SUPREME COURT COPY

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SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

April 1, 2014

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

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

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

On March 19, 2014 this Court ordered the parties to brief by April 1 the following question:

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

This question necessarily presents another question, i.e., is the long-standing prohibition set forth in *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) against admitting an incriminating hearsay statement of a nontestifying codefendant at a joint trial abrogated in light of *Crawford* if the statement may be deemed "nontestimonial" within the meaning of *Crawford* and its progeny. As explained below, the *Bruton* doctrine still prohibits the admission of such statements.

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

As a preliminary matter, the Court should not, in this particular case, answer the question posed. The matter was not litigated at trial, where the People conceded that Drebert's statements were inadmissible against appellant under *Aranda/Bruton*. (1RT:119; 3CT: 594-598.) Generally, a new issue or theory of admissibility of evidence may not be presented for the first time on appeal unless it involves a question of law only and the factual record relating to that new issue or theory was fully developed below. (See *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 [cataloguing the circumstances

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under which a new legal theory will not be considered on appeal and noting that defendant's lack of "notice of the new theory and thus no opportunity to present evidence in opposition" merits rejection of that theory]; *In re P.C.* (2006) 137 Cal.App.4th 279, 287 [reciting the general rule of forfeiture that a "'new theory may not be presented for the first time on appeal unless it raises only a question of law and can be decided on undisputed facts.' [Citations omitted.]"]; see also *People v. Sakarias* (2000) 22 Cal.4th 596, 646 [declining to take judicial notice of matters not presented to and considered by the trial court, because of unfairness in allowing "'one side to press an issue of theory on appeal that was not raised below.' [citations omitted]".)

In this case, the application of *Crawford* involves factual issues that were not litigated below and that defendant had no reason to know needed to be investigated and presented. The guidelines adopted by *Crawford* and it progeny are inherently fact-based: the relevant inquiry is the purpose that reasonable participants would have had in making the statement, as ascertained from the individuals' statements and actions and the circumstances in which the hearsay conversation occurred. (*Michigan v. Bryant* (2011) ___U.S.___, 131 S.Ct. 1143, 1156.) Stated another way, a testimonial statement encompasses pretrial statements that declarants would reasonably expect to be used prosecutorially. (*Crawford, supra*, 541 U.S. at p. 51.) In this case, if defense counsel had notice that the admission of Drebert's statement to Santos was to be contested under *Crawford*, he should have, and as a reasonably competent attorney would have, investigated the circumstances of Drebert's statement in order to determine whether it was testimonial. For example, an investigation could have been conducted to show that Drebert knew that he was soon to be arrested and that he was making a statement to Santos in order to cast the blame on Capistrano in the coming legal proceedings, which is exactly what happened in this case. Also, if the admission of Drebert's statement was to be contested, defense counsel could have investigated whether Drebert actually said the things Santos attributed to him about Mr. Capistrano by interviewing Eric Pritchard, who was present during the statement.[1] However, Mr. Capistrano had no notice of the legal issue the court now raises, he had no opportunity to be heard, and the record is incomplete. For all three of these reasons, which rest on the defendant's due process rights to notice, an opportunity to be heard, and the right to a reliable, complete and accurate record on appeal, Mr. Capistrano's case is an inappropriate – indeed, an unfair – vehicle for resolution of the legal issues inherent in the court's question.

Further, the factual and legal framework within which defense counsel operated and gave advice to Mr. Capistrano was built on the strength of the prosecution's case as everyone at trial understood it – i.e., that Drebert's statement was inadmissible against

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[1] Positing what could have been done at trial is speculative, but that is the reason for the forfeiture rule – because the matter was not litigated at trial, the record is incomplete.

Mr. Capistrano. This framework affected all advice counsel gave to Mr. Capistrano, including but not limited to advice integrally related to a potential decision to plead guilty or a decision to testify.

Appellant presumes it was exactly these considerations which prompted respondent's decision *not* to assert in the briefing on appeal that the *Bruton* lines of cases has been significantly limited by *Crawford*, even though respondent's brief was filed in 2007, well after the high court issued the *Crawford* opinion. Witkin explains that "every brief should contain a legal argument with citation of authorities on the points made. If none is furnished on a particular point, the [appellate] court may treat it waived, and pass it without consideration." (9 Witkin, Cal. Procedure (5th ed. 2008) § 701, p. 769.)

Thus, this court should accept respondent's concession at trial and the lower court's determination that Drebert's statement was inadmissible, and should further find that the *Crawford* issue has been forfeited here by respondent's failure to raise it on appeal. The question for this court should be whether, in light of the trial court's then well-founded *Aranda/Bruton* ruling, the prosecutor violated that ruling by eliciting testimony from Santos that informed the jury that codefendant Drebert told her that Mr. Capistrano was the killer and, if so, whether the error was prejudicial under *Chapman v. California* (1967) 386 U.S. 18. (AOB:121-135.)

Quite simply, having conceded at trial that Drebert's statement was inadmissible, the People should not now be given an opportunity to argue that the statement was admissible under *Crawford* or exceptions to the hearsay rule. (Cf. *People v. Livaditis* (1992) 2 Cal.4th 759, 778 [proponent's failure to assert exceptions to the hearsay rule in response to a hearsay objection by opponent forfeits proponent's right to argue exception on appeal]; *People v. Mullens* (2004) 119 Cal.App.4th 648, 669 and fn. 9 [prosecution waived hearsay objection by failing to make it at trial]; see also *People v. Kennedy* (2005) 36 Cal.4th 595, 612 [rule that claim is forfeited if no objection is made ensures that the opposing party is given an opportunity to address the objection].)

If this Court decides, over appellant's objections, that this case is the appropriate vehicle in which to reach the *Crawford* question posed by the Court, then appellant respectfully requests that this Court order full briefing on the merits and that he be provided more time within which to state appellant's position. As is briefly described below, the interplay between *Crawford* and *Bruton* is complex. Since the United States Supreme Court has not decided if or how *Crawford* applies to *Bruton*'s rule against the admission of incriminating hearsay statements of a codefendant at a joint trial, more time is needed in order to protect appellant's due process right to meaningful appellate review and his right to the effective assistance of appellate counsel.

Crawford Does Not Abrogate the *Bruton* Doctrine

As to the substance of the Court's question, admission of Drebert's statements to Gladys Santos regarding appellant's role in the Koen Witters killing violated *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*) as appellant argued at trial and argues on appeal. *Crawford* sets forth an absolute test for constitutional admissibility of testimonial evidence – if the evidence is testimonial, it must be subject to cross-examination. However, *Crawford* had no effect on the *Bruton* doctrine. *Bruton* sets forth a different test that serves a different purpose. It sets forth a rule of constitutional harmfulness in a very specific and limited context – that the incriminating hearsay statement of a non-testifying joined codefendant is so damaging to the non-declarant defendant and so suspect that jurors cannot be trusted to give such evidence the minimal weight it logically deserves, whatever instructions the trial judge might give.

In *Bruton*, the United States Supreme Court held that admission of a codefendant's confession that implicated defendant at a joint trial constituted prejudicial error even though the trial court gave clear, concise, and understandable instruction that the confession could only be used against the codefendant and must be disregarded with respect to the defendant. In so doing, the Court overruled *Delli Paoli v. United States* (1968) 352 U.S. 232 (*Delli Paoli*) to the extent it had held that a confessor's extrajudicial statement that his codefendant participated with him in committing the crime was admissible against the codefendant as long at the jury had sufficiently clear instructions to disregard the inadmissible hearsay reference to the codefendant. The *Bruton* court explained:

> [A]s was recognized in *Jackson v. Denno, supra,*[2] there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. [Citations.] Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others. The unreliability of such evidence is intolerably compounded when the alleged accomplice, as here, does not testify and cannot be tested by cross-examination.

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[2] *Jackson v. Denno* (1964) 378 U.S. 368.

(*Bruton, supra,* 391 U.S. at pp. 135-136.)

Indeed, the Sixth Amendment guarantees more than just a right to confront witnesses. It also guarantees the right to an impartial jury. (U.S. Const., 6th Amend.) Appellant submits that *Bruton*, with its concern about the limited ability of jurors to follow instructions in the face of powerfully incriminating evidence, also rests at least equally on this clause of the Sixth Amendment. In addition, since *Bruton* relied in part on *Jackson v. Denno, supra*, 378 U.S. 368, the decision also rests at least equally on a defendant's right to due process of law under the Fourteenth Amendment.

The *Bruton* decision was in accord with and relied upon this Court's decision in *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*). In *Aranda*, which presaged *Bruton*, Chief Justice Traynor recognized the import of the high court's decision in *Jackson v. Denno, supra*, 378 U.S. 368 as it applied to the constitutional imperatives involved in the admissibility of codefendant's statement implicating another defendant at a joint trial:

> Although *Jackson* was directly concerned with obviating any risk that a jury might rely on an unconstitutionally obtained confession in determining the defendant's guilt, its logic extends to obviating the risks that the jury may rely on any inadmissible statements. If, [as *Jackson* held] it is a denial of due process to rely on a jury's presumed ability to disregard an involuntary confession, it may also be a denial of due process to rely on a jury's presumed ability to disregard a codefendant's confession implicating another defendant when it is determining that defendant's guilt or innocence.

(*Aranda, supra*, 63 Cal.2d at pp. 528-529.)

Thus, while *Bruton* has a Sixth Amendment Confrontation Clause component, the primary concern of *Bruton* was the high likelihood that juries cannot be trusted to actually disregard certain very prejudicial inadmissible evidence that they have already heard. The goal of both *Bruton* and *Aranda* is to ensure that a defendant receive due process of law and a fair trial by an impartial jury. Thus, whether a statement of a codefendant is testimonial or not, if it is incriminating against a nondeclarant joined defendant, *Bruton's* test of constitutional harmfulness still applies.

For years, *Bruton* was understood to apply to all co-defendant statements, regardless of whether they were made in a testimonial setting. (See, e.g. *People v. Schmaus* (2003) 109 Cal.App.4th 846, 854-856 [statements to cell mate]; *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1645 [same].)

Recently, the United States Supreme Court held the Confrontation Clause applies

only to "testimonial" statements. (*Davis v. Washington* (2006) 547 U.S. 813, 821 (*Davis*) ["Only [testimonial statements] cause the declarant to be a 'witness' within the meaning of the Confrontation Clause."]; *Crawford v. Washington* (2004) 541 U.S. 36, 51 (*Crawford*).) Although *Bruton* has a Confrontation Clause component, the United States Supreme Court has not addressed the effect, if any, of the testimonial/non-testimonial distinction on *Bruton* and its progeny.[3] Nor could appellant find a case in which this Court squarely addressed the applicability of *Crawford* to *Bruton*.

Appellant located two Courts of Appeal decisions after *Crawford* that have specifically addressed the admissibility of an incriminating nontestimonial statement by a codefendent against the nondeclarant defendant. (See *People v. Cervantes* (2004) 118 Cal.App.4th 162, 169-178 (*Cervantes*); *People v. Arceo* (2011) 195 Cal.App.4th 556, 571-572, 575 (*Arceo*).) Neither of these cases addressed the Sixth Amendment right to an impartial jury or the Fourteenth Amendment due process principles of *Jackson v. Denno*, *supra*, 378 U.S. 368; they discussed only the interaction of *Crawford* and *Bruton*. Moreover, neither was a capital case. The high court has recognized – particularly with respect to rules rooted in reliability concerns – that different rules may apply in capital and non-capital contexts. (See, e.g., *Beck v. Alabama* (1980) 447 U.S. 625 [in a state capital case the jury cannot, consistent with due process, be given an "all or nothing choice" and must be given the option of convicting a capital defendant on a lesser charge, where applicable].)

In *Cervantes*, *supra*, 118 Cal.App.4th at pp. 169-174, the court held that a statement against penal interest to a friend was admissible against his codefendants where the facts showed that the declarant defendant did not reasonably anticipate that the statement would be used at trial. The court found the statement was thus not testimonial within the meaning of *Crawford* and that indicia of reliability of the statement, that had been found by the trial court, rendered the admission of the statement constitutionally permissible. (*Id.* at pp. 174-178.)

In *Arceo, supra,* 195 Cal.App.4th at pp. 571-572, 575, the Court of Appeal directly addressed *Crawford*'s applicability to *Bruton* in the context of incriminating codefendant statements. The court held that although the United States Supreme Court has not

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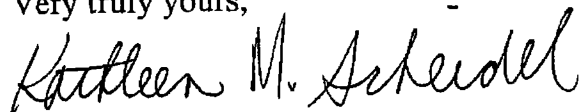
[3] The Supreme Court's recent cases limiting the Confrontation Clause to testimonial statements have not addressed statements from codefendants. (*Crawford, supra*, 541 U.S. at p. 38 [statements to police from defendant's wife who witnessed assault]; *Davis, supra*, 547 U.S. at p. 817 [911 call from victim]; *Whorton v. Bockting* (2007) 549 U.S. 406, 411 [child sexual abuse victim's prior statements]; *Michigan v. Bryant, supra,* 131 S.Ct. at p. 1150 [fatally wounded victim's statements to police officers].)

overruled *Bruton* in *Crawford* or any post-*Crawford* case, *Crawford* and its progeny apply only to testimonial statements and extrajudicial statements by nontestifying codefendants are admissible against the nondeclarant defendant as long as they satisfy state law exceptions to the hearsay rule and otherwise satisfy the constitutional requirement of trustworthiness. (*Id.* at p. 575, citing *United States v. Johnson* (6th Cir. 2009) 581 F.3d 320, 326 [because it is based on the Confrontation Clause, the *Bruton* rule does not apply to nontestimonial statements] and *United States v. Figueroa-Cartagena* (1st Cir. 2010) 612 F.3d 69, 85 [*Bruton* must be viewed through the lens of *Crawford* and its progeny].)

Finally, appellant respectfully submits that *Cervantes* and *Arceo* were wrongly decided. *Bruton* recognized that codefendant statements, more so than other types of hearsay, implicate the values protected by the Sixth and Fourteenth Amendments. Because of the special nature of codefendant statements, the Supreme Court has held that measures such as limiting jury instructions which might suffice to render the admission of other types of hearsay constitutional are not sufficient in the case of codefendant statements. (*Bruton, supra* [jury instructed to limit codefendent statement implicating defendant to codefendant]; *Gray v. Maryland* (1998) 523 U.S. 185, 195 [admission of statements unconstitutional where mention of the nondeclarant defendant superficially redacted.]) Whether a codefendant's statements are testimonial or not, they remain uniquely devastating and inherently unreliable – unreliability which is "intolerably compounded" by the lack of cross examination. Codefendant statements "create[] a special, and vital, need for cross-examination[.]" (*Gray v. Maryland, supra*, 523 U.S. 194.) The admission of such a statement therefore deprives a defendant of his rights to due process, a fair trial, to an impartial jury and to confront witnesses. (U.S. Const., 6th and 14th Amends.)

For all the foregoing reasons, admission of codefendant Drebert's statements implicating appellant, without an opportunity for appellant to cross examine Drebert, violated *Bruton* and the Sixth, Eighth, and Fourteenth Amendments regardless of whether the statements were testimonial. For all the reasons stated in appellant's opening and reply brief, that error was prejudicial.

Very truly yours,



KATHLEEN M. SCHEIDEL
Assistant State Public Defender

DECLARATION OF SERVICE

Re: *People v. John Leo Capistrano*

No.: KA 034540
Calif. Supreme Ct. No. S067394

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

LETTER BRIEF DATED APRIL 1, 2014

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

Office of the Attorney General
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Michael Satris
PO. Box 337
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Mr. John L. Capistrano
E-43412 1-EB-67
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San Quentin, CA 94974

Each said envelope was then, on April 1, 2014, sealed and deposited in the United States mail at Oakland, California, the county in which I am employed, with the postage thereon fully prepaid. I declare under penalty of perjury that the foregoing is true and correct.

Signed this April 1, 2014, at Oakland, California.

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DECLARANT