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April 19, 2011

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

RE: *People v. John Alexander Riccardi* (Automatic Appeal)
California Supreme Court Case No. S056842
Respondent's Supplemental Letter Brief Pursuant to March 23, 2011 Order

Dear Mr. Ohlrich:

On March 23, 2011, this Court requested that the parties submit supplemental letter briefing by April 25, 2011, addressing the following three issues:

> 1) The significance of the previously untranscribed portions of People's Exhibit 69,[1] as it relates to defendant's claim that the trial court erroneously admitted this evidence as a prior consistent statement;
>
> 2) Whether defendant's awareness of the decedent victim's fear of him, and her actions in conformity with that fear, rendered her fearful state of mind relevant to provide defendant's motive under Evidence Code section 1250 (see *People v. Ruiz* (1988) 44 Cal.3d 589, 609, *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594, and *Commonwealth v. Qualls* (Mass. 1997) 680 N.E.2d 61, 64); and
>
> 3) Whether the trial court had a sua sponte duty to give a limiting instruction concerning those nonhearsay statements presented as circumstantial evidence of the decedent victim's state of mind (see

[1] Pursuant to this Court's March 23, 2011 Order directing respondent to prepare and file a complete transcript of prosecution witness Marilyn Young's police interview contained in People's Exhibit 69, respondent filed the new transcription of the exhibit on April 7, 2011. Respondent will refer to it as the complete transcript of People's Exhibit 69 ("Complete Trans. of Peo. Exh. 69").

Evid. Code, § 1250; *People v. Hamilton* (1961) 55 Cal.2d 881, *People v. Cox* (2003) 30 Cal.4th 916, 962-963, and *People v. Ortiz* (1995) 38 Cal.App.4th 377).

As discussed in detail below, respondent submits that: (1) the previously untranscribed portions of People's Exhibit 69 further establish that the trial court acted well within its discretion when it ruled that this evidence was admissible as a prior consistent statement; (2) evidence of the decedent victim Connie Navarro's[2] fear was admissible to show her state of mind including how she felt about the relationship with appellant – namely, to explain her conduct in ending the relationship, which in turn tended to show appellant's motive for assaulting and then murdering her; and, (3) it is well established under California law that the trial court had no sua sponte duty to give a limiting instruction as to the nonhearsay statements presented as circumstantial evidence of the decedent victim's fear.

I. THE TRIAL COURT PROPERLY ADMITTED PROSECUTION WITNESS MARILYN YOUNG'S POLICE INTERVIEW AS A PRIOR CONSISTENT STATEMENT UNDER EVIDENCE CODE SECTIONS 1236 AND 791

A. Introduction

In his opening brief appeal, appellant contended that the trial court violated his right to confrontation and due process by allowing the jury to hear during redirect testimony the audio recording of Marilyn Young's police interview (Peo. Exh. 69). (AOB 73-97.) In its brief, respondent argued that the recording was admissible as a prior consistent statement under Evidence Code sections 1236 and 791 because the defense's cross-examination repeatedly implied that Young's testimony at trial was recently fabricated due its minor differences with her police statements. (RB 65-71.) Also, because appellant had cross-examined Young concerning the statements she made during that interview, the prosecution was allowed to admit the entire interview under Evidence Code section 356. (RB 71-74.) Additionally, respondent argued that allowing the jury to hear Young's interview did not violate his Sixth Amendment confrontation rights because Young testified at trial and was subjected to cross-examination. (RB 63-65.)[3]

At the time of prior briefing, the parties were using the transcript of People's Exhibit 69 contained in Volume One of the Clerk's Transcript (Supplemental II) of the record on appeal, which, as this Court observed in its March 23, 2011 Order, was "incomplete" because it "does not contain a substantial portion of side two of the audio recording" of Young's police interview.

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[2] Two family members who testified at trial share the same last name as Ms. Navarro. Thus, to avoid confusion, respondent will refer to decedent victim Connie Navarro as "Connie."

[3] Respondent also argued that the police investigator's statements made during the interview were admissible and did not violate appellant's confrontation rights. (RB 74-78.)

In its first question, this Court asks about "[t]he significance of the previously untranscribed portions of People's Exhibit 69 as it relates to defendant's claim that the trial court erroneously admitted this evidence as a prior consistent statement[.]" (3/23/Order at p. 1.) The previously untranscribed portions (contained at pages 93 through 131 of the complete transcript of People's Exhibit 69, filed on April 7, 2011), further establish that the trial court acted well within its discretion when it ruled that Young's interview was admissible as a prior consistent statement.

B. Applicable Law Regarding the Liberal Admission of Prior Consistent Statement Pursuant to Evidence Code Sections 1236 and 791

> Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness's trial testimony and is offered in compliance with Evidence Code section 791. Evidence Code section 791 allows a prior consistent statement if offered after "[a]n express or implied charge has been made that [the witness's] testimony at the hearing is recently fabricated or is influenced by bias or other improper motive, and the statement was made before the bias, motive for fabrication, or other improper motive is alleged to have arisen." (*Id.*, subd. (b).)

(*People v. Bolin* (1998) 18 Cal.4th 297, 320-321.)

Thus, "Evidence Code section 791 permits the admission of a prior consistent statement when there is a charge that the testimony given is fabricated or biased, not just when a particular statement at trial is challenged. [Citations.]" (*People v. Kennedy* (2005) 36 Cal.4th 595, 614, overruled on other grounds in *People v. Williams* (2010) 49 Cal.4th 405, 459.) When a witness is implicitly accused of fabricating his or her testimony at trial, a prior consistent statement made before trial is admissible. (See, e.g., *People v. Ainsworth* (1988) 45 Cal.3d 984, 1013-1015; *People v. Gentry* (1969) 270 Cal.App.2d 462, 473; accord, *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.) The "offering of a prior inconsistent statement necessarily is an implied charge that the witness has fabricated his testimony since the time the inconsistent statement was made." (*People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1015.) Additionally, this Court has noted that in cross-examining witnesses as to their failure to tell officers facts to which they later testified, a defendant by implication makes a charge of recent fabrication. (*People v. Dennis* (1998) 17 Cal.4th 468, 531-532; *People v. Williams*, *supra*, 102 Cal.App.4th at p. 1011.)

As previously observed by respondent (RB 66-67), California has been described as one of the most liberal states in allowing the admission of prior consistent statement to rehabilitate the credibility of impeached witnesses. (See, e.g., *People v. Gentry*, *supra*, 270 Cal.App.2d at p. 474 [pointing to *People v. Duvall* (1968) 262 Cal.App.2d 417, 420-421, fn. 1, when observing that "California is one of the most liberal states as far as the admission of prior consistent statements is concerned"].)

C. As Further Evidenced by the Previously-Untranscribed Portions of the Interview, Young's Prior Consistent Statements Were Admissible Because the Defense Had Implicitly Accused Her of Fabrication

As previously discussed at pages 56 through 63 of the Respondent's Brief, the defense cross-examined Young about alleged discrepancies between her trial testimony and her 1983 police interview. Specifically, the defense tried to impeach her as to four parts of her trial testimony: (1) about Connie learning that appellant had broken into her home (10RT 1734-1736); (2) Connie hearing a "loud bang" on her patio the day before the murder (10RT 1737); (4) appellant threatening Connie a day before the murder that he "could hurt [her] if [he] wanted to" (10RT 1750); and (4) Young receiving a telephone call from appellant (10RT 1753-1754.) By so doing, the defense sought to imply that Young had recently fabricated her trial testimony. (See 10RT 1766; RB 65-71.)

This defense strategy rendered it permissible for the prosecution to show that Young's trial testimony was consistent with the statements she made during her police interview in 1983. (See *People v. Kennedy*, *supra*, 36 Cal.4th at p. 614; *People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1015.) Moreover, the trial court did not abuse its discretion by admitting the recorded interview, even though defense counsel told the court they were "just pinpointing the sequence of the times[.]" (10RT 1767.) The jury heard the allegedly impeaching evidence and could consider it, regardless of what defense counsel represented to the court or chose to argue to the jury.[4] Thus, the prosecution was entitled to bolster Young's credibility with her prior consistent statements in the recorded interview.

As discussed below, the previously-untranscribed portions of Young's recorded interview further establish that the audiotape was admissible because it contained prior consistent statements.

1. First Instance of Alleged Fabrication

During cross-examination, defense counsel highlighted an alleged discrepancy between Young's testimony and her prior statements to the police regarding appellant breaking into Connie's condominium and watching her from the closet:

> [Defense Counsel]: And let me ask you about that. You said that [Connie] found out that [appellant] was in the closet.

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[4] Indeed, the defense expressly accused Young of fabrication and bias when, during summation, the defense argued that, when a close friend or family member is murdered, a person "might go out of [one's] way to be helpful to the prosecution[,]" and "try[] to remember things that maybe didn't happen[.]" (15RT 3008.)

What she told you was that a friend of hers had told you that; correct?

[Young]: That he was watching, yes. And I think that he admitted it to her, too. I think that she told me that.

[Defense Counsel]: That's not what you told the police, was it, ma'am? Didn't you tell the police that a friend name [sic] Don Clapp [sic] had told Connie - -

[Young]: That he was - - first - - he first told Connie that she should get out of town because he thinks that [appellant] is - - he asked her if she has a skylight.

[Defense Counsel]: Let me ask you about that. [¶] What Connie told you is that Don Clapp had read an astrology chart and in the astrology chart - -

[Young]: This was a different story. There was a woman named Sue Johnson who was an astrologer. I didn't know that Donnie had anything to do with that. And she told Connie that she should also get out of town because [appellant] was in a rage, too. And so that's why we went to Laguna. [¶] And also that Donnie Clapp said that [appellant] was breaking into her house and that he was in a rage and that she should get out of town.

[Defense Counsel]: All right. Did you tell the police back in March the 5th in that tape-recorded conversation that Connie went to Laguna because she was afraid that [appellant] might go crazy this weekend because a friend of hers told her that, you know, her friend is an astrologer and told her that [appellant's] sign's showing that he's going to erupt this weekend and she got frightened and wanted to go away? Did you tell the police that?

[Young]: Yes, I did. That was one of the friends.

[Defense Counsel]: The friend, the astrologer, talked to her; correct?

[Young]: That was one of - - also Donnie Clapp [sic] told her that [appellant] was there, though, and not to tell [appellant]. He also told Connie not to tell [appellant], that he wanted to protect Connie. And he asked her if she has a skylight in her house. I'm not sure when this happened, but I know this also

happened, that Donnie wanted to tell Connie that Dean was breaking into her house.

[Defense Counsel]: Let me ask you this. When did Don mention the skylight?

[Young]: I'm not sure. It may have been - - I can't tell you, but I know he mentioned it to her. She told me that. It might have been right before the murder and it could have been a few weeks before that.

[Defense Counsel]: What you told the police about that in the written statement is that on the Wednesday or Thursday before Connie died that Don Clapp [sic] told her that [appellant] had entered the apartment through a skylight and was hiding in a closet when she went back for her clothes on Tuesday; correct?

[Young]: Right. That was one thing. But then there was another time that Donnie told her that [appellant] was in a rage and that she should get out of town.

[Defense Counsel]: Are you telling us that when Don Clapp told Connie that she needed to get out of town because [appellant] is in a rage that at the time he mentioned the skylight also?

[Young]: No. It may have been another time. I think it was two times he said something like that to her.

[Defense Counsel]: About a skylight?

[Young]: No. Once about a skylight, the other time is a rage.

[Defense Counsel]: The one time is about the skylight and the other time is a rage and then [appellant] stands in the closet and watches Connie get clothes; right?

[Defense Counsel]: That was right before it happened, when David and Connie went for clothes, right.

(10RT 1734-1737.)[5]

The previously untranscribed portions of People's Exhibit 69 show that Young had made prior consistent statements during her police interview about Donald Klapp made statements to Connie about appellant breaking into her home. Specifically, as to Donald Klapp telling Connie about appellant entering through the skylight, the following discussion took place between Young and the interviewer, Detective Purcell:

> DETECTIVE PURCELL: How did he break in, do you know?
>
> MS. YOUNG: Uh, he may have gone through the skylight, too. Because Donny -- his friend asked Connie, Donny Klapp asked Connie if she's got a skylight. Because nothing was broken. And, um – and he said that he got in through the sliding glass door, he told Donny. But Donny thinks that he -- and Connie did see a break in the skylight. She saw like a crack in the skylight.

(Complete Trans. of Peo. Exh. 69 at p. 96.) Young later reiterated that Donald Klapp had told Connie that appellant had been hiding in her closet. (*Id.* at p. 127.)

Young also told the police about the reason they went to Laguna: because Connie's astrologer friend Sue Johnson told her that appellant was in a "rage," and Donald Klapp told her to get out of town because appellant was "angry." Specifically, Young said during the interview:

> MS. YOUNG: Um, Connie was supposed to go out with Sue. Sue had a date. I was going to a party with my -- with Sidney and my kids. But that I didn't want to leave Connie alone. I knew she was frightened, because a friend told her that Dean was in a rage now because his stars were -- you know. We were annoyed with her friend, Sue Johnson, in a way, to get herself frightened.
>
> DETECTIVE PURCELL: Uh-huh.
>
> MS. YOUNG: But -- and then Donny called her and said that Dean is very angry, he like seen him so angry.
>
> DETECTIVE PURCELL: Which Donny is this?

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[5] As pointed out at footnote 18 on page 58 of the Respondent's Brief, it appears that defense counsel was referencing the portion of Young's interview at pages 29-30 and 58-59 of the Supplemental II Clerk's Transcript.

> MS. YOUNG: Donny --
>
> DETECTIVE PURCELL: Donny Klapp?
>
> MS. YOUNG: Klapp.
>
> DETECTIVE PURCELL: Okay.
>
> MS. YOUNG: And that maybe he -- maybe she should get out of town.
>
> [¶] . . . [¶]
>
> DETECTIVE PURCELL: Let's see, [Klapp] told her what, that she should be careful or that she should leave town?
>
> MS. YOUNG: He was worried about her, and maybe she should either get out of town. I think he said that. She was going to go to Palm Springs by herself, and Sue and I talked her out of it. We didn't want her to go by herself. We were all going to go down the next day and meet her there. And then she said, well, she's not going to be frightened by what Sue Johnson said about the astrology. But it seemed that Donny told her that he was in a rage.

(Complete Trans. of Peo. Exh. 69 at pp. 117-118.)

As the previously untranscribed portions of People's Exhibit 69 further establish, Young's prior consistent statements were admissible because the defense's impeachment of Young by repeatedly contrasting her trial testimony with her statements to the police – by pointing out omissions or discrepancies between the two – implicitly accused her of fabricating her trial testimony. (See *People v. Kennedy*, *supra*, 36 Cal.4th at p. 614; *People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1015.)

2. The Second Instance of Alleged Fabrication

Later, defense counsel again suggested that Young was altering her story at the trial regarding a noise that Connie heard the day before her death:

> [Young]: That night she went home. The next morning she told me that she heard a loud bang on her patio and she just thought that it might have been [appellant].

> [Defense Counsel]: *That's something you didn't tell the police during any of the conversations you had*, either the one they recorded or the one where the detective took notes; correct?
>
> [Young]: No, that's not correct. I think I did say it.
>
> [Defense Counsel]: You didn't see it in your statement; right?
>
> [Young]: I may not have said it in a statement. I was pretty shook up.

(10RT 1747, emphasis added.)[6]

As previously pointed out in the Respondent's Brief, Young had made a prior consistent statement during her police interview about Connie having heard a loud bang. (RB 59, fn. 19 (citing Supp. II CT 57); accord, Complete Trans. of Peo. Exh. 69 at p. 136 [Young telling the police that "the night before last, in the middle of the night [Connie] heard a big, loud bang, which scared her"].) Accordingly, the audiotape was admissible as a prior consistent statement.

3. The Third Instance of Alleged Fabrication

Later, the defense again raised a discrepancy between Young's prior statement and her testimony regarding a comment appellant made to Connie:

> [Young]: Correct. That was after - - when he came in and he did say, "*I could hurt you if I wanted to*, but I - - you know, and nobody would be able to do anything and I could - - no locks could keep me out of anywhere."
>
> [Defense Counsel]: *What you told the police back in March of '83 was that, "I don't want to hurt you, but if I wanted to, I could do it right here?"*
>
> [Young]: He did say that. I'm - - yes.

(10RT 1750, emphasis added.)[7]

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[6] Appellant admits that "[c]ross-examination on this point did raise a claim of fabrication," but he asserts that "it was not necessary or permissible to play the entire 45-minute tape." (AOB 87; Reply 50.)

The previously untranscribed portion of People's Exhibit 69 shows that Young had made prior consistent statements during her police interview as to this as well. Specifically, the following colloquy took place:

> DETECTIVE PURCELL: Did he ever threaten to kill her?
>
> MS. YOUNG: No, he never said anything (inaudible). He only said, "*I can hurt you if I wanted to*, and I saw you so many times alone." That's what he said Friday -- when he saw us in the restaurant, and he said, "She was walking around the streets by herself while I was" -- that Friday night that we picked her up. He said, "*I could have -- I could have hurt her then if I wanted to.*"

(Complete Trans. of Peo. Exh. 69 at pp. 100-101, emphasis added.) In a previously transcribed portion of the interview, Young had affirmed to Detective Purcell that appellant had said that "no locks could keep him out[.]" (Supp. II CT 57; accord, Complete Trans. of Peo. Exh. 69 at p. 135.)

Accordingly, because the defense had implicitly accused Young of fabricating her testimony, the prior consistent statements were admissible. (See *People v. Kennedy*, *supra*, 36 Cal.4th at p. 614; *People v. Ainsworth*, *supra*, 45 Cal.3d at p. 1015.)

4. The Fourth Instance of Alleged Fabrication

Defense counsel also raised Young's alleged failure to report a conversation she had with appellant to the police:

> [Young]: And I remember there was a phone call that - - he called me. And I can't remember exactly when it was, but he wanted Connie. He said he left Connie a message that he was going to leave her alone and he called me and he was - - had this unbelievably breathless voice saying, "Marilyn, um, it's [appellant]. I left a message for Connie and I wanted her to known [sic] that I'm going to leave her alone, but she didn't get back to

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(...continued)

[7] As noted in the Respondent's Brief, it appears that defense counsel was impeaching Young with statements contained on pages 39-40 of the Supplemental II Clerk's Transcript. (RB 59, fn. 20.) Additionally, it appears that defense counsel may also have been referring to statements contained on pages 56-57 of that transcript. (See Complete Trans. of Peo. Exh. 69 at p. 134.)

me and so call me back later." [¶] And I was afraid to call him back. I was afraid to call him. So I didn't call.

[Defense Counsel]: *You didn't mention that call to the police?*

[Young]: I did. I'm sure I did.

[Defense Counsel]: That's something you never saw in your statement; correct?

[Young]: There was a recorded statement.

[Defense Counsel]: Let me show you a transcript of that. I'll show you both statements. You want to look through them, please.

[Young]: Which one is the recorded statement? Because I had forgotten about that conversation.

[Defense Counsel]: That's the one that said Detective Purcell, Marilyn Young, and it has questions and answers on it. [¶] What we're looking for is a statement you made to the police how [appellant] called you breathlessly telling you how he was going to leave Connie alone and how he left this message and she hadn't called him back.

[Young]: That's not in here?

[Defense Counsel]: Why don't you look, please, and see if its in there.

[Young]: Well, I listened to it, of course, and I heard - - I remembered saying that I heard it on the recorder. So if it's not in here, I don't know why.

[Defense Counsel]: You heard a recording of you telling the police that [appellant] called you and you all had the conversation you just described for this jury, you actually heard a tape of you telling the police that?

[Young]: I heard - - I listened to my testimony.

[Defense Counsel]: How many tapes did you hear?

> [Young]: Just my testimony.
>
> [Defense Counsel]: Just one tape of you and Detective Purcell?
>
> [Young]: I heard what I said that night.

(10RT 1753-1754.)

Young was correct about her memory of the interview. When asked if appellant had discovered that Connie was staying with her ex-husband Mike in the days before the murders, the following discussion took place between Detective Purcell and Young:

> DETECTIVE PURCELL: Had [appellant] found out where she was staying then?
>
> MS. YOUNG: He knew where she was, because he told -- he left a message on my machine when I got home in the evening, and he sounded like, "Hello, Marilyn, this is Dean. Uh, Connie didn't get the message from you. I'm trying to convince her that, um, I'm going to leave her alone, and I want you to give her a call. I think she's up at Mike's in Bel Air. And call me later." I didn't call him. I was afraid to call him. He sounded so nuts.

(Complete Trans. of Peo. Exh. 69 at p. 129.)

In his prior briefing, appellant argued that the audiotape was "not admissible to rebut the defense claim of fabrication" because the former transcript of People's Exhibit 69 did not contain this statement. (AOB 88; Reply 50-51.) As the complete transcript makes clear, Young did make this prior consistent statement and thus it was admissible to rehabilitate her credibility after the defense implied fabrication based on her alleged silence. (See *People v. Dennis*, *supra*, 17 Cal.4th at pp. 531-532; *People v. Williams*, *supra*, 102 Cal.App.4th at p. 1011.)

D. The Entire Police Interview Was Admissible Under Evidence Code Section 356

As previously discussed at pages 71 through 74 of the Respondent's Brief, the trial court had ample discretion under Evidence Code section 356[8] to admit the entire interview audio

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[8] Evidence Code section 356 provides: "Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration,

(continued...)

recording. (See, e.g., *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 [allowing prosecutor to play entire tape of a conversation excerpts of which had been introduced by the defense as prior inconsistent statements].)

> Section 356 is sometimes referred to as the statutory version of the common-law rule of completeness. (See e.g. *People v. Samuels* (2005) 36 Cal.4th 96, 130 . . . .) According to the common-law rule: "'[T]he opponent, against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder, in order to secure for the tribunal a complete understanding of the total tenor and effect of the utterance.' [Citation.]" (*Beech Aircraft Corp. v. Rainey* (1988) 488 U.S. 153, 171, 109 S.Ct. 439, 102 L.Ed.2d 445 (*Beech*).)

(*People v. Parrish* (2007) 152 Cal.App.4th 263, 269, fn. 3, brackets in *Parrish*.)

Here, the trial court ruled that the prosecution would be allowed to play the audiotape in its entirety because it "believe[d] in the cross-examination of the witness [Young] just about every phone conversation was gone into, every first hand conversation was gone into. In other words, [Young's] whole spectrum of the statement she said she gave to the police department was a matter of cross-examination." (10RT 1779.) When the defense asked that the playing of the audiotape be stopped and the prosecutor countered they were "in the middle" of the tape and it should be played to completion, the trial court agreed with the prosecution that "[w]e'll finish it." (10RT 1781-1783.)

In making its rulings, the trial court implicitly reasoned that the jury needed to hear everything, even if some of the material presented did not fall within the ambit of a prior consistent statement, in order to understand the context of the prior consistent statements. As this Court explained in *Hamilton*,

> In applying Evidence code section 356 the courts do not draw narrow lines around the exact subject of inquiry. "In the event a statement admitted in evidence constitutes part of a conversation . . . , the opponent is entitled to have placed in evidence all that was said . . . by or to the declarant in the course of such conversation . . ., provided the other statements have *some bearing upon, or*

(...continued)

conversation, or writing which is necessary to make it understood may also be given in evidence."

> *connection with*, the admission or declaration in evidence." [Citations.]

(*People v. Hamilton*, *supra*, 48 Cal.3d at p. 1174, emphasis in original.)

Here, listening to the entire audiotape gave the jury the context of statements, and thereby gave the jury the opportunity to evaluate the tenor of the interview and, in so doing, to evaluate Young's credibility both at the time of the interview and during trial. And, as the trial court had noted, the defense had cross-examined Young as to the "whole spectrum of the statement she said she gave to the police department[.]" (10RT 1779.) Finally, stopping and starting the audiotape to find the relevant statements would have been inordinately time-consuming, particularly given the technology in use – an audiotape from 1983 being played on a tape recorder that "d[id]n't work very well" (10RT 1780, 1802).

Quite simply, the trial court did not abuse its discretion when it permitted the prosecution to play the entire audiotape to rehabilitate Young's credibility on redirect examination following appellant's attempts to accuse her of fabrication by picking apart her trial testimony by point to minute alleged discrepancies between it and her recorded police interview.

E. Any Error In Admitting Any Portion of Young's Interview as a Prior Consistent Statement Was Harmless

Even if the trial court erred in permitting the prosecution to play any portion of the recorded police interview on redirect examination, any error was harmless. At the guilt phase, the erroneous admission of a prior consistent statement is subject to the state law harmless-error standard in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Andrews* (1989) 49 Cal.3d 200, 211, disapproved on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237; accord, *People v. Manzo* (2011) 192 Cal.App.4th 366, 391-392.) Here, even assuming error, the judgment must be affirmed because it is not reasonably probable that a result more favorable to appellant would have been reached absent the error. (See *People v. Watson*, *supra*, 46 Cal.3d at p. 836.)

First, appellant's identity as the person who shot and killed Connie and her friend Sue Jory, and committed the murders during a burglary, was overwhelmingly and conclusively established by the prosecution during the guilt phase. Appellant's fingerprints were found around linen cabinet where Connie's body was found and on the door jamb leading to the master bedroom where Jory's body was found. (8RT 1311-1316, 1319-1321; 9RT 1494, 1551-1588.) Appellant's pattern of breaking into Connie's home and stalking her was compelling evidence of his motive and ability to enter the condominium and commit the murders. (See 9RT 1360-1376, 1506-1507; 10RT 1702; 11RT 1887-1888.) Appellant was seen with a gun immediately before the murders, and he left a nearby restaurant with sufficient time for him to get to the condominium by the estimated time of the murders. (11RT 1892.) Appellant fled Los Angeles immediately after the murders and, apart from his own self-serving testimony, he had no support for his alibi. (13RT 2381, 2393-2398, 2506-2508.) Additionally, a few days after the murders

he had documents instructing him how to change his identity (13RT 2509), by the end of the month he had applied for a passport under the a different name, "William Failla" (11RT 2035, 2043-2044; 13RT 2531-2532), and about two years after the murders he underwent plastic surgery that altered his facial appearance (11RT 2023; 13RT 2447). At the time of his arrest eight years after the murders, appellant was living in Texas under the assumed "William Failla" name and denied for several days being John Riccardi. (11RT 2021, 2040-2041.) Seven guns were recovered from appellant's Texas home; based on rifling impressions, one of those guns – one of appellant's two .38-caliber Colt revolvers – could not be excluded as the murder weapon. (11RT 2023, 2050-2052; 12RT 2141, 2143-2146.)

Additionally, appellant had admitted to two people that he had committed the murders. Appellant's burglary partner, Samuel Sabatino, testified that a few weeks before the murders appellant had told him that Connie had left him and he "felt like he was going to kill himself and that he was going to kill her." (11RT 1964-1965.) Then, several weeks later, appellant confessed to Sabatino about committing the murders. (11RT 1966-1969, 2002-2003.) Similarly, appellant's stepmother, Rosemary Riccardi, testified that appellant had admitted to his father that he had committed the murders. (12RT 2163-2175.)

Moreover, while appellant denied at trial that he was the murderer, the crime scene did not support a robbery or theft theory as a motive to suggest third-party culpability. When the murders were discovered, Connie's and Jory's purses – both containing cash, credit cards, wallets – were found untouched in Connie's home (8RT 1330-1333), and Connie's jewelry was still on her body (8RT 1251). This evidence supported the prosecution's theory that the murderer had a motive other than theft upon entering Connie's home, and once inside formed the intent to commit the murders. (See 15RT 2804 [prosecutor explaining to court that prosecution's theory on the "burglary is not with the intent to commit theft, but it's to commit other felony therein"]; 15RT 2807 [during summation, prosecutor arguing that appellant was guilty of first degree murder based on willful, deliberate, premeditate murder and noting "there's no sign of forced entry[,]" "[t]here's no ransacking[,]" "[t]here's nothing taken"]; 15RT 2808 [prosecutor arguing that "the shooter . . . knew both of these women and this was not a killing for financial gain"]; 15RT 2810 [prosecutor arguing to the jury that the murders were first degree murder based on express malice aforethought: appellant broke into Connie's home, intended to assault them, "there was an argument and he shot both of the two women," i.e., appellant formed intent to commit the murders only after entering the home]; 15RT 2815-2816 [prosecutor arguing burglary special circumstance for Connie's murder to jury as, not theft, but intent to "commit a felony inside"]; 15RT 3044-3046 [when discussing appropriate jury instruction for burglary special circumstance, prosecutor explains his theory for the burglary special circumstance was that appellant entered Connie's home with the intent to commit assault]; see also14RT 2633 [prosecutor telling court "I'm going to proceed in this case solely on a first degree murder theory of willful, deliberate, and premeditated murder. Therefore, I am going to withdraw [CALJIC No. 8.21, which deals with felony murder."]; 14RT 2654 [when discussing proposed instructions, the prosecutor stated, "my only argument in regard to [burglary] is with regard to the special circumstance"]; 14RT 2684 [prosecutor telling the court that he was proceeding on the underlying murder charges under a "willful, deliberate , premeditated murder" and not on a

felony-murder theory, and he was arguing that Connie's murder occurred during a burglary strictly in relation to the burglary special circumstance allegation]; 15RT 2813-2814 [prosecutor urging jury to find first degree premeditated murder].) Rather, the crime scene pointed to appellant.

Second, Young's recorded police interview was "substantially similar to [her] testimony at trial, and thus was largely cumulative." (*People v. Andrews*, *supra*, 49 Cal.3d at p. 211.) Third, the trial court gave the jury a limiting instruction regarding the portions of the audiotape where Young expressed concerns about her safety. (10RT 1784.) The jury is presumed to have followed the instruction. (See *People v. Guerra* (2006) 37 Cal.4th 1067, 1115.)

In sum, given the overwhelming and conclusive evidence of appellant's guilt, the cumulative nature of the recorded statement, and the curative instruction, there is no reasonable probability that, had the audiotape not been played, appellant would have received a more favorable verdict.

II. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF CONNIE'S FEAR OF APPELLANT

In its second question, this Court asks "[w]hether defendant's awareness of the decedent victim's fear of him, and her actions in conformity with that fear, rendered her fearful state of mind relevant to provide defendant's motive under Evidence Code section 1250 (see *People v. Ruiz* (1988) 44 Cal.3d 589, 609, *Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594, and *Commonwealth v. Qualls* (Mass. 1997) 680 N.E.2d 61, 64)[.]" (3/23/Order at p. 1.) As discussed below, the answer is yes.

A. Relevant Procedural Background

As set forth in the previously filed Respondent's Brief, the trial prosecutor successfully opposed appellant's motion in limine to exclude evidence of Connie's fear of him. (See RB 102-103.) In the written response to appellant's motion, the prosecution argued that the evidence of Connie's fear was admissible to show her behavior in conformity with her fear pursuant to Evidence Code section 1250.[9] Consistent with this theory, the prosecution argued that the

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[9] Evidence Code section 1250 provides, in pertinent part: "(a) Subject to Section 1252, evidence of a statement of the declarant's then existing state of mind, emotion, or physical sensation (including a statement of intent, plan, motive, design, mental feeling, pain, or bodily health) is not made inadmissible by the hearsay rule when: [¶] (1) The evidence is offered to prove the declarant's state of mind, emotion, or physical sensation at that time or at any other time when it is itself an issue in the action; or [¶] (2) The evidence is offered to prove or explain acts or conduct of the declarant."

(continued...)

statement was relevant to prove that Connie did not allow appellant into her condominium on the night of the murders. (2CT 531-532.) Additionally, the prosecution argued that the evidence of specific conduct was nonhearsay circumstantial evidence to prove Connie's fear. (2CT 532.) The trial court determined that the evidence was relevant to show that Connie took actions in conformity with her fearful state of mind. Further, the court found that the probative value of the evidence outweighed any prejudicial effect it might have. (7RT 1155-1156.)[10]

With regard to fear evidence, the Respondent's Brief discusses: the parties' opening statements during which appellant (prior to any evidence being presented at trial) disputed the nature of his relationship with Connie (RB 107-108); the stalking evidence introduced at trial through the testimony of various prosecution witnesses (Carl Rasmusson, Janet Rasmusson, George Hoefer, Marilyn Young, Craig Spencer, and Connie's son David) (RB 103-104); the fear evidence (presented through the trial testimony of Marilyn Young and Connie's ex-husband James "Mike" Navarro) that appellant challenges on appeal (RB 109-110); and, appellant's trial testimony during which he gave very different account of his relationship with Connie after their breakup and before her murder (RB 104-107).

B. Evidence that Connie Feared Appellant Was Relevant and Admissible To Prove Appellant's Motive

Here, appellant's awareness of Connie's fear of him rendered evidence of her fearful state of mind relevant to prove appellant's motive – namely, the "fear" evidence explained her conduct in ending the relationship, which in turn tended to show appellant's motive for assaulting and then murdering her.

Evidence Code section 1250 creates an exception to the hearsay rule for evidence of a declarant's statements regarding his or her then-existing state of mind (1) when the declarant's state of mind is at issue or (2) when the evidence is offered to prove or explain the declarant's acts or conduct. (*People v. Hernandez* (2003) 30 Cal.4th 835, 872; *People v. Cox*, *supra*, 30 Cal.4th at p. 962; *People v. Ruiz*, *supra*, 44 Cal.3d at p. 608; *People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 389.) "A prerequisite to this exception to the hearsay rule is that the

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(...continued)

[10] The trial court also granted the prosecutor's motion to introduce evidence of appellant's stalking behavior as to Connie Navarro, pursuant to Evidence Code section 1101, subdivision (b), to demonstrate motive and intent. (7RT 1150; see 2CT 514-527 [prosecution's motion].) The jury was instructed to consider that evidence for the limited purpose of whether it tended to show defendant's (a) motive, and (b) knowledge or means to commit the crimes. (3CT 702-703; 14RT 2773.)

declarant's mental state or conduct be factually relevant." (*People v. Hernandez*, *supra*, at p. 872; accord, *People v. Guerra*, *supra*, 37 Cal.4th at p. 1114.)

Circumstantial evidence of a victim's fear also may be admissible as nonhearsay evidence of the victim's state of mind.

> [A] statement which does not directly declare a mental state, but is merely circumstantial evidence of that state of mind, is not hearsay. It is not received for the truth of the matter stated, but rather whether the statement is true or not, the fact such statement was made is relevant to a determination of the declarant's state of mind. [Citation.] Again, such evidence must be relevant to be admissible-the declarant's state of mind must be in issue. ([Evid. Code,] § 210.)

(*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 389; see *People v. Garcia* (1986) 178 Cal.App.3d 814, 822 ["Statements by a victim concerning the defendant's prior conduct such as threats made to him tend to establish the victim's state of mind towards the defendant, namely, fear of him, and may be admitted where that state of mind is in issue."].)

"A murder victim's fear of the alleged killer may be in issue . . . when, according to the defendant, the victim behaved in a manner inconsistent with that fear." (*People v. Hernandez*, *supra*, 30 Cal.4th p. 872; see, e.g., *People v. Guerra*, *supra*, 37 Cal.4th at p. 1114 [murder victim's statement that she feared defendant was "clearly probative of her lack of consent to sexual intercourse in the attempted rape"]; *People v. Crew* (2003) 31 Cal.4th 822, 840 [murder victim's statement to friend, "If you don't hear from me in two weeks, send the police," made prior to leaving on trip from which she never returned, was properly admitted to rebut defense theory that victim was a troubled person who had disappeared of her own accord]; *People v. Lew* (1968) 68 Cal.2d 774, 778-780 [murder victim's fear of defendant relevant to disprove defendant's claim that the decedent was sitting on his lap when his gun accidentally discharged]; see also *People v. Griffin* (2004) 33 Cal.4th 536, 578 [twelve-year-old victim's statement that she intended to confront the defendant if he continued to fondle her, made on day she was killed, was admissible under section 1250 to prove that she confronted him in accordance with her statement of intent]; cf. *People v. Jablonski* (2006) 37 Cal.4th 774, 820-821 ["the victims' statements were inadmissible under section 1250 because the state of mind of the victims was not relevant to any dispute issue; however, evidence that defendant knew one of the victims "was afraid of him had some bearing on his mental state in going to visit the women . . . and how he planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation"]; *People v. Noguera* (1992) 4 Cal.4th 599, 621-622 [because there was no dispute as to decedent victim's state of mind or behavior in conformity, victim's statements of fear were inadmissible].)

"[A] victim's prior statements of fear are not admissible to prove *the defendant's* conduct or motive (state of mind)[]" because "[i]f the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill." (*People v. Ruiz*, *supra*, 44 Cal.3d at 609, emphasis in original.) But, *where there is a disputed issue as to the victim's state of mind*, evidence that tends to show how the victim was feeling about the defendant is admissible because it "tend[s] to explain [the victim's] conduct" toward the defendant, and that evidence may "in turn logically tend[] to show [the defendant's] motive to murder [the victim]." (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 594; see also *id.* at pp. 598-599 ["When the declarant's state of mind is relevant and the statements of threats or brutal conduct are circumstantial evidence of that state of mind, the evidence is admissible so far as a hearsay objection is concerned."].)

Such was the case here. *Rufo v. Simpson*, *supra*, 86 Cal.App.4th 573 – the civil action where the jury found that O.J. Simpson had killed his ex-wife Nicole and Ronald Goldman – is persuasively resolves this issue. There, the trial court admitted evidence of Nicole's telephone call to a battered women's shelter relating, among other things, that Simpson had stalked her, she feared him, and she had decided to not to move back in with him. (*Id.* at pp. 588-590.) The Court of Appeal ruled that Nicole's statements – both as statements of fear under Evidence Code 1250 and as circumstantial nonhearsay permitting a state-of-mind inference – regarding her relationship with Simpson were admissible to show her state of mind and explain her conduct in terminating the relationship, "which in turn was alleged to have provoked Simpson to murder." (*Id.* at pp. 591-592.)

The Court of Appeal rejected Simpson's argument that Nicole's state of mind was irrelevant, concluding that her state of mind was at issue given the parties' contrasting views of the relationship. (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at pp. 594-595.) "According to the plaintiffs' theory of the case, Nicole, after a long stormy sometimes violent relationship with Simpson and efforts to reconcile, decided in May of 1994 finally to end the relationship; the final few weeks were tense; Simpson reacted negatively; finally, on the night of the killings, when Simpson was excluded from the family gathering he flew into a rage and killed Nicole, along with Ronald, an unanticipated bystander." (*Id.* at p. 594.) Simpson, by contrast, contended that "'the relationship was a loving relationship and that [he] had no basis in that relationship which would cause him to commit the acts resulting in the deaths of the decedents.'" (*Ibid.*) As the Court of Appeal explained, Nicole's state of mind was relevant and the evidence explained "how Nicole was feeling about Simpson, tended to explain her conduct in rebuffing Simpson, and this in turn logically tended to show Simpson's motive to murder her." (*Ibid.*)

As in *Rufo v. Simpson*, Connie's statements of fear – both as express statements of fear under Evidence Code section 1250 and as circumstantial nonhearsay permitting an inference of her fear – were admissible as evidence of her state of mind and were offered to explain Connie's conduct in ending her relationship with appellant and rejecting him. (See *Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 591.) In turn, this state-of-mind evidence, and her conforming conduct, was alleged to have provoked appellant to assault and ultimately murder her. (See *Ibid.*)

Similarly, as in *Rufo v. Simpson*, Connie's state of mind was a disputed issue given the parties' conflicting views of the relationship. (See *Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 594 [decedent's state of mind at issue where plaintiffs' theory was that Simpson killed Nicole after she finally terminated the stormy and violent relationship versus the defense contention that the relationship was a loving one].) In his opening statement, the trial prosecutor told the jury that appellant's motive to kill Connie would be proved by appellant's stalking of her prior to the murders. (8RT 1192-1198.) During an opening statement given before the prosecution's case began, the defense disputed this characterization of appellant's relationship with Connie, stating:

> [W]hat the evidence is going to show is that there was no stalking of Connie Navarro. You'll hear, you'll see, that there was a sincere and genuine effort of a man who loved a woman very much to try to salvage a relationship that was important to him.

(8RT 1205; see 8RT 1211 ["[appellant] did not force Connie Navarro to meet him for breakfast or for lunch or dinner, but it was consensual"].) Appellant's trial counsel told the jury that appellant had no motive to kill Connie because they had both agreed to the possibility of reconciliation, stating:

> There was no motive on the part of [appellant] to kill because he felt jilted after [Connie] Navarro broke up with him. Because remember on March the 2nd [i.e., the day before the murders], when they met for breakfast, that [appellant] told Connie Navarro that he would be back from New York in a few weeks and the possibility was left open that they could see each other again. The same way that they had broken up half a dozen times over the last year. There would be absolutely no point in killing her.

(8RT 1223; see 8RT 1214 ["[Connie] doesn't close the door immediately on the relationship. She tells him, 'I need time to assess where I am and what I want.' She tells him, 'When you get back, call me.'"].)

The disputed nature of the relationship, making Connie's fearful state of mind relevant to prove appellant's motive, permeated the trial. For example, during closing argument, the prosecutor pointed to the parties' dispute regarding the nature of the relationship as it related to appellant's motive to kill Connie, stating:

> Motive, domestic violence, stalking, [appellant's] jealously, [appellant's] possession of Ms. Navarro – [appellant's] obsession with her. And [appellant] tells you none of that is true, that all these people who testify as to the specific instances and facts where he's looking in the windows, where he's making calls to find out what she's eaten at 12 o'clock to Marilyn Young, that none of the statements of any of the witnesses are true.

(15RT 2822-2823.) The defense countered in its summation: "There is no motivation on the part of [appellant] to kill Connie Navarro." (16RT 3074.) The defense argued to the jury that the relationship had not ended, but rather had continued:

> [Appellant] loved Connie Navarro very much. . . . [¶] Maybe he didn't know how to love her perfectly. Maybe he didn't know how to let go during the time she would want to let go, *yet would come back*, this back-and-forth relationship. Maybe he should have walked away in July or September or December. *But the relationship went on and on.*

(16RT 3077-3078, emphasis added.)

Moreover, any contention by appellant that he did nothing to put at issue Connie's state of mind or conduct immediately before the murders, because he denied being the murderer (see 2CT 362, 535; 7RT 1154-1155; AOB 138-139, 144-145; Reply 89), fails. The court in *Rufo v. Simpson* rejected a similar contention, explaining:

> [Defendant] contends that because he denied being the perpetrator, the defense did nothing to put into issue [the victim's] state of mind or conduct immediately before the killings. This does not show the evidence was irrelevant. Even without an opening statement by [defendant's] counsel or testimony by [defendant], plaintiffs were entitled to present evidence tending to establish motive. Without persuasive evidence from plaintiffs regarding motive, the jurors might believe there was nothing in the relationship between [defendant] and [victim] which would precipitate a murder. (See *People v. Zack*[(1986)] . . . 184 Cal.App.3d 409, 415. . . [prior assaults on wife admissible, husband "was not entitled to have the jury determine his guilt or innocence on a false presentation that his and the victim's relationship and their parting were peaceful and friendly"]; *People v. Linkenauger*[(1995)] . . . 32 Cal.App.4th 1603, 1615. . . [same].)

(*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at pp. 594-595; see *People v. Smithey* (1999) 20 Cal.4th 936, 971-972 [murder victim's statements to acquaintance that she thought defendant previously had stolen from her was admissible "for the nonhearsay purpose of showing [murder victim's] state of mind concerning defendant" and to impeach defendant's testimony about the prior theft; that defendant did not testify until after the statements were admitted through the victim's acquaintance's testimony "does not change the conclusion on appeal that [the acquaintance's] statements regarding [the murder victim's] state of mind were admissible"].) Thus, here, appellant's alibi defense could not, and did not, render immaterial the evidence of Connie's

fearful mind, which was highly relevant to showing appellant's motive for assaulting and then murdering her.

Additionally, this Court has held that a defendant's knowledge of a decedent's victim's fear is admissible. Specifically, in *Jablonski*, a case where the defendant was convicted of the first degree murders of his wife (Carol Spadoni) and her mother (Eva Petersen), this Court held that victim Petersen's statement of fear of the defendant, "communicated to the defendant by [his prison friend], . . . was generally admissible on the issue of premeditation." (*Jablonski*, *supra*, 37 Cal.4th at pp. 820-821.) Seven months before the murders, Peterson had asked the defendant's prison friend to pick up some of defendant's belongings. (*Id.* at p. 818.) The defense sought to exclude the statement as inadmissible fear evidence. (*Ibid.*) The prosecution countered that the statement was relevant to show premeditation – that Petersen would not have allowed him in the house and thus he would have had to break in. (*Ibid.*) While this Court concluded that fear statements made by both victims were inadmissible under Evidence Code section 1250 "because the state of mind of the victim was not relevant to any disputed issue" – i.e., because the defendant did not dispute that they feared him – this Court held that Petersen's statement of fear was properly admitted as nonhearsay circumstantial evidence to show the statement's effect on the defendant, notwithstanding that the statement was communicated to him seven months before the murders. (*Id.* at pp. 820-821.) This Court explained: "Evidence that defendant believed Petersen was afraid of him had some bearing on his mental state in going to visit the women – as the trial court expressed it, 'he was not going for a friendly visit' – and how he planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation." (*Id.* at p. 821.)

Other states' courts have allowed evidence of a victim's state of mind as proof of the defendant's motive to kill in certain circumstances. For example, in Massachusetts, "[t]he state-of-mind exception to the hearsay rule calls for admission of evidence of a murder victim's state of mind as proof of the defendant's *motive to kill* the victim when and only when there also is evidence that *the defendant was aware* of that state of mind at the time of the crime and would be likely to respond to it." (*Commonwealth v. Qualls*, *supra*, 425 Mass. at p. 167; compare *id.* at p. 169 [evidence of victim's fear is inadmissible, even if defendant knew of the fear, where it does not shed light on defendant's motive to kill], with *Commonwealth v. Seabrooks* (1997) 425 Mass. 507, 681 N.E.2d 1198, 1202 [discussing two cases – *Commonwealth v. Lowe* (1984) 391 Mass. 97, 104-106, 461 N.E.2d 192, and *Commonwealth v. Borodine* (1976) 371 Mass. 1, 7-8, 353 N.E.2d 649 – evidence admissible where "the murder victim's statements were declarations of future intent to break off a relationship with the defendant[,]" from which "the jury could infer that the victim communicated that intention to the defendant, and the statements were material on the issue of the defendant's motive for killing the victim"].)

Following that rule, Connie's statements that she feared appellant were admissible under either Evidence Code section 1250 or as nonhearsay circumstantial evidence of her fearful mind, which was relevant to prove appellant's motive. Here, there was evidence that appellant was aware of Connie's fear of him and how he would likely respond to it. For example, after Connie broke up with him in January 1983, appellant "forced" his way into her home, "forced himself on

[Connie] and to spend the night with her," holding her all night by her breast and not letting her get off the bed. (10RT 1711.) About a month before the March 1983 murders, he kidnapped her at gunpoint. (10RT 1718-1725, 1729.) Then, after the kidnapping and another incident where he sabotage her car, Connie, joined by Marilyn Young and Young's then-boyfriend, met with appellant to tell him to stop harassing Connie. (10RT 1711, 1725, 1727, 1730-1731.) Finally, on the morning of March 2 – the day before the murders – appellant approached Connie who was with Young and Young's ex-husband. (10RT 1702.) Appellant, who was "angry" (10RT 1760), told Connie:

> "[T]here are no locks that could keep me out of anyplace. If I wanted to hurt you, I could. I could hurt you right here and nobody would do anything. I could have hurt you on the street the other night. You were all alone and I didn't hurt you."

(10RT 1702; see 10RT 1750, 1760.)[11]

Moreover, the evidence showed how appellant was likely to respond to her fear – i.e., that he would retaliate against her when she finally terminated the relationship. Before the murders, appellant voiced this intended motive to his longtime burglary partner, Samuel Sabatino. Appellant told Sabatino that Connie had left him, he was "going crazy over it," he "felt like he was going to kill himself and . . . going to kill her." (11RT 1964-1965.) Additionally, he told Sabatino that he was "very upset" because he had found out that Connie was dating another man. (11RT 2002.) In a similar vein, appellant told Marilyn Young a day

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[11] During that incident, appellant confronted Connie about a letter that she had addressed to him but never sent. (10RT 1702-1703, 1751, 1759-1760.) Appellant admitted to her that he had broken into her home and found the letter. (10RT 1702, 1760.) Although the actual stolen letter was not presented at trial, a draft of a letter written by Connie to appellant, expressing her feelings about him and her fear, was introduced into evidence. (10RT 1797-1798; Peo. Exhs. 70 & 70A.) Given the date of the draft letter, it was reasonable to infer that it was a draft of the letter that appellant stole. The draft letter read, in part:

> I'm so sorry that you are still so angry & that you feel a need for vengence (sic) & punishment—You are accomplishing your goal . . . the smallest sound or movement—makes me jump. The sound of the phone now is frightening—another hang up? [¶] I'm so locked up in my home—afraid of every sound the walls have probably always made—I walk out of my house—a coffee shop—the gym—looking—*terror*—until I get into my car & I know that the doors are locked & I can breath [sic] again until I get out—then it starts all over again—How long is it going to go on?

(Peo. Exh. 70A, emphasis added.)

before the murders that he "would not be . . . responsible for what he would do if he ever saw [Connie] with anybody[,]" i.e., going out with another man. (10RT 1690; see also 10RT 1762 [Young's testimony that Connie had dated another man].)

Thus, because appellant was aware of Connie's fear of him and her conduct conforming to that fear – i.e., that she finally terminated the relationship with him – this evidence of her fearful state was relevant to prove his motive – i.e., that he broke into her home to assault her in retaliation for her rejection of him. (See *Jablonski*, *supra*, 37 Cal.4th at p. 821; *Commonwealth v. Qualls*, *supra*, 425 Mass. at p. 167.)[12]

C. Any Error in the Admission of Evidence of Connie's Fear of Appellant Was Harmless

Regardless, even assuming the evidence of Connie's fear was erroneously admitted, the error was harmless under either the *Watson* standard for assessing the prejudicial effect of state law error, or the *Chapman*[13] standard for assessing the prejudicial effect of federal constitutional error. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 821; but see *People v. Ruiz*, 44 Cal.3d at p. 610 [applying *Watson* harmless-error analysis only].)

The admission of Connie's statements of fear was not prejudicial under either standard because the jury heard testimony that appellant repeatedly followed Connie (10RT 1691-1696, 1701, 1740-1741), threatened men who were seen with her (10RT 1621-1623), appeared

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[12] Respondent notes that evidence of Connie's fear of appellant also was admissible and relevant to prove the burglary circumstance, which the jury found true as to her murder (3CT 763). (See *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 819-820 [evidence tending to show the victim's fear of the defendant may also be relevant when "'the victim's state of mind is directly relevant to an element of the offense'"].) Here, Connie's state of mind was at issue because the burglary special circumstance required proof that appellant had no right to enter Connie's home, i.e., that Connie would not have consented to his entry. (See *id.* at p. 821 [defendant's awareness of victim's fear was relevant to premeditation]; *People v. Ortiz*, *supra*, 38 Cal.App.4th at pp. 385, 391[decedent victim's statements were admissible to prove the victim's state of mind, i.e., that she disliked or was uncomfortable with the defendant, and therefore would not have voluntarily had sexual relations with him].) Here, the burglary special circumstance required the People to prove Connie's state of mind beyond a reasonable doubt regardless of whether or not appellant's chosen defense theory was alibi, especially given that appellant had disputed Connie's actions conforming with that fear by claiming that both had believed in the possibility of reconciliation just prior to her murder. (See *People v. Waidla* (2000) 22 Cal.4th 690, 723 [alibi defense did render murder victim's state of mind immaterial because lack of consent was an element of burglary and robbery].)

[13] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

uninvited at her home (10RT 1788; 11RT 1814-1815), repeatedly broke into her home (9RT 1506-1509; 10RT 1690-1691, 1695, 1710, 1738), handcuffed her fifteen-year-old son during one of the break-ins (9RT 1360-1376), pointed his finger at her like it was a gun and gestured as if shooting her (10RT 1674-1675), kidnapped her at gunpoint (10RT 1696-1699; 11RT 1816-1818, 1844-1845), and that Connie had prepared to get a restraining order against appellant (10RT 1796-1797, 1799-1800; 11RT 1824-1825). The only evidence produced to controvert the prosecution's evidence of stalking was appellant's own self-serving denials. In light of all this evidence of appellant's threatening behavior, Connie's hearsay and nonhearsay statements of her fear of appellant were unremarkable at best. In fact, based on the evidence, the jury almost certainly inferred her fear prior to even hearing Connie's statements of fear. Because the statements of Connie's fear were largely cumulative of other properly admitted evidence to the same effect, the admission of these statements was harmless. (See *Noguera*, *supra*, 4 Cal.4th at pp. 622-623 [harmless error where much of the erroneously admitted testimony was heard by the jury through other witnesses].)

Moreover, as set forth in greater detail in the harmless-error discussion in Argument I, above, the prosecution's guilt phase evidence overwhelmingly and conclusively established that appellant was the murderer. Additionally, he admitted killing the two women to two people – his longtime burglary partner and his father.

Quite simply, even if the fear evidence was erroneously admitted, it was not prejudicial because the other evidence overwhelmingly and conclusively established appellant's guilt.

III. THE TRIAL COURT DID NOT HAVE A SUA SPONTE DUTY TO GIVE A LIMITING INSTRUCTION

In its third and final question, this Court asks "[w]hether the trial court had a sua sponte duty to give a limiting instruction concerning those nonhearsay statements presented as circumstantial evidence of the decedent victim's state of mind (see Evid. Code, § 1250; *People v. Hamilton* (1961) 55 Cal.2d 881, *People v. Cox* (2003) 30 Cal.4th 916, 962-963, and *People v. Ortiz* (1995) 38 Cal.App.4th 377)." The answer is no.

"A limiting instruction is required with declarations used as circumstantial evidence of the declarant's mental state; that is, the declaration is not received for the truth of the matter stated and can only be used for the limited purpose for which it is offered. ([Evid. Code,] § 355.)" (*People v. Ortiz*, *supra*, 38 Cal.App.4th at p. 389; accord, *People v. Cox*, *supra*, 30 Cal.4th at pp. 962-963.) Evidence Code section 355 provides, in pertinent part: "When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly." (Italics added.) "[A]bsent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction." (*People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3, citing, inter alia, Evid. Code, § 355; accord, *People v. Smith* (2007) 40 Cal.4th 483, 516; *People v. Farley* (1996) 45 Cal.App.4th

1697, 1711 ["Although the court must instruct the jury on the general principles of law applicable to a case, this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered. [Citation .]"].); see also *People v. Hamilton*, *supra*, 55 Cal.2d at pp. 889-890 [limiting instruction given regarding use of decedent's state-of-mind declarations], overruled on another point by *People v. Wilson* (1969) 1 Cal.3d 431, 442.)

Here, as noted in footnote 37 at page 117 of the Respondent's Brief, the defense did not request a limiting instruction regarding the use of the "fear" evidence. Accordingly, the trial court did not err in not giving a limiting instruction because, absent a request, the trial court had no sua sponte duty to give such an instruction. (See *People v. Macias*, *supra*, 16 Cal.4th at p. 746, fn. 3.)

IV. CONCLUSION

For the reasons set forth above and those contained in respondent's previous briefing, respondent respectfully requests that the judgment of conviction and sentence of death be affirmed.

Dated: April 19, 2011

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. John Alexander Riccardi***
Case No(s).: **S056842, S046836**

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 19, 2011**, I served the attached **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF Pursuant To March 23, 2011 Order** 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 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 **April 19, 2011**, at ~~Los Angeles, California~~.

Z. Salena
Declarant

Signature

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