LAW OFFICE OF
KATHY R. MORENO
P. O. Box 9006
Berkeley, CA 94709
(510) 649-8602
katmoreno@comcast.net

March 31, 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 16, 2011, this Court ordered supplemental letter briefing in the above-entitled case on two issues. Appellant addresses each in turn, as set forth below.

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.

Appellant first sets out the facts relevant to the question posed. Appellant then addresses the important policy considerations in support of a conclusion that even if Evidence Code section 1202 [hereafter "section 1202"] is interpreted as in Osorio, fairness requires the following limitation: a prosecutor in a criminal case is only allowed to impeach the hearsay witness as to **credibility**; the prosecutor **may not** use the opportunity to introduce otherwise inadmissible evidence under the guise of "impeachment." That is, the prosecutor cannot present hearsay which is not useful to establish a significant fact only to open the door to "impeaching" that hearsay with a prior inconsistent statement which is useful. This is the "primary purpose" rule widely recognized and applied in numerous jurisdictions.

Appellant next argues that the Osorio decision is flawed and that the decision in People v . Beyea (1974) 38 Cal.App.3d 176, upon which appellant relied in previous briefing, is better reasoned. Osorio was wrong in concluding that section 1202 should be applied without resort to legislative intent.

Application of the Osorio reasoning will result and already has resulted in anomalous results.

Summary of Relevant Facts

Eva Blacksher ["Eva"] testified at the preliminary hearing but was unable to remember or understand much. She said that her daughter had taken over her "remembrance" for her over the last years. (See AOB, p. 7.) She did not remember going to the courthouse for a restraining order a day or two before the shootings. She did not remember signing the order and did not remember telling her daughter Versenia to write anything for her in court. She denied writing that if appellant were allowed to stay in the house and be abusive, her daughter and caretaker Versenia would leave. She knew nothing about it. (CT 766-69, see AOB, p. 18.)

Eva was held incompetent to testify prior to trial, and the court admitted her former preliminary hearing testimony under Evidence Code section 1290. The prosecutor then introduced testimony by Eva's daughter Ruth Cole (who accompanied Eva to the courthouse) that Eva did know she was going to the courthouse to get a restraining order against appellant; and Eva said they were getting the order because appellant had said he was going to kill his nephew Torey. (RT 2141-75; see AOB, pp. 17-18.)

The trial court overruled defense objections to this testimony, stating that Ruth Cole's testimony as to Eva's out-of-court statements was admissible under the prior inconsistent statement hearsay exception (and also to show Eva's then-existing state of mind). (RT 2163-68; see AOB, pp. 153-56.)

On appeal, appellant argued that Cole's testimony was inadmissible to impeach Eva's preliminary hearing testimony because the prosecution had introduced Eva's testimony and then sought to impeach it with Cole's testimony. Appellant relied People v. Beyea, 38 Cal.App.3d at 193 which held that Evidence Code section 1202 did not allow a prosecutor to introduce a hearsay statement and then use a prior inconsistent statement to impeach it.

The Osorio and Beyea Cases and Important Policy Considerations

People v. Osorio disagreed with Beyea on the grounds that (1) nothing in the plain and unambiguous statutory language of Evidence Code section 1202 prevented a party from impeaching its own witness, and (2) Beyea had relied on the California Law Revision Commission comments [Comments], "exalt[ing]" those comments over the statutory language. (Osorio, 165 Cal.App.4th at 616.)

At the outset, this discussion will be assisted by looking to the history, purpose, and policy considerations supporting appellant's position that the prosecution is not allowed to impeach its own hearsay declarant with prior inconsistent statements. Earlier rules prohibiting a party from impeaching its own witness have eroded in light of the recognition that the calling party is not generally able to choose its witnesses, and should not be forced to vouch for its witnesses. (Broun et al., McCormick on Evidence (6th ed. 2006, at 168-69) § 38 [hereafter McCormick].) The same considerations clearly do not apply to statements by a witness declared unavailable when those statements are presented by the party presenting that witness's former testimony or statements.

Regarding the application of these principles in criminal cases, McCormick and the cases cited therein noted that (1) a party's impeachment of its own witness presents particular potential for prejudice in criminal cases, such as when the prosecutor calls a witness with the primary purpose of impeaching his witness with otherwise inadmissible evidence, and (2) the risk that jurors will misuse such "impeachment evidence is heightened when the prior inconsistent statements contain an admission by the defendant. This Court expressed similar concerns in People v. Lawrence (1963) 21 Cal.3d 368, 371-72. Lawrence discussed the purpose underlying the rule that only the party **against whom** hearsay evidence was introduced should be allowed to impeach that testimony with a prior inconsistent statement (as Beyea holds) and determined that the purpose was to be fair to the party against whom the hearsay was received inasmuch as he was denied the opportunity of cross-examination.

McCormick summarized the case law holding that (1) such impeachment was particularly prejudicial in a criminal case (2) when the prosecutor called a witness with the primary purpose of impeaching his witness with otherwise inadmissible evidence, and (3) the risk of jury misuse of such "impeachment" evidence was heightened when the prior inconsistent statements contained an admission by the defendant.

> **It has been widely held that a criminal prosecutor may not employ a prior inconsistent statement to impeach a witness as a "mere subterfuge" or for the "*primary* purpose" of placing before the jury substantive evidence which is otherwise inadmissible.** (McCormick at § 38; emphasis in bold supplied; italics in original.)

This rule should apply even more strictly when applied to an attempt to "impeach" an unavailable witness's prior testimony with hearsay evidence.

The "primary purpose" or "mere subterfuge" doctrine focuses on the content of the witness's testimony: only when her testimony is useful to establish a fact of consequence to the prosecution may it be impeached by means of a prior inconsistent statement as to other matters. The pivotal question is whether the prosecution is calling the witness with the reasonable expectation that she will testify to something helpful to its case aside from the prior inconsistent statement. (McCormick at fn. 2.) In the present case, it is undeniably clear that the prosecutor knew he would not obtain helpful testimony either by calling the witness in person, or by introducing her preliminary hearing testimony.

U.S. v. Gilbert (9th Cir. 1995) 57 F.3d 709, 711-12 acknowledged that under the Federal Rules of Evidence a party could impeach its own witness, but nonetheless could not knowingly elicit testimony from a witness in order to impeach him with otherwise inadmissible testimony. "Impeachment is improper when employed as a guise to present substantive evidence to the jury that would be otherwise inadmissible." The question is whether the prosecutor presented the witness's testimony for the primary purpose of placing before the jury substantive evidence which is otherwise inadmissible. U.S. v. Patterson (7th Cir. 1994) 23 F.3d 1239, 1245 confirmed that the prosecution was not permitted to call a witness knowing he or she would not give useful testimony just so it could introduce otherwise inadmissible hearsay in the hope the jury would miss the subtle distinction between impeachment and substantive evidence.

In this case, it is undeniably clear that the prosecutor introduced Eva's preliminary hearing hearsay **solely** to impeach it with hearsay from Ruth Cole as to Eva's "inconsistent" statements. Eva's preliminary hearing testimony provided nothing useful to establish any fact of consequence significant in the context of the prosecution.[1] Any quick summary of Eva's preliminary hearing testimony fails to show the scope and extent of her impairment at that time. Appellant's Opening Brief sets forth her testimony in more detail at AOB 124-131. The prosecutor himself acknowledged that her "memory problems" began some years before the offense and the preliminary hearing. (3CT 559, fn. 1.)

---

[1] Eva was confused, basically remembered nothing, and to the extent she was able, admitted her incompetence as a witness: "Well, you must understand I am an old lady, yes. Do you want me? I will tell you. I am 81 years old. I can't remember things." "No, I can't remember that. I get a certain age you don't understand that, or when you are young at least, I don't know." (3CT 105, 113) Eva sat in the witness chair and did not even know her son, appellant, was there: she said she hadn't seen him that day and asked, "Is he here today?" (3CT 103.)

After Eva was presented as a witness at the preliminary hearing and established her memory loss, the prosecutor called Ruth Cole as a witness explaining that once Eva testified she "realized that Cole would be a necessary witness." (1CT 171.) Thereafter, prior to trial, the prosecutor moved to have Eva declared incompetent to testify (see 2RT 329-333, 339-48, 369) and then introduced her former testimony hearsay and impeached it with Cole's "necessary" testimony as to her prior inconsistent statements.

This sequence of events evidences a prosecutorial plan to use Cole's "impeachment" testimony as "necessary," i.e., **substantive** testimony, which in turn provides strong support for application of the "primary purpose" rule that impeachment of a hearsay declarant with a prior inconsistent statement cannot be permitted when it is intended not to attack credibility but as an improper way to introduce substantive information. It was not "necessary" for the prosecutor to attack Eva's credibility; her garbled testimony was sufficient for that. What the prosecutor deemed "necessary" was to introduce as pseudo-impeachment the information that appellant said – the day before the shootings – that he was going to kill his nephew. This was the evidence the prosecutor deemed "necessary" to the prosecution for first-degree premeditated murder, and thus the death penalty.

Moreover, the fact that Cole's testimony as to Eva's prior inconsistent statement contained an admission by appellant (i.e., that Eva said that appellant said he was going to kill his nephew and that was why they had gone to court for a restraining order)[2] is of critical importance. The danger always exists that the jury will consider the otherwise inadmissible impeachment evidence as proof of guilt. As explained in U.S.v. Morlang (4th Cir. 1975) 531 F.2d 183, 190:

> "The danger in this procedure is obvious. The jury will hear the impeachment evidence, which is not otherwise admissible and is not substantive proof of guilt, but is likely to be received as such proof. The defendant thus risks being convicted on the basis of hearsay evidence that should bear only on a witness's credibility."

However, this danger is greatly magnified when -- as here -- the statement offered as impeachment contains an admission of guilt by the defendant. (U.S. v. Buffalo (8th Cir. 2004) 358 F.3d 519, 525 [the risk of jury misuse of evidence supposedly offered only to impeach credibility "is multiplied when the statement offered as impeachment testimony contains the defendant's alleged admission of guilt."].)

This Court should apply the primary purpose rule to preserve the

---

2 See 9RT 2147.

important difference between impeaching credibility, and introducing substantive evidence through the back door route of "impeachment." If this circumvention is allowed it will mean a significant incursion on the reliability of testimonial evidence generally, and especially in death penalty cases, where heightened reliability is required. (Monge v. California (1998) 524 U.S. 721, 732.)

In sum, the Beyea decision is better reasoned and more applicable to the facts in this case. Fairness and the policy of preventing prosecutorial use of "impeachment" to put before the jury otherwise inadmissible evidence likely to be used substantively dictate that this Court adopt the "primary purpose" rule in applying section 1202.

Osorio's Interpretation of Section 1202 is Flawed

Osorio criticizes Beyea for "exalt[ing] the Comments over the statutory language," stating that because the statute is "clear and unambiguous" there is no need to resort to the Comments for clarification. (165 Cal.App.4th at 616.) Appellant disagrees. As set forth below, the reasoning in Osorio is flawed and Beyea is better-reasoned, more applicable to the facts at bar, and serves the basic principles embedded in the right to confront and cross-examine.

First, Osorio is incorrect in claiming that Beyea relies solely on the Comments (and on the interpretation of the Comments in Am-Cal Inv. Co. v. Sharlyn Estates, Inc. (1967) 255 Cal.App.2d 525, 542. (Osorio, 165 Cal.App4th at 616.) Am-Cal relied not just on the Comments but on long-established precedent from this Court, i.e., People v. Lawrence, 21 Cal. At 371-72, which (as discussed above) determined that principles of fairness underlay the rule allowing only the party against whom hearsay was introduced to impeach it with prior inconsistent statement.

As Osorio points out, section 1202 and section 785 were both enacted at the same time and related to the same subject matter and thus are to be read together as if parts of the same "Act."[3] (165 Cal.App.4th at 617.) Section 785 provides that the credibility of a witness may be attacked or supported by *any party*. Section 1202 refers to "evidence offered to attack or support the credibility of a declarant." Read together, section 785 shows that the legislators knew how to provide for impeachment by any party but chose not to render section 1202 in such broad terms. This discrepancy, especially when considered in concert with the case history and legislative history, creates an uncertainty or ambiguity necessitating reliance on legislative intent.

---

[3] The entire Evidence Code was enacted at this time. (Stats. 1965, ch. 299, § 2, p. 1297; see Assembly Bill 333 (Song -1965.)

Osorio reads the two sections "as a single statute" to infer that had the legislators intended to make the two "mutually exclusive" (i.e., acceptance or application of one provision necessarily excludes acceptance or application of the other) they would have done so; and that their failure to do so allows the prosecution to impeach hearsay it has introduced with a prior inconsistent statement. (165 Cal.App.4th at 617.) This reasoning is faulty. Section 785 refers to attacks on the credibility of a witness in general; section 1202 refers to impeaching a hearsay declarant with prior inconsistent statements. That either party can attack a live witness's credibility (section 785) does not necessarily preclude a rule prohibiting the proponent of hearsay from impeaching its own evidence through a prior inconsistent statement (the Beyea reading of section 1202). Permitting the proponent to impeach a known unavailable witness with a prior inconsistent statements opens the door to prosecutorial design beyond that which due process may allow, especially in a capital case requiring a heightened standard of fairness. (See e.g., Monge v. California,524 U.S. at 732.)

The Osorio discussion of the Comments is equally questionable. Osorio states that "nothing in the Comments suggests the Legislature intended to prevent the use of impeachment evidence by the proponent of hearsay evidence." (164 Cal.App.4th at 616.) But the Comments expressly state that "the party against whom the evidence is admitted should not be deprived of both his right to cross-examine and his right to impeach," citing to People v. Lawrence, 21 Cal. at 372, which held that fairness underlay the rule that only the opponent of hearsay could impeach a hearsay declarant with a prior inconsistent statement.

At the same time, Osorio acknowledges that the Comments express "concern about the party against whom a hearsay statement is offered" but attempts to dismiss that concern as "understandable" because at the time the Comments were drafted in 1965 the question whether a hearsay declarant could be impeached with a prior statement was "moot" (because of the rule against impeaching one's own witness unless one was surprised, and one could not be surprised by hearsay one introduced). The question may have been moot in 1965 but the Law Revision Commission was about to "unmoot" it with the enactment of section 785 as part of the same Evidence Code in which it enacted section 1202: this was why the Comments expressed its "concern."

In sum, appellant maintains that the language of section 1202 is sufficiently ambiguous as to require clarification through the Comments, and that the Comments explain that the legislative intent was to continue the rule of Lawrence (cited in the Comments) as correctly interpreted by Beyea, i.e., the proponent of hearsay evidence cannot impeach that hearsay with a prior inconsistent statement.

When the Legislature enacts a statute as proposed by the Law Revision Commission (and section 1202 was so enacted),[4] the Commission's explanatory Comments are "persuasive evidence of the Legislature's intent." (People v. Martinez (2000) 22 Cal.4th 106, 129; Brian v. Superior Court (1978) 20 Cal.3d 618, 623.)

People v. Tackett (2006) 144 Cal.App.4th 445 is helpful in this analysis. Tackett interpreted the language of section 1103, subd.(a)(1) [character evidence of "the victim of the crime for which the defendant is being prosecuted" is admissible to prove conduct of the victim in conformity with that character trait] and held that the Legislature did not employ the word "victim" in the broad sense of anyone injured by the defendant's conduct but rather in the more limited sense of the person at whom the defendant' s conduct was directed and whose own conduct could explain or justify the defendant's own conduct. The Court of Appeal interpreted the statute despite the seemingly plain and unambiguous statutory language purporting to allow character evidence of "the victim of the crime for which the defendant is being prosecuted" and **not** (as interpreted by the Court of Appeal) "the victim at whom the defendant's conduct was directed, etc." Tackett explained that this was the existing common law when the Evidence Code was adopted and that the Comments indicated the statute was meant to codify existing law.

Tackett also determined that the statutory language required clarification so as to avoid anomalous or absurd results. (Pineda v. Williams-Sonoma Stores, Inc. (2011) 51 Cal.4th 524, 533 [a statute open to more than one interpretation should be interpreted so as to avoid anomalous or absurd results].) The Osorio interpretation will lead – and already has – to anomalous and absurd results.

People v. Baldwin (2010) 189 Cal.App.4th 991 is a case on point. Baldwin involved a defendant who wanted to impeach his own jailhouse tape-recorded statements (introduced by the prosecution), i.e., that he was the shooter with his prior inconsistent statements to the police, i.e., that he was present but not involved. In reliance on the Comments, the trial court ruled that the proponent of the inconsistent statements was required to call the declarant (i.e., in that case, the defendant) if he was available to testify, to allow explanation or denial of the inconsistencies. The trial court reasoned that since the defendant was available to testify (had he waived his privilege), the defendant had to testify in order to have his prior statements admitted. (Baldwin at 1003.)

---

[4] See http://www.clrc.ca.gov/pub/Printed-Reports/Pub066.pdf [Law Revision Commission report, containing letter to governor at page 5 noting that the Evidence Code was enacted in 1965 at the recommendation of Law Revision Commission].

The Court of Appeal disagreed, and, following Osorio, applied the language of section 1202 without resort to the Law Revision Comments or fundamental fairness, allowing it to reach its otherwise inexplicable conclusion: Baldwin held that section 1202 permitted an attack on the credibility of any hearsay declarant -- including a criminal defendant -- by the introduction of his prior inconsistent statement. Baldwin recognized that application of the plain statutory language had "an odd result," but not so odd as to create such an incongruity that would justify a departure from the statutory language. (Baldwin at 1004.) And yet the Court of Appeal apparently did find the result incongruous, since it urged the Legislature to examine an amendment to section 1202 "to exclude criminal defendants seeking to attack their own credibility as declarants." (Baldwin at 1005, fn. 11.)

Appellant contends that a similar problem arises here: the wooden application of the statutory language without resort to legislative intent has an incongruous result that allows the prosecution to "prove" its case by presenting hearsay only to impeach the hearsay, resulting in the denial of the defendant's opportunity to test any of the hearsay under cross-examination – the primary concern specified in the Comments and the case by this Court cited therein, People v. Lawrence.[5]

In sum, Osorio is flawed and should not be followed in this case. Considerations of policy and fairness as discussed above support either a broad ruling that section 1202 prohibits the proponent of hearsay from impeaching that hearsay with a prior inconsistent statement, or a narrower ruling encompassing the "primary purpose" rule 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 to the prosecution other than as a stalking horse for the admission of the prior inconsistent statement.

---

[5] Baldwin noted that evidence introduced to impeach a hearsay declarant's statement was admissible only to attack the declarant's credibility, and emphasized that when the particular circumstances of the case created a substantial danger of prejudice, the "impeachment" should be excluded or limited. (Baldwin, 189 Cal.App.4th at 1005.) That danger was clearly present in this case.

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.**

Crawford v. Washington (2004) 541 U.S. 36 held that statements made in police interrogations are testimonial and their admission violated the Confrontation Clause. Davis v. Washington (2006) 547 U.S. 813, 822 distinguished between statements made under circumstances indicating the primary purpose of the interrogation was to enable the police to meet an ongoing emergency (non-testimonial) and those made with the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution. (testimonial). Michigan v. Bryant explained that to determine whether the primary purpose of an interrogation was (1) to enable the police to meet an emergency or (2) establish past facts, the court had "objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties." (131 S.Ct. at 1147.)

The Michigan v. Bryant Case

Bryant enumerated and discussed a number of factors, stating that among the most important, but not dispositive, factors is whether the interrogation occurred during an ongoing emergency or afterwards. Questioning during an ongoing emergency focuses on ending a threatening situation and thus is not focused on proving past events relevant to a threatening situation.

The scope or duration of the emergency informs the ultimate inquiry as to the primary purpose of the interrogation. The scope or duration of the emergency may depend on the type of weapon used in that a gun tends to extend the scope. (131 S.Ct. at 1158.)

The formality or informality of the interrogation and the surrounding circumstances are other factors to consider: was the questioning in an exposed public area prior to the arrival of emergency personnel akin to a 911 call, or more similar to a structured interview. Finally, the statements and actions of both the declarant and police officer are relevant to determining the purpose of the interrogation. The inquiry is an objective one, focused on the understanding and purpose of a reasonable declarant under the circumstances, which prominently include the declarant's physical state. (Id. at 1160.)

In Bryant, the police responded to a report that a man had been shot. They found the man on the ground in a gas station parking lot with a gunshot wound to his abdomen. The police asked what happened, who had shot him and where it had occurred. The man responded that Bryant had shot him at another location

and that he then drove to the gas station. The conversation ended when emergency personnel arrived. Bryant considered the objective purpose of the interrogation was to enable the police to meet an ongoing emergency, noting that the police did not know if the threat was private and limited to the injured victim or whether the threat had ended; that a gun was involved; that the police did not know the location of the shooter. (Id. at 1164.)

Bryant emphasized that the ultimate inquiry was an objective determination of the declarant's understanding of the interrogator's primary purpose. In Bryant the declarant's answers were punctuated with questions about when the medics would arrive: he was mortally wounded. A reasonable person in this situation would not have the primary purpose of proving past events. Also, the police question "who shot you" and "where" were of the type what would allow the police to assess safety and danger. Finally, the informality of the interrogation in a public space with a mortally wounded victim was more similar to a harried 911 call than to the structured in-house interview deemed testimonial in Crawford. Bryant thus considered the statements non-testimonial and outside the protections of the Confrontation Clause. (Id. at 1165.)

Bryant sets out a multi-factor balancing test and recognizes that the objective purpose of an interrogation may "transition" from non-testimonial to testimonial. (Id. at 1148.) This case includes facts both similar and dissimilar to those in Bryant, but appellant contends that the balance tips in favor of a conclusion that the objective purpose of the interrogation was to establish past events rather than to meet an ongoing emergency.

Application of Bryant to the Facts in This Case

The facts in this case are as follows: Officer Neilsen testified on approaching the house where Eva was standing outside with her neighbor, he "stopped and talked with her" because he "wanted to find out what information she had." (7RT 1872.) Eva said her daughter and nephew had both been shot and she thought they were dead. (7RT 1873.) Nielsen said he was trying to determine what had just happened in the house so that the police could take an appropriate action. (7RT 1874.) Eva said that appellant had come to the house earlier that morning and argued with his sister. (7RT 1875.) Nielsen questioned Eva for some ten to fifteen minutes. He got the initial information so that his fellow officers could go into the house, and then he continued questioning Eva to get "clarification." (7RT 1875.) As Nielsen continued his questioning, neighbor John Adams left. Nielsen then left Eva with another police department employee (Daryl Brand) in an unmarked police car. (7RT 1876.)

After reviewing his police report, Nielsen testified that Eva said that appellant, who lived in a detached unit behind the house, came into the house that morning, and shot his sister and nephew. Nielsen specifically asked how appellant was armed, and then where he got the gun. Eva said she didn't see a gun but assumed he had it hidden on his person. (7RT 1882-83; 8RT 1902.) At his request, she described appellant's clothing and said he drove a gold Cadillac. (7RT 1883.) He asked if appellant was still in the house and she said she didn't know. (7RT 1883.) The other officers had checked the house; Nielsen checked the back unit (15 minutes after he arrived at the scene) but did not find appellant. (7RT 1885; 8RT 1901.) During this time Eva was tense and agitated but not breaking down. (8RT 1896.)

First of all, Eva was not injured and was not seeking emergency medical help for herself or the victims. A reasonable person in this situation would not consider the interrogation as meant to enable the police to meet an ongoing emergency. Next, because the location was not an anonymous public place as in Bryant but right outside Eva's own house, once she said that her son had shot his sister and nephew, the motive was known to be familial and personal and there was no danger that a killer with an unknown motive was on the loose. (Compare Bryant, 131 S.Ct. at 1148-49.) Thus, even if the officer's first questions might be deemed to have been understood as relating to an ongoing emergency, after that they transitioned into questions objectively understood as intending to establish past events. For example, when Nielsen subsequently asked how appellant was armed and where he got the gun, these questions are objectively understood as having the purpose of establishing past events as these questions would not be seen by a reasonable person as relating to an immediate problem

It is true that Officer Nielsen himself testified that he was questioning Eva to determine if appellant was alone, or if anyone else was in the house who might be in danger prior to entering the house. (8RT 1910.) However, Bryant makes it clear that it is not the officer's subjective purpose that determines the issue, but rather how a reasonable person would understand the purpose of the questioning.

Respectfully submitted,

KATHY R. MORENO
Attorney for Erven Blacksher