SUPREME COURT COPY

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SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

Honorable Chief Justice Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. John Leo Capistrano* **(Capital Case)**
Supreme Court of the State of California, Case No. S067394
Los Angeles County Superior Court Case No. KA034540

Dear Honorable Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Respondent files this letter brief in response to this Court's order filed March 19, 2014, requesting briefing on the following question: "Did the admission of Michael Drebert's statement to Gladys Santos regarding defendant's role in the killing of Koen Witters violate appellant's confrontation right in light of the United States Supreme Court's conclusion in *Crawford v. Washington* (2004) 541 U.S. 36, that the Sixth Amendment's confrontation clause applies only to testimonial statements?"

The simple answer: No. The admission of Drebert's statement to Santos did not violate appellant's confrontation right as it was not testimonial under *Crawford* and, as such, was not subject to the rule of *Aranda/Bruton.*[1]

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The United States Supreme Court ruled in *Bruton, supra*, 391 U.S. 123, that a confession by a non-testifying defendant that facially incriminates a codefendant is

[1] *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 [88 S.Ct. 1620, 20 L.Ed.2d 476] (*Bruton*). At appellant's 1997 trial, the prosecutor elicited Drebert's statement to Santos in a redacted form that did not expressly

DEATH PENALTY

inadmissible in a joint trial because it violates the codefendant's right to cross-examination under the Confrontation Clause. (*Id.* at pp. 126, 135, 137.) The high court limited the scope of the *Bruton* rule in *Richardson v. Marsh* (1987) 481 U.S. 200, 211 [107 S.Ct. 1702, 95 L.Ed.2d 176] (*Richardson*) [the high court held, "the Confrontation Clause is not violated by the admission of a nontestifying codefendant's confession with a proper limiting instruction when . . . the confession is redacted to eliminate not only the defendant's name, but any reference to his or her existence."].)

In 2004, the United States Supreme Court established a new rule for determining whether hearsay statements made by an unavailable witness are admissible. (*Crawford, supra*, 541 U.S. at pp. 67-69 (*Crawford*).) The Court focused on the testimonial versus non-testimonial nature of the out-of-court statement and ruled that out-of-court *testimonial* statements are admissible only if the declarant is available at trial or if the declarant is unavailable but was previously subjected to cross-examination. (*Id.* at p. 68.) The Court declined to define the term "testimonial" in *Crawford*, although it listed grand jury testimony, prior trial testimony, ex parte testimony at a preliminary hearing, and statements taken by police officers in the course of interrogations as examples of testimonial statements. (*Id.* at pp. 51-53.) It further noted that statements made "under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial" could be considered "testimonial." (*Id.* at p. 52.)

The Court clarified in *Davis v. Washington* (2006) 547 U.S. 813 [126 S.Ct. 2266, 165 L.Ed.2d 224] (*Davis*), that only testimonial out-of-court statements render the declarant a "witness" within the meaning of the Confrontation Clause. (*Id.* at p. 828.) The Court explained, "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is

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mention either Drebert or appellant. The parties previously briefed the application of the

not subject to the Confrontation Clause." (*Davis*, *supra*, 547 U.S. at p. 821.) Subsequently, the United States Supreme Court, this Court, and appellate courts at all levels have affirmed that the confrontation clause has *no application* to out-of-court statements that are not testimonial in nature. (*See Giles v. California* (2008) 554 U.S. 353, 376 ("only *testimonial* statements are excluded by the Confrontation Clause"); *Whorton v. Bockting* (2007) 549 U.S. 406, 420 [127 S.Ct. 1173, 167 L.Ed.2d 1]; *People v. Gutierrez* (2009) 45 Cal.4th 789, 812-813 [admission of child's statement to aunt did not was not testimonial and did not violate Sixth Amendment right to confront witnesses even though it was improperly admitted as a spontaneous statement].)

This Court has previously declined to expressly hold that the *Aranda/Bruton* rule has no application when the statement admitted at trial is a *codefendant's statement* that would not be characterized as testimonial under *Crawford*. (See, e.g., *People v. Jennings* (2010) 50 Cal.4th 616, 652 [declining to address constitutional claims raised concerning codefendant's statements made to psychologist who testified as expert trial witness on codefendant's behalf "because even assuming it was error under *Crawford* or *Aranda* and *Bruton* to admit the disputed statements made by [codefendant] Michelle to Kaser-Boyd, such error was harmless beyond a reasonable doubt"]; cf. *People v. Lewis* (2008) 43 Cal.4th 415, 507 [codefendant's statement to police was testimonial, but any error was harmless].)

In contrast, however, the lower appellate courts and several federal courts have held that the confrontation clause has no application to out-of-court non-testimonial statements made by codefendants. (See, e.g., *People v. Arceo* (2011) 195 Cal.App.4th 556, 576-578 [statements by codefendants to fellow gang members were not testimonial]; *People v. Cervantes* (2004) 118 Cal.App.4th 162, 173-177 [codefendant's statement to friend from whom medical assistance sought after crime was not testimonial]; *Desai v. Booker*, 732

Bruton rule to this statement. (AOB 121-135; RB 116-126; Reply 20-24.)

F.3d 628, 630 (6th Cir. 2013) [Confrontation Clause no longer applies to non-testimonial hearsay, such as the friend-to-friend confession of Desai's codefendant]; *United States v. Figueroa–Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 [*Bruton* must be viewed "through the lens of *Crawford* and *Davis*. The threshold question in every case is whether the challenged statement is testimonial. If it is not, the Confrontation Clause has no 'application'"]; see also *United States v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 ["[b]ecause it is premised on the Confrontation Clause, the *Bruton* rule, like the Confrontation Clause itself, does not apply to non-testimonial statements"].)

Respondent submits these cases were correctly decided and should be found persuasive by this Court. The threshold question to evaluate a Sixth Amendment confrontation clause claim is whether a non-testifying defendant's statement incriminating a codefendant is testimonial. (See *Arceo*, *supra*, 195 Cal.App.4th at pp. 573-575.) If the statement is testimonial, *Bruton* applies. If it is not testimonial, *Bruton* is inapplicable and the normal rules of evidence apply. (*Ibid.*) Thus, if a non-testifying defendant's statement incriminates a codefendant, but is not testimonial, the statement may be admitted if it constitutes non-hearsay or an exception to the hearsay rule and is otherwise trustworthy. (*Ibid.*; see also *People v. Garcia* (2008) 168 Cal.App.4th 261, 291 [finding that, "[i]f the statement is not testimonial, it does not implicate the confrontation clause, and the issue is simply whether the statement is admissible under state law as an exception to the hearsay rule"].)

Here, Drebert's statement to Santos is not subject to *Bruton* because the statement was not testimonial under *Crawford*. (*Arceo*, *supra*, 195 Cal.App.4th at pp. 573-575; *Cervantes*, *supra*, 118 Cal.App.4th at pp. 173-177.) Drebert spoke with Santos, a friend and civilian. Drebert initiated the conversation, which occurred in Santos's apartment. At the time the conversation occurred, none of the participants in the murder of Witters had been apprehended, and the group had committed additional crimes against E.G. and J.S. and probably the Weirs while avoiding apprehension by authorities. Drebert had no

reason to believe his statement to Santos would be used later in future judicial proceedings. No objectively reasonable witness would view Drebert's statement as an "interrogation" within the meaning of *Crawford.* Thus, his statement was not "testimonial," and there was no violation of appellant's constitutional right to confrontation. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 813 [a three-year-old boy's statement to his aunt was not testimonial and did not violate Sixth Amendment right to confront witnesses]; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [statement to friend at school not testimonial], disapproved on other grounds in *People v. Riccardi* (2012) 54 Cal.4th 758, 824, fn. 32; *Cervantes*, *supra*, 118 Cal.App.4th at pp. 173-174 [statements about crimes to longtime friend while seeking medical assistance at defendant's home not testimonial].)

Appellant has not claimed that, absent the *Bruton* rule, Drebert's statement would not qualify for admission under an applicable state-law hearsay exception. (AOB 121-135; Reply 20-24.)[2] In any event, Drebert's statement qualified as a declaration against penal interest. "Evidence Code section 1230 provides that the out-of-court declaration of an unavailable witness may be admitted for its truth if the statement, when made, was against the declarant's penal interest." (*People v. Lucas* (1995) 12 Cal.4th 415, 454.) The proponent offering a statement under this hearsay exception must show that the declarant is unavailable, that the declaration was against the declarant's penal interest, and that the declaration was sufficiently reliable to warrant admission. (*Id.* at p. 462.) "The focus of the declaration against interest exception to the hearsay rule is the basic trustworthiness of the declaration." (*People v. Frierson* (1991) 53 Cal.3d 730, 745.) In

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[2] Indeed, appellant seemingly concedes Drebert's statement to Santos qualified as a declaration against penal interest but for the *Bruton* exclusionary rule: "[s]uch otherwise rank hearsay could only be admissible in this case as a declaration against penal interest (Evid. Code, § 1230); however, the trial court had previously, and correctly, ruled that pursuant to *Aranda*, the content of Drebert's statements was not admissible against Capistrano." (AOB 130-131.)

determining whether a statement is sufficiently trustworthy to be admissible under Evidence Code section 1230, the trial court may take into account the words, the circumstances under which they were uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (*People v. Brown* (2003) 31 Cal.4th 518, 536; *Frierson, supra*, at p. 745.)

During his conversation with Santos, Drebert strongly inculpated himself in the murder of Witters, admitting that he had cased the victim's apartment with appellant, had tied the victim at appellant's direction, and had assisted in strangling the victim. (6RT 2548-2551.) The words, the circumstances under which they were uttered, the possible motivation of the declarant (Drebert), and Drebert's relationship to appellant all indicate that Drebert's statement was sufficiently trustworthy to be admissible under Evidence Code section 1230. In addition to the circumstances described above, in December 1995 and January 1996, Santos saw appellant, Drebert, and Pritchard on a regular basis. (5RT 2426.) Drebert called appellant, "Dad." (5RT 2427-2428.) When they met in October 1995, appellant introduced Drebert and Pritchard to Santos as the "big brothers" of Justine, a teenager Santos believed was appellant's daughter and who stayed with Santos for three nights each week. (6RT 2540, 2543-2544.)

Given that Petitioner's confrontation rights were not implicated by the admission of Drebert's non-testimonial statement, even assuming the trial court erroneously admitted Drebert's statement to Santos pursuant to state law (Evid. Code, § 1230), any error was harmless as it was not reasonably probable that a contrary result would have ensued in its absence. (*People v. Duarte* (2000) 24 Cal.4th 603, 618-619 [evidence admitted in violation of Evidence Code section 1230 analyzed under *People v. Watson* (1956) 46 Cal.2d 818, 836].)

Appellant made a detailed confession to the murder of Koen Witters that was corroborated by other evidence. Indeed, his confession provided details that could only have been known by the killer or someone present when the murder occurred.

Particularly, appellant's confession revealed that he had observed the victim shaving prior to entering the apartment to rob him (5RT 2442); investigating officers found shaving cream and stubble in Witters's bathroom sink. (5RT 2372). Appellant admitted strangling and cutting the victim (5RT 2439-2441, 2443); Witters was bound, gagged, strangled, and his wrists cut, and the small quantity of blood suggested Witters was dead or dying when the cuts were made (5RT 2368, 2370, 2382, 2389-2390; 7RT 2812-2820, 2831-2832). Witters's Apple MacIntosh computer was stolen during the robbery. (5RT 2344-2345, 2351-2354, 2357-2358, 2373-2376, 2381.) After the murder, appellant asked Santos if she knew anyone who wanted a desktop Apple MacIntosh computer. (5RT 2447-2448, 2461.) Appellant commented that the victim "liked to travel to Europe" (5RT 2447) and liked Asian women (5RT 2445, 2447); Witters was a Belgian citizen, his girlfriend was Taiwanese, and a photograph of an Asian woman was found on his ransacked bed. (5RT 2334-2337, 2346-2348, 2371-2372.) The state of Witters body—bound, gagged, and strangled and lying face down on the bedroom floor—left no question that his killing was premeditated. (5RT 2359-2382; 7RT 2825, 2831-2835.) The ransacked state of the apartment and missing cellular phone, video cassette recorder, and desktop computer provided ample independent proof corroborating that the murder occurred during a residential burglary and robbery. (5RT 2370-2381, 2409.)

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For these reasons and the arguments previously presented in the Respondent's Brief, appellant's claim the admission of Drebert's statement to Santos violated his Sixth Amendment right to confront witnesses should be rejected.

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. John Leo Capistrano***
No.: **S067394**

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.

On March 28, 2014, I electronically filed the attached **SUPPLEMENTAL LETTER BRIEF** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On March 28, 2014, I served the attached **SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

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The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

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 March 28, 2014, at Los Angeles, California.

Bernie Santos
Declarant

Signature

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