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April 15, 2011

Office of the Clerk, California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: People v. Erven Blacksher, S076582: SUPPLEMENTAL LETTER BRIEF

On March 31, 2011, appellant and respondent submitted simultaneous supplemental letter briefs pursuant to this Court's order dated March 16, 2011. The Court also stated that Reply Briefs could be filed by April 15, 2011.

Respondent's Supplemental Brief repeats and quotes at length from the cases cited above but does not make any argument not addressed in appellant's Supplemental Brief. However, respondent does address appellant's argument in his Reply Brief filed April 12, 2011, and appellant replies to those arguments herein, as follows:

1. The significance of People v. Osorio (2008) 165 Cal.App.4th 603 on defendant's claim regarding the admissibility of Eva Blacksher's statements to Ruth Cole.

The Primary Purpose Rule

Respondent argues that the primary purpose rule proposed by appellant is "redundant" because the prosecution did advance theories of admission for the challenged evidence in this case, after which the trial court admitted Eva's statements to Cole for impeachment. According to respondent, this ruling should be deemed a primary purpose inquiry, obviating the need for further analysis by this Court. (Respondent's Reply to appellant's Supplemental Letter Brief ["RR"] p. 1.)

The primary purpose rule is not satisfied by the prosecutor's ability to advance legal theories of admissibility for hearsay statements. The question is

whether the prosecution has called the witness with a reasonable expectation that she will testify to something helpful to its case, i.e., to establish a fact of consequence to the prosecution; or whether the witness has been called only to impeach her with a prior inconsistent statement that would otherwise not be admissible. This requires judicial analysis and not just an arguable theory advanced by the proponent of the evidence.

Respondent next argues that in fact Eva's preliminary hearing testimony did establish useful or "valuable" facts, i.e., that she heard a gunshot and Versenia fell into her arms, and that appellant lived behind the house and had a key. According to respondent, these facts show that presentation of Eva's preliminary hearing testimony at trial (when Eva was unable to testify) was not a subterfuge for rendering admissible the otherwise inadmissible prior inconsistent statement through Cole's testimony. (RR, p. 2.)

Appellant disagrees. That there was a gunshot and Versenia died did not need proof through Eva's hearsay. The more persuasive point is the prosecutor's own action after Eva testified at the preliminary hearing. In obvious recognition of Eva's impairment, the prosecutor called Ruth Cole to the stand (even though Cole was not listed as a witness) and explained that she had just "realized that Cole would be a necessary witness." (1CT 171.) Cole was **necessary** to the prosecution at the preliminary hearing because Eva was unable to establish any useful facts. The prosecutor knew at the time of trial that Eva's preliminary hearing testimony was not useful because of her memory problems; he knew what her former testimony was; and he knew it would have to be "supplemented" with Cole's testimony.

Respondent also claims that Eva testified that "her memory was generally intact at the time the events took place." (RR, p. 2, citing CT 105.) Appellant disagrees. The portion of the transcript cited by respondent is as follows:

Q. Have you been [] having problems with your memory for a long time?
A. With who?
Q. Remembering things?
A. Well, yes . . . . I am 81 years old. I can't remember things.
[]
Q. Even back when this happened you were having problems with your memory then?
A. Well, no. I don't think so.
Q. Okay.
A. No, I don't think.
Q. You think you can remember?
A. How, how you say it?

Q. Back when this happened, do you think you were having problems with your memory then, when something happened to Versenia?

A. You mean – I don't understand.

Q. (repeating the question)

A. Was I having problems with.

Q. Remembering things?

A. With my baby, with my son?

Q. No, just remembering things.

A. Do I remember? Well, no, not too much, because Versenia [] took over my remembrance. I couldn't remember good. (CT 105-16.)

Respondent describes Eva's memory problems as a result of defense counsel's "suggestions." (RR, p. 2.) Appellant contends that any reading of Eva's preliminary hearing testimony shows that she had profound cognitive and memory problems due to age and having nothing to do with so-called suggestions by defense counsel. Indeed, it was during direct examination by the prosecutor when Eva said "I haven't seen [appellant today. Is he here?" When the prosecutor asked again, "Do you see him anywhere in the courtroom?" Eva asked "Is he here today?" Eva was unable to identify her son sitting just feet away from her until appellant said, "I'm right here, Mom." (CT 102-03.)

Appellant contends that at the preliminary hearing, not only could Eva not remember, or remember if her memory was intact at the time of the events, she could not understand the questions put to her. (See AOB, pp. 124-131 [setting forth Eva's testimony in detail showing the extent of her mental impairment].) Even the prosecutor acknowledged that Eva's memory problems had begun years before the offense and the preliminary hearing. (See 3CT 559, fn. 1.)

Respondent argues that appellant has ignored the fact that the jury was instructed to consider Cole's testimony only for impeachment purposes. (RR, p. 2.) In his Supplemental Brief at page 5, appellant pointed out the danger of the jury considering impeachment evidence as proof of guilt, that is, despite any limiting instruction. The case law is replete with opinions rejecting the notion that instructions are sufficient to obliterate prejudice. (People v. Bracamonte (1981) 119 Cal.App.3d 644, 650, quoting Krulewitch v. U.S. (1949) 336 U.S. 440, 453 ["'The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'"; see also United States v. Kerr (9th Cir. 1992) 981 F.2d 1050; People v. Perez (1962) 58 Cal.2d 229, 247.)

That the danger the jury would consider Cole's "impeachment" for its substantive content was a clear and present one in this case because Cole's testimony did not directly discredit Eva's veracity (see Black's Law Dictionary, 7th

edition) so much as she supplemented it or substituted for her. As Eva put it, Cole "took over her remembrance" as her other daughter had done. Under this circumstance, the jury would very likely consider as substantive evidence Cole's testimony that Eva said that appellant had admitted he was going to kill his nephew .

Although the court instructed the jury that Cole's testimony as to the challenged hearsay was admitted for the limited purpose of "impeaching the previously read testimony of Eva Blacksher" (CT 1240-41), there was no explanation that "impeaching" referred to her credibility (and "impeaching" is not a commonly used or understood word in this context). Further confusing the issue were instructions that the former testimony read to the jury (Eva's) should be considered as testimony **by a witness in this trial**; and that evidence of a prior inconsistent statement made **by a witness in this trial** could be considered not only for testing the credibility of the witness, "but also as evidence of the truth of the facts as stated." (CT 1244-45.) At the very least, the latter two instructions could easily be interpreted to conflict with the first limiting instruction even assuming the jury understood the limited purpose of "impeaching" in the first instruction.

Respondent also argues that People v. Lawrence (1893) 21 Cal. 368[1] is not helpful to appellant's argument because it involved the admission of a dying declaration which deprived the defendant of an opportunity to cross-examine, whereas in this case, Eva was subject to cross-examination at the preliminary hearing.[2] According to respondent, the Lawrence holding "related only to the facts before it," and because those facts do not involve prior inconsistent statements, it does not support the reasoning in People v. Beyea (1974) 38 Cal.App.3d 176.

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[1] Respondent points out that appellant's initially cited Lawrence as a 1963 case at 21 Cal.3d 368, rather than 1n 893 case at 21 Cal.368. (RR, p. 3, fn. 1.) This was a typographical error and certainly was not done with any intention to mislead as to the date of the case. Appellant's further citations to Lawrence correctly cite the case as reported at 21 Cal. 368. (See Supplemental Letter Brief at pp. 6, 7.)

[2] Appellant cannot agree with respondent's assertion that Eva was "subject to cross-examination" at the preliminary hearing. As set out in Appellant's Opening Brief, Arg. IV, Part D, pp. 124-134, Eva's mental impairment at the time of the preliminary hearing deprived appellant of an opportunity to cross-examine her regarding her prior unsworn statements. When Eva testified at the preliminary hearing, the prosecutor knew there was a problem and that Cole's testimony would be **necessary** and yet she didn't ask Eva about her prior statements – because it was obvious Eva couldn't remember and didn't understand. Defense counsel had the same problem. He could not effectively cross-examine Eva at the preliminary hearing.

(RR, p. 3)

Appellant cited Lawrence for the general proposition of fairness, and to point out that Beyea relied not only on the Comments (as Osorio claimed) but on the interpretation of those Comments in Am-Cal Inv. Co. v. Sharlyn Estates,Inc. (1967) 255 Cal.2d 525, 542, which also relied on Lawrence for the proposition that principles of fairness underlay the rule allowing only the party against whom hearsay was introduced to impeach it with a prior inconsistent statement.

Thus, respondent's point that Lawrence relates to a dying declaration is inapposite. As explained in Harris v. Superior Court (1992) 3 Cal.App.4th 661, 666-67, "we must not seize upon those facts, the pertinence of which goes only to the circumstances of the case but is not material to its holding. The Palsgraf rule, for example, is not limited to train stations."

Finally, respondent asserts (without authority) that the statements contained in the challenged hearsay were not admissions of guilt. Appellant disagrees. An admission is a statement offered against the declarant in an action to which he is a party, offered to prove the truth of the assertions. (Witkin, 1 California Evidence (4th ed. 2000) §90-91, pp. 793-94.) In People v. Smith (1984) 151 Cal.App.3d 89, 96, the defendant's statement that "I would have done him in" was properly introduced as an admission on the issue of intent. In People v. Hamilton (1985) 41 Cal.3d 408, 427, the defendant's statement that he would "kill a lot more" was an admission relevant to guilt in a murder prosecution. The hearsay testified to by Cole, that Eva said that appellant said that he was going to kill his nephew is undeniably a statement offered against appellant to prove that he intended and premeditated the homicide of his nephew, and thus an admission relevant to guilt in his murder prosecution.

As such, and as argued in appellant's Supplemental Letter Brief, the danger that the jury will consider the "impeachment" testimony as substantive evidence of guilt is greatly magnified where the hearsay contains an admission of guilt. (U.S. v. Buffalo (8th Cir. 2004) 358 F.3d 519, 525 [risk of jury misuse of supposed impeachment is multiplied when the impeachment contains admission of guilt].) Thus, whether the prior inconsistent statement contains an admission of guilt, this is a critically important factor in determining its admissibility.[3] (U.S. v. Morlang

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[3] Respondent argues that the challenge hearsay is not of "critical importance" because other witnesses testified that appellant had made statements about wanting to kill his nephew because he wouldn't quit bothering him. (RR, p. 3.) Respondent confuses the issue of admissibility of hearsay with prejudice analysis. Where "impeachment" evidence contains an admission of guilt," the jury is more likely to consider the impeachment as substantive evidence and this is a critical factor in determining admissibility under the

(4th Cir. 1975) 531 F.2d 183, 190.)

The Osorio Interpretation of Section 1202 Is Flawed

Respondent fails to address the bulk of appellant's argument regarding statutory construction. Appellant has set out at length the flaws in the reasoning in Osorio and the unwanted and problematic consequences that would and have resulted if and when that flawed reasoning is adopted.

Although respondent has ignored those arguments that challenge and/or contradict his position, this Court cannot do the same. Appellant thus refers this Court of his Supplemental Letter Brief at pages six through nine.

Respondent is content with arguing that Osorio is better-reasoned and that the language of section 1202 is plain and need not be interpreted as in Beyea. (RR, p. 4.) Appellant has shown the discrepancies in the statute that require inquiry into legislative intent. (Appellant's Supplemental Letter Brief, pp. 6-7.)

Respondent's only argument is that Lawrence does not impose the restriction on section 1202 set out in Beyea and that the "factual posture" of Beyea differs from the facts of this case. (RR, p. 4.)

As to Lawrence, appellant has explained above, that it sets forth the general principle of fairness. (See p. 4, above.) As to Beyea, respondent argues that Beyea "found it dispositive that the defense did not learn of the statements until trial," whereas here, Cole testified at the preliminary hearing to Eva's prior inconsistent statements. Appellant contends that respondent is wrong. Beyea pointed out that the prosecution had actual knowledge of the prior inconsistent statements prior to the defendants' preliminary examination, "and, for this additional reason, should not have been permitted to further its own case by impeaching its own witnesses with their prior inconsistent hearsay statements." (38 Cal.App.3d at 194.) An **additional** reason cannot accurately be described as the "dispositive" reason. Respondent also reads Beyea to suggest that had the inconsistent statements been presented at the preliminary hearing, "the fairness concern would be moot." (RR, p. 4.) Appellant finds no such suggestion at the cited page in Beyea in which the court merely agreed that the defense was correct in arguing that the impeachment should have been presented at the preliminary hearing.

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primary purpose rule. Whether other witnesses provided similar testimony is not relevant to the question whether hearsay is admissible.

Finally, in footnote two, respondent disagrees with appellant's argument that he was deprived of his right to cross-examine Eva regarding the prior inconsistent statements, since the record suggests that Cole transported Eva to court and so "presumably, Eva remained available to the defense" after Cole's testimony. (RR, p. 4, fn. 2.) Whether Eva was sitting in the courtroom or not is not the problem. As argued in Appellant's Opening Brief, Eva was unavailable for cross-examination at the preliminary hearing. Her body might have been present, but her mind was not.

In sum, for all the reasons set forth above, and in appellant's initial Supplemental Brief, this Court should not follow the Osorio decision, and should instead consider either a broad ruling that section 1202 prohibits the proponent of hearsay from impeaching it with a prior inconsistent statement, or a narrower ruling that the prosecutor in a criminal case cannot present hearsay and then impeach it with a prior inconsistent statement where the initial hearsay served no useful purpose other than a means of admitting the prior inconsistent statement.

2. The significance of Michigan v. Bryant (No. 09-150) and Davis v. Washington (2006) 547 U.S. 813 on defendant's claim regarding the admissibility of Eva Blacksher's statements to Officer Nicholas Nielsen.

Appellant understands Michigan v. Bryant as setting out a fact-intensive balancing test for determining whether a statement is testimonial, and subject to the Confrontation Clause, or non-testimonial, and not so subject.

Respondent inaccurately portrays appellant's argument as encompassing the claim that various of these facts "require" a determination that the statement is non-testimonial. (RR, p. 5.) Appellant has not argued that any specific fact is dispositive. Rather, Michigan v. Bryant requires consideration of all the facts and surrounding circumstances as informing the ultimate inquiry, i.e., the primary purpose of the interrogation, as a reasonable person in the declarant's situation would understand it.

Appellant has pointed out the facts and circumstances that tend to show that an objective declarant would consider the purpose of the police questioning as meant to establish facts rather than to meet an ongoing emergency. These facts are that Eva was not injured (even though she might have been upset); she was not seeking medical attention; she was on the sidewalk in front of her own house and at least one neighbor was nearby. Moreover, even if the initial questioning would be deemed, objectively, as intended to meet an ongoing emergency, once the officer asked where appellant got the gun, the objective declarer would necessarily consider that an attempt to establish a past fact.

Appellant contends that the totality of the circumstances show the police purpose to be one of establishing past events, particularly the later questioning as to how appellant was armed and where he got the gun.

Respectfully submitted,

K Moreno

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CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P. O. Box 9006, Berkeley, CA, 94709-0006. I have made service of the foregoing APPELLANT'S SUPPLEMENTAL LETTER BRIEF -- REPLY by depositing in the United States mail on April 15, 2011, a true and full copy thereof, to the following:

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Erven Blacksher
San Quentin, CA

Executed under penalty of perjury on April 15, 2011, in Berkeley, CA.

K Moreno
KATHY MORENO