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DEPARTMENT OF JUSTICE

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SUPREME COURT COPY

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SUPREME COURT
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Frederick K. Ohlrich Clerk
Deputy

The Honorable Frederick K. Ohlrich, Clerk
Supreme Court of California
350 McAllister Street, First Floor
San Francisco, California 94102-4797

RE: *People v. Erven Blacksher*
Supreme Court of the State of California, Case No. S076582

Dear Mr. Ohlrich:

At the Court's invitation, respondent files this reply to appellant's Supplemental Letter Brief ("SLB").

I. *PEOPLE V. OSORIO* (2008) 165 CAL.APP.4TH 603 AND THE PROSECUTION'S IMPEACHMENT OF EVA BLACKSHER'S PRELMINARY HEARING TESTIMONY

A. A "'Primary Purpose'" Rule Is Unnecessary

Appellant acknowledges that state and federal law recognizes a party's ability to impeach its own witness. (SLB 1, 4.) However, he contends public policy considerations support a limitation on the prosecution's ability to impeach its own hearsay witness with prior inconsistent statements. (SLB 1.) Specifically, appellant suggests this Court adopt a "'primary purpose'" rule, which would ensure that impeachment of a hearsay declarant with inconsistent statements is for the purpose of attacking credibility and not to secure admission of otherwise inadmissible evidence. (SLB 1.)

In support of his position, appellant relies primarily on Broun et al., *McCormick on Evidence* (6th Ed. 2006) § 38 (*McCormick*), which, in essence, cautions against allowing the prosecution to introduce a Trojan horse to the jury by disguising inadmissible substantive evidence as purported impeachment evidence. (SLB 3.) Relying on *McCormick*, appellant advances a "'primary purpose'" rule, which would encourage trial courts to uncover any prosecutorial subterfuge by ascertaining the purpose of the proffered evidence.

As a threshold matter, such a rule is unnecessary because it is redundant. The prosecution, like any party litigant, must advance legal grounds for admission of proffered evidence and a trial court must base a decision to admit or exclude such evidence on an established statutory framework. This vetting process necessarily incorporates assessing the

purpose of the evidence. That is precisely what happened here. During the course of Ruth's testimony, in response to defense objections, the trial court asked the prosecution to state its grounds for admission of Ruth's testimony regarding the restraining order. (RT 2145-2148.) The prosecution responded with several statutory bases, including for the purpose of impeaching Eva's former testimony in which she declaimed knowledge of the restraining order or participation in seeking the order. (RT 2145-2150.) The trial court initially based admission of the relevant portion of Ruth's testimony on several statutory grounds related to impeachment and as substantive evidence. (RT 2151-2154.) However, upon further consideration, the court limited the evidence to impeachment purposes only. (RT 2169-2172.) Thus, the trial court conducted a "'primary purpose'" inquiry regarding the evidence at issue. There is no need for this Court to specially mandate such a rule.

Further, appellant completely disregards that the trial court instructed the jury that it was to consider that portion of Ruth's testimony, which attributed statements to Eva concerning the restraining order, only as inconsistent statements for the purpose of impeaching Eva's former testimony. (RT 2172.) Thus, appellant's concern about the risks that a jury might misuse such evidence (SLB 3), is baseless in this case.

Apart from seeking a prophylactic rule generally, appellant also contends the prosecution's machinations in this case, in particular, demonstrate the need for closer scrutiny of purported impeachment evidence. To illuminate the alleged disingenuousness of the prosecution, he contends there was nothing useful about Eva's testimony in establishing any facts of consequence other than to set the stage for impermissibly introducing Ruth's testimony as substantive evidence cloaked as impeachment. (SLB 4.) However, inspection of Eva's preliminary hearing testimony, admitted at trial, demonstrates that appellant's attribution of Machiavellian-like motives to the prosecution is baseless.

Eva's testimony was valuable because she was the only percipient witness to the events, aside from appellant, who lived to tell. She testified that appellant lived in a house on her property and he had a key to her house. (CT 103, 107.) Eva stated that appellant was at her house on the day in question and that Versenia and Torey were also there and in their rooms. (CT 98.) Appellant entered Eva's bedroom and asked her about supper. (*Ibid.*) After appellant left, Eva heard Versenia call out to her that she had heard a gunshot. When Eva got up, she saw Versenia who fell into her arms and was bleeding. (CT 99.) Eva acknowledged hearing a gunshot. (*Ibid.*) She explained that when Versenia came to her, she could not communicate with Versenia because Versenia "was up in heaven." (CT 108.) Eva confirmed there were no strangers in her house that morning. (CT 112.) As for Eva's memory challenges, she stated that her memory was generally intact at the time the events took place. (CT 105.) Eva was able to recall specifically that she was outside when she spoke to the police. (CT 109.) It was only after defense counsel repeatedly suggested to Eva, during cross-examination, that she had memory problems at the time of the murders, did Eva say, "Right. Right." (CT 105-106.) Given Eva's testimony, this is not a case, such as that in *U.S. v. Patterson* (7th Cir. 1994) 23 F.3d 1239 (SLB 4), where the prosecution called a witness knowing the witness would not provide useful testimony with the eventual goal of deluding the jury into considering the impeachment evidence as substantive evidence.

After acknowledging the absence of a prohibition against a party impeaching its own witness, appellant cites to *People v. Lawrence* (1893) 21 Cal. 368 (*Lawrence*),[1] a 137-year-old case from this Court, for the proposition that only the party against whom the hearsay evidence was introduced should be allowed to impeach that testimony with a prior inconsistent statement. (SLB at 3.) However, a close reading of *Lawrence* reveals that it is not helpful to appellant.

In *Lawrence*, the prosecution introduced the dying declarations of the victim against the defendant. The defendant sought to impeach the deceased declarant with inconsistent statements, which the court excluded. (*Lawrence*, *supra*, 21 Cal. at p. 371.) In finding this to be reversible error, the Court repeatedly observed that there was no opportunity for cross-examination of the deceased declarant. (*Id.* at pp. 371-372.) Therefore, the Court found the interests of justice would be ill-served if the defendant did not have the opportunity to impeach the hearsay declarant with his allegedly inconsistent statements, given the absence of an opportunity to cross-examine him. (*Id.* at p. 372.)

Here, unlike *Lawrence*, Eva testified at the preliminary hearing and was subject to cross-examination by the defense. (See generally CT 97-116.) Further, the *Lawrence* court noted there was nothing in the record as to the basis for the trial court's exclusion of the hearsay declarant's inconsistent statements. (*Lawrence*, *supra*, 21 Cal. at p. 371.) As a result, the Court's holding related only to the facts before it. Moreover, appellant offers *Lawrence* for the proposition that *only* the party against whom hearsay was introduced should be allowed to impeach with inconsistent statements. (SLB 6.) *Lawrence* makes no such pronouncement limiting the use of impeachment evidence. Accordingly, appellant's effort to have the Court interpret *Lawrence* as support of the decision and reasoning of *People v. Beyea* (1974) 38 Cal.App.3d 176 (*Beyea*) (SLB 3) should be rejected.

Further, insofar as Ruth's testimony related Eva's statement that appellant threatened to kill his nephew Torey (RT 2154-2156), it should be noted that appellant repeatedly told other family members that he was fed up with Torey and wanted to kill him and this evidence was before the jury (RT 2134-2136, 2501-2502, 2506-2507.) Consequently, appellant's contention that Ruth's testimony in this regard was "of critical importance" (SLB 5) is without merit. Additionally, the threats attributed to appellant are not admissions of guilt, as he suggests (SLB 5).

In sum, appellant has failed to demonstrate that the prosecution improperly used impeachment evidence as a means to get inadmissible substantive evidence before the jury. He has also failed to establish the necessity for a new rule to forestall the possibility that this might occur.

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[1] Appellant initially cites the case as "*People v. Lawrence* (1963) 21 Cal.3d 368, 371-72." (SLB at 3.)

B. This Court Should Adopt *Osorio*'s Reasoning and Conclusion Regarding Evidence Code Section 1202

Appellant prefers the conclusion and reasoning of *Beyea* to that found in *People v. Osorio* (2008) 165 Cal.App.4th 603 (*Osorio*). That stands to reason. However, for the reasons we argued in our Supplemental Brief, in addition to those below, *Osorio* is the better reasoned decision and this Court should adopt its holding and reasoning with respect to whether a party can impeach its own hearsay declarant with prior inconsistent statements.

In an effort to shore up *Beyea*, appellant contends the decision and reasoning is founded upon more than just the Law Revision Comments. He suggests that *Beyea*'s limitation that only the party against whom the hearsay is offered can impeach with prior inconsistent statements has support in *Lawrence*. As argued above, *Lawrence* neither imposes nor supports such a restriction. (SLB 6.)

Further, as we stated in our Supplemental Letter Brief, the *Beyea* court acknowledged that the plain language of Evidence Code section 1202 (i.e., "read literally") "appears to permit" the very practice the court chose to disapprove. (*Beyea*, *supra*, 38 Cal.App.3d 176 at p. 193.)

Moreover, the factual posture of *Beyea* bears no resemblance to that in this case. The statements at issue in *Beyea* were known to the prosecution prior to the defendants' preliminary hearing. In one instance, the inconsistent statements were made to police; in the other, at a different preliminary hearing not involving the defendants. (*Beyea*, *supra*, 38 Cal.App.3d 176 at p. 192.) The *Beyea* court found it dispositive that the defense did not learn of the statements until trial, when it had no opportunity to cross-examine the hearsay declarants. The *Beyea* court observed that this enabled the prosecution to further its own case at a decided disadvantage to the defendants. (*Id.* at p. 194.) Here, in contrast, the statements at issue were generated at the preliminary hearing, when the defense was in a position to cross-examine Eva.[2] In fact, in *Beyea*, the appellate court suggested that, had the inconsistent statements been presented during the defendants' preliminary hearing—as they were in this case—the fairness concern would be moot. (*Ibid.*) Therefore, even under *Beyea*, it is evident that the prosecution in this case did not enjoy an unfair advantage at trial when it introduced Eva's inconsistent statements through Ruth's testimony.

In short, there is nothing inherently unfair in letting the prosecution impeach its own hearsay witness with prior inconsistent statements. Evidence Code sections 785 and 1202 provide for this practice, as *Osorio* correctly recognized.

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[2] Should appellant contend he was denied the opportunity to cross-examine Eva because he was not aware of her statements to Ruth until after Ruth testified, the contention has no merit. The record suggests that Ruth transported Eva to court for the preliminary hearing and was sitting in court during Eva's testimony. (CT 198.) So, presumably, Eva remained available to the defense after it learned of her statements to Ruth during the prosecutor's questioning.

II. *MICHIGAN V. BRYANT* (2011) 562 U.S. ___ [131 S.CT. 1143] AND EVA'S NON-TESTIMONIAL STATEMENTS

Appellant, in an effort to avoid the blow that *Michigan v. Bryant* (2011) 562 U.S. ___ [131 S.Ct. 1143] (*Bryant*) deals to his claim that Eva's statements to Officer Neilsen were testimonial, misreads the case in applying it to the facts here.

First, appellant ascribes to *Bryant* a requirement that, for the statements at issue to be considered non-testimonial, the hearsay declarant must be injured. (SLB 12.) *Bryant* imposes no such restriction. However, *Bryant* does explain that the hearsay declarant's physical or medical condition be taken into account as a relevant circumstance in ascertaining whether the declarant is in a condition to "have any purpose at all in responding to police questions" and, even if the declarant could have formed a purpose, the likelihood that it could be testimonial in nature. (*Bryant, supra*, 131 S.Ct. at pp. 1158-1159.) Here, although Eva escaped physical harm, she was highly agitated and upset when she spoke to Officer Neilsen. (RT 1872-1873.) In other words, her emotional condition was severely compromised by the events, including having her dying daughter fall into her arms. In light of *Bryant*, Eva's emotional condition strongly suggests that she had not formed any purpose in answering Officer Neilsen's questions. And, to the extent that any purpose existed, it was to assist police in resolving the ongoing emergency.

Next, appellant implicitly argues that because the encounter occurred outside Eva's house, instead of at a gas station parking lot, as was the case in *Bryant,* the encounter had the ring of formality. (SLB 12.) Appellant mistakenly reads *Bryant* to require the statements be rendered at an "anonymous" public location. (SLB 12.) Not so. The United States Supreme Court observed that the encounter at issue "occurred in an exposed, public area, before emergency medical services arrived, and in a disorganized fashion." (*Bryant, supra*, 131 S.Ct. at p. 1160.) In this case, the fact that the encounter happened outside Eva's house, as opposed to a public parking lot, does not serve to invalidate the informal nature of the encounter. Eva related what happened to Officer Neilsen, who was one of the first officers to arrive on the scene in response to the 911 call, as they stood outside on the street shortly after appellant shot Versenia and Torey. (CT 555; RT 1870-1872.) These circumstances do not remotely resemble a formal stationhouse interrogation.

Appellant further contends that because the gunshot victims were family members, there was no ongoing emergency. (SLB 12 "no danger that a killer with an unknown motive was on the loose"].) This contention stretches the bounds of credulity. At the time of the encounter, no one knew what appellant's motive was and, even if it could be assumed that his ill intentions were limited to family members, whether other family members—who did not live with Eva—were also in danger, as appellant was armed and his whereabouts unknown. (RT 1869-1875.) (See *Bryant, supra*, 131 S.Ct. at p. 1159 [whether perpetrator is disarmed or apprehended is relevant to assessing whether threat is ongoing].) Additionally, it is not far-fetched to suggest that police officers might envision that appellant, having committed two murders, would not be averse to committing additional murders—including of non-family members—to evade capture.

Lastly, appellant seemingly acknowledges that, at least initially, Officer Neilsen's questions were for the purpose of resolving an ongoing emergency. (SLB 12.) However, appellant contends that when the officer asked Eva about appellant's possession of a handgun, the purpose of the questioning transmuted into establishing past events and was, therefore, testimonial. (SLB 12.) Respondent disagrees. Given the context of the encounter (see *Bryant*, *supra*, 131 S.Ct. at p. 1158 ["a highly context-dependent inquiry"]), which is detailed more fully in our brief (RB 20-21, 122-123), this view is objectively unreasonable. The encounter between Eva and Officer Neilsen occurred within minutes of the 911 call. Eva was highly agitated as she spoke to the officer outside on the street. At that point, two people had been shot and the shooter—appellant—remained on the loose and was, presumably, still armed with a handgun. In short, given this context, the relevant questioning was for the purpose of resolving an ongoing emergency. Therefore, the statements were non-testimonial.

Sincerely,

DONNA M. PROVENZANO
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Erven Blacksher**
No.: **S076582**

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 April 12, 2011, I served the attached **LETTER TO THE HONORABLE FREDERICK K. OHLRICH** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

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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 April 12, 2011, at San Francisco, California.

Nelly Guerrero
Declarant

N. Guerrero
Signature

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