called appellant from the garage, even though there is no record of Thomas making a call at Timm's house. (2 RT 232-233.) When appellant arrived inside the garage, Thomas coerced her help in covering up his crime by threatening the lives of her and her son, Alexander. (2 RT 323, 326.)

Apart from being incredible on its face, appellant's story simply did not jibe with her behavior following the murder. For example, while appellant claimed that she believed Thomas had people watching Alexander and could make good on his threat to hurt him, she made absolutely no effort to warn her son of this imminent danger. (2 RT 345; 3 RT 427-428, 431, 433.) Instead, she went furniture shopping. (3 RT 427-428, 431.)

Similarly, appellant's conduct and attitude towards Thomas were wholly inconsistent with her being scared for her own life. After Thomas had brutally murdered Brown and threatened to do the same to appellant and her son, appellant regularly used terms of endearment like "honey" and "snuggly teddy bear" to describe him. (2 RT 277, 388; 1 CT 96; 2 CT 208.)

Moreover, following their arrest, appellant repeatedly sent Thomas mash notes that gushed with longing and desire. (2 RT 265-266; 3 RT 468-469.) The letters were replete with heart drawings and declarations of appellant's everlasting love. (2 RT 265-266; 3 RT 468-469.)

Lastly, once Thomas committed suicide and appellant was free of this purported monster, she did not go to the police and tell them that Thomas had forced her to go along with him. Rather, she wrote an inscription in his memory that read, "My love is gone and I pray he is in heaven with Jesus. 7/6/81-12/16/11." (3 RT 471-472.)

In light of the overwhelming evidence against appellant, and the patent preposterousness of her story, the Court should find beyond a reasonable doubt that the jury would have reached the same verdict even if it had not heard Thomas's statements to the police.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Court of Appeal.

Dated: May 19, 2016

Respectfully submitted,

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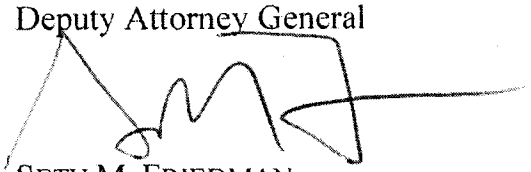

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CERTIFICATE OF COMPLIANCE

I certify that the attached respondent's answer brief on the merits uses a 13 point Times New Roman font and contains 13,769 words.

Dated: May 19, 2016

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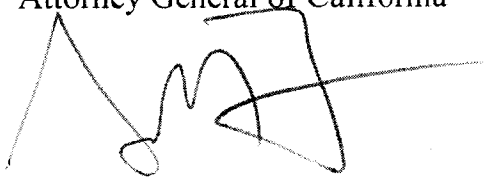

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DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Hopson**
Case No.: **S228193**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 20, 2016, I served the attached **RESPONDENT'S ANSWER BRIEF ON THE MERITS** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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(2 Copies)

Riverside County Superior Court
Clerk of the Court
For: The Honorable Jeffrey J. Prevost
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and, furthermore I declare, in compliance with California Rules of Court, rules 2.251(i)(1)(A)-(D) and 8.71 (f)(1)(A)-(D), I electronically served a copy of the above document on May 20, 2016 to Appellate Defenders, Inc.'s electronic service address eservice-criminal@adi-sandiego.com by 5:00 p.m. on the close of business day.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 20, 2016, at San Diego, California.

B. Romero
Declarant

B. Romero
Signature

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