SUPREME COURT COPY

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SUPREME COURT
FILED
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Frederick K. Ohlrich Clerk
Deputy

July 8, 2011

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

RE: People v. John Alexander Riccardi (Automatic Appeal)
Case No. S056842
Appellant's Letter Brief Pursuant to March 23, 2011 Order

Dear Mr. Ohlrich:

On March 23, 2011, this Court ordered that counsel review the taped exhibit 69 for completeness. After listening to the exhibit, I agree that the previously untranscribed pages are contained at pages 93-131 of the AG's Complete Transcript of People's Exhibit 69, and that the Complete Transcript is accurate.

This Court requested the parties to submit supplemental letter briefs addressing the following three issues:

1. The significance of the previously untranscribed portions of Exhibit 69, 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 prove defendant's motive under Evidence Code section 1250 (see

DEATH PENALTY

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 NE 2d 64.

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 Ev. 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 below, appellant submits that the newly transcribed portions of Exhibit 69 further demonstrate that (I) (A) the trial court violated appellant's rights to confrontation and due process by allowing the jury to hear the entire audio recording of the interview of Marilyn Young by Detective Purcell, where Detective Purcell's hearsay statements (theorizing about appellant's guilt and the danger to Marilyn Young as long as appellant is on the loose) were chilling and inflammatory, and (I)(B) the trial court erroneously admitted this evidence as a prior consistent statement; (II) the victim's fearful state of mind was not relevant to prove defendant's motive, the statements of the victim violated appellant's right to confrontation, and (III) the trial court had a sua sponte duty to give a limiting instruction concerning this evidence if admitted as evidence of victim's state of mind.

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I. THE TAPE RECORDING WAS ERRONEOUSLY ADMITTED

A. THE TRIAL COURT VIOLATED APPELLANT'S RIGHT TO CONFRONTATION AND DUE PROCESS BY ALLOWING THE JURY TO HEAR THE ENTIRE AUDIO RECORDING OF EXHIBIT 69, INCLUDING DETECTIVE PURCELL'S STATEMENTS

While appellant's appeal was pending, the United States Supreme Court held in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) that the admission of testimonial out-of-court statements, even if authorized by an exception to the hearsay rule, violates the confrontation clause. This Court is bound by *Crawford's* holding.

A witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination.

The Supreme Court has yet to issue an exhaustive definition of testimonial evidence-the kind of evidence implicating the Confrontation Clause. At the very least, testimonial evidence covers statements made in the course of police interrogations when the "circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." *Davis v. Washington,* (2006) 547 U.S. 813, 822. In *Davis v. Washington* and its companion case, *Hammon v. Indiana*, the Court explained what constitutes testimonial hearsay:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances indicate that there is no ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

The *Davis* Court noted several factors that, objectively considered, help determine whether a statement is testimonial: 1) whether the statement describes past events or events as they are happening, 2) whether the purpose of the statement is to assist in investigation of a crime or, on the other hand, provide information relevant to some other purpose, 3) the level of formality of the exchange in which the statement is made. The court noted that a single conversation with, for example, a 911 operator, may contain both statements that are intended to address an ongoing emergency and statements that are for the purpose of assisting police investigation of a crime. The latter are testimonial statements because they are the sort of statements that an objectively reasonable person, listening to the statements, would expect to be used in an investigation or prosecution.

Detective Purcell's statements were testimonial because they were made in the course of a police investigation and were made for the primary purpose of

establishing or proving past events potentially relevant to later criminal prosecution.

Crawford was concerned with ensuring that out-of-court testimonial statements were not used as evidence before a jury if the speaker cannot be cross-examined. *Ocampo v. Vail*, (9th Cir. 2011) --F.3d --.

In *Ocampo*, only one of parties to the interrogation was available for cross-examination at trial. In that case, a police officer testified about what a witness had told him. The presence and testimony of only one of the parties to the interrogation session was not enough to satisfy the Confrontation Clause.

In *Melendez-Diaz v. Mass* (2009) 129 S. Ct 2527, the Supreme Court clarified that the text of the Sixth Amendment contemplates two classes of witnesses - "those against the defendant and those in his favor. The prosecution must produce the former, while the defendant may produce the latter. . . there is not a third category of witnesses, helpful to the prosecution, but somehow immune from confrontation." *Id.* at 2534.

The Court in *Melendez* said, "Various formulations of this core class of testimonial statements exist: *ex parte* in-court testimony or its functional equivalent-that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements ... contained

in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Id.*, at 51-52, 124 S.Ct. 1354.

Appellant's case bears many similarities to the challenged evidence in Ocampo, in that only one of the parties to the session testified. Detective Purcell did not testify at the trial. Yet the entire taped exhibit ---in which Purcell propounded opinions of appellant's behavior, guilt and dangerousness --- was played to the jury; through Purcell's statements, the jury was exposed to numerous and inflammatory statements about the alleged danger to Marilyn Young as long as appellant was on the loose.

At one point on the tape, the police officer and Young agree that the best thing for Riccardi to do is to kill himself. (Compl. Trans. at 89.) Purcell tells Young, "with his [appellant's] crazy mind, if he thinks you know all this stuff you are probably in just as much danger as if he thinks you told it, not more. If you have already told it, then what's he got to gain by silencing you?" (Compl. Trans. at 83.) These statements were chilling and could not have failed to influence the jury's decisions about appellant's guilt and sentence. The detectives "testimony," under whatever guise, violated appellant's right to confrontation.

As previously discussed in the opening brief (AOB 89-92), the opinions of an investigating officer on the defendant's guilt or dangerousness are presumptively prejudicial and inadmissible. Because the officer's statements may carry with them the imprimatur of the State, the jury may tend to give the officer's personal opinion added weight. The testimony of law enforcement officers often carries with it "an aura of special reliability and trustworthiness" (*United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172, and the jury is overwhelmingly likely to defer to the officer's judgment, rather than rely on its own view of the evidence.

It is clear under California law that before a tape recording of an interrogation is played to the jury, the tape should first be edited to remove material that is either inadmissible or would unfairly prejudice the defense. (*People v. Sanders* (1977) 75 Cal.App.3d 501.)

In this case, Officer Purcell was unavailable for cross-examination, and his remarks should not have been admitted. Because this absent witness's statement went before the jury without an opportunity for cross-examination, it violated appellant's rights under the Sixth Amendment and *Crawford*. (*Ocampo v. Vail* (9th Cir. 2011) - F.3d. --.

As previously discussed in the opening brief (AOB 73-97), and in his Supplemental Brief, pages 1-10, the hearsay on this tape recording was chilling. Young told

Detective Purcell that she was afraid appellant would come looking for her now, and Detective Purcell cautioned her to stay somewhere else that night. When Young asked Purcell for police protection, he told her that if appellant wanted to silence her, the best thing for her to do was talk to police, because then the defendant would have no reason to kill her. Purcell told Young they would give her ideas how to protect herself and avoid appellant so he could not harm her. Purcell stated if Riccardi killed himself, it would end a lot of misery. Purcell told Young he would not let her walk out of the police station alone.

On the newly transcribed complete transcript, Purcell continues to repeat everything Young said, agreeing with her. Thus, the inclusion of statements by Detective Purcell artificially inflated previous statements made by Young because a jury cannot be expected to disregard statements made by a police officer concerning public safety.

For example, on the tape, Detective Purcell is heard to summarize and emphasize appellant's alleged efforts to stalk Connie and Connie's corresponding efforts at self-protection, "Now, getting back to February, you found out from a friend that Dean [appellant] had been going into her apartment without her knowledge and trying to listen to her messages. . And she changed her locks after that." (Compl. Trans. at 94.)

Purcell told Young that the shock of what happened would soon hit Christi [victim Sue Jory's daughter]. Purcell told Young she was probably in shock to some extent too. He said, it's obviously going to affect you. This doesn't happen every day. (Compl. Trans. at 99.)

Purcell had Young go over the facts again, about appellant having guns, threatening to kill himself, telling Connie that he could hurt her if he wanted to. (Compl. Trans. at 100.)

Purcell asked Young when it was the appellant said he did not know what he would do if he even caught Connie with another man, and Young gave a detailed account. (Compl. Trans. at 102.) Detective Purcell asked Young to go over each part of her statement again, to place it in a timeline. (Compl. Trans. at 104-107.)

Young asked Purcell if her statement would help them catch appellant. Purcell answered, No, but when we do catch him, we need to have enough reason to hold him. So that's what I am trying to do, establish that we have a reason to suspect him. (Compl. Trans. at 111.) Young continued to ask questions about the time line of events and she repeated what she had heard from Connie and others, including that Connie was in fear because the astrologer told her that appellant's stars showed he was in a rage. (Compl. Trans. at 115-122.)

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B. THE TRIAL COURT ERRONEOUSLY ADMITTED THE TAPED EVIDENCE AS A PRIOR CONSISTENT STATEMENT

1. The Errors

When defense counsel cross-examined Young, he apparently had in his possession Young's statement to the police (2 CT 520-524) and the partial transcript of the taped interview (Supp CT 24-60.) In his opening brief, appellant argued that the defense used the taped statement to impeach Young's testimony on only three specific instances, and therefore, the court should have admitted only those specific instances, as prior consistent statements. (AOB 73-97.)

As to the first instance of alleged fabrication, the discussion between Young and Purcell did not appear in the former transcript but now appears on the newly transcribed portion of Ex. 69 at page 96. Apparently trial counsel did not have this portion of the transcript when he cross-examined Marilyn Young. However, the testimony centers around the fact that Donny Klapp allegedly told Connie that appellant had told him that appellant may have entered through the skylight. (Id. at 96.) On the tape, she relates that Donnie Clapp told Connie that appellant was hiding in her closet. (Id. at 127.) Young also told the police the reason she and Connie went to Laguna was because Connie's astrologer friend read the stars to say that appellant was in a rage. And Donnie Klapp told Connie that appellant was in a rage and she should get out of town. (Id. at 117-118.)

Thus, Young's report is blatant hearsay, alleging reporting what the victim had told a third party, and what he in turn, told Young. It painted appellant as a dangerous man in a rage, in violation of appellant's right to confront adverse evidence and witnesses.

The second instance of alleged fabrication, where Marilyn Young testifies that Connie heard a loud bang on the patio, appears on the original tape.

Respondent has added a third instance, where Young testified that Connie had told her that appellant told Connie that he could hurt her if he wanted to. (Resp. Lt. Brief at 9.) This conversation did not appear on the original transcript but appears in the newly transcribed portions of the tape, and apparently trial counsel did not have it at the ready. (Id. at 100-101.) The allegation of such a threat was obviously a red flag for jurors.

The fourth instance, where Marilyn testified that appellant had left a message on her answering machine, did not appear in the first transcript, but does appear in the complete transcript. (Id. at 129.)

The fact that trial counsel failed to obtain a complete copy of the taped evidence is raised in his petition for writ of habeas corpus as below the Sixth Amendment standard of care, and prejudicial ineffective assistance of counsel, (Habeas Petition, page 126-132), and as prejudicial prosecutorial misconduct. (Page 104.) However, this taped evidence should never have been played to the jury.

In a pretrial proceeding, the trial court granted the prosecutor's motion to introduce evidence of Connie's fear to show that she would never have permitted appellant to enter her house on the night of the homicides, even though the defense did not put this in issue. (2 CT 358.) Yet the evidence introduced at trial from Marilyn Young and from the tape of Detective Purcell went way beyond anything authorized by the court.

The trial court abused its discretion and violated appellant's right to confrontation and to a fair guilt and penalty trial by allowing the entire tape to be played to the jury.

2. Prejudice

The fact that the prosecutor relied on the out of court information is important to the court's determination of prejudice. See *Ocampo v. Vail*, supra. In the case at bar, the prosecutor built his entire closing argument on the evidence of Connie's fear, and the testimony of Marilyn Young. The following are only a few examples: defendant "has accused Marilyn Young of being a liar (15 RT 2820); this is a classic stalker (15 RT 2843); Young said Connie wanted to break up with Dean in September 1993 (15 RT 2844); and the defendant will not let her go (15 RT 2845); I want to direct your attention to the testimony of Marilyn Young truly is the witness that was with Connie almost constantly during the period of time during the break-up of the relationship between September/October of 1982 to her

death on March the 3rd. Marilyn tells you certain things and I am going to go through them. Beginning of 1983, the testimony was that Connie didn't want to see Dean anymore, that she originally was going to break up September 1982, decided she would wait until after Christmas season and broke up early 1983. (15 RT 2855). And Connie's state of mind, even though she had a love relationship with this guy, is that she is clearly petrified of him. She is in terror, she is in fear. (15 RT 2856.) Marilyn tells you that the statement [from appellant to Connie] from the garage is: You ain't going to start the car because I undid the wires" (15 RT 2860- 2861).

In his rebuttal argument, the prosecutor again argued that there was evidence of stalking of Connie Navarro by the defendant, and that was proved by the testimony of Marilyn Young and others. (16 RT 3081)

The warnings of Detective Purcell that Marilyn Young should hide so that appellant did not kill her next were so chilling a jury could not ignore them, especially given that they came from a police officer. The magnitude of the impact on the jury from the repeated hearsay on the tape rendered the limiting instruction futile. The hearsay statements of Connie Navarro that she was in fear of appellant likewise carried great force. So called prophetic expressions of fear are especially prejudicial because they misleadingly suggest that the victim had accurate knowledge of the defendant's intention to harm her and

that the defendant subsequently acted in conformity with this state of mind. These statements thus could not be ignored or disregarded for their improper purpose, i.e., their truth, by jurors. Since the entire case against appellant was circumstantial, admission of the hearsay statements admitted against appellant cannot be found to be harmless beyond a reasonable doubt at either phase of his trial.

The case against appellant was far from overwhelming. Appellant's fingerprints were found in the linen closet where Connie's body was found, but appellant lived in the condo with Connie for the two years prior to the murder. A neighbor who knew appellant was an eye witness to a man leaving the apartment after shots were fired, and she could not identify appellant as being the man she saw, even though she knew him well. It is true that appellant left Los Angeles shortly after the murders, but since he was a burglar and knew he would be a suspect, it is not remarkable that he left town and took an assumed identity.

The prosecutor produced evidence that appellant confessed his guilt to two people. But one was a convicted felon who was testifying for a reduced sentence in another matter, and one was his step-mother, who was clearly a fanatic with a motive to fabricate because she was writing a book about the murders.

The taped evidence was not cumulative to Marilyn Young's testimony because it contained Detective Purcell's chilling statements, repeatedly underscored, about the danger Young was in. No curative instruction could erase these terrifying warnings from Purcell.

These errors not only violated state evidentiary rules against hearsay, but also constitute prejudicial error under the federal constitutional and analogous provisions of California state constitution. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The Chapman standard of prejudice for constitutional errors requires the beneficiary of the error to prove beyond a reasonable doubt that the error did not contribute to the result obtained. (*People v. Neal* (2003) 31 Cal.4th 63, 86.)

II. DEFENDANT'S AWARENESS OF DECEDENT'S FEAR OF HIM, AND HER ACTIONS IN CONFORMITY WITH THT FEAR, DID NOT RENDER HER FEARFUL STATE OF MIND RELEVANT TO PROVE DEFENDANT'S MOTIVE UNDER EVIDENCE CODE SECTOIN 1250

A. HEARSAY EVIDENCE OF CONNIE'S FEAR OF APPELLANT

The trial court admitted multiple hearsay statements purportedly made by the deceased Connie Navarro, from which the prosecutor argued that Connie was living in fear of appellant. Appellant claimed that admission of this material was error because the statements were irrelevant hearsay which violated his state and federal constitutional rights to due process and confrontation. (AOB claim 4-5, Supp. AOB at 7,8.)

The prosecutor argued that the statements were relevant to Connie's state of mind to show that she

would not have consented to appellant entering her home.

No limiting instruction was given.

B. CONNIE'S STATEMENTS OF FEAR VIOLATED APPELLANT'S RIGHT TO CONFRONTATION

As argued above, the admission of testimonial out-of-court statements, even if authorized by an exception to the hearsay rule, violates the federal confrontation clause. *Crawford v. Washington* (2004) 541 U.S. 36

C. EVIDENCE THAT CONNIE FEARED APPELLANT WAS IRRELEVANT AND INADMISSIBLE TO PROVE APPELLANT'S MOTIVE

Respondent argues that evidence of Connie's fear should have been admissible under Evidence Code 1250 to explain her conduct in ending the relationship, which in turn tended to show appellant's motive for assaulting and then murdering her. In *People v. Ruiz*, this Court held that a victim's prior statements of fear are not admissible to prove the defendant's conduct or motive (state of mind). If 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* (1988) 44 Cal.3d 589.)

Respondent cites cases where the victim's fear actually was relevant to an element in dispute [*People v. Hernandez*, (2003) 30 Cal.4th 835, murder victim's statement that she feared defendant was probative of

her lack of consent to sexual intercourse]; [*People v Lew* (1968) 68 Cal.2d 774, murder victim's fear of defendant admissible to disprove defendant's claim that she was sitting on his lap when his gun accidentally discharged].

However, in the case at bar there was no dispute as to the victim's state of mind. There was no contested issue of fact as to whether appellant was welcome in Connie's apartment, and there was also no dispute that he had been living there for the better part of the past two years. See *People v Noguera* (1992) 4 Cal.4th 599, 621.)

This Court should follow *Ruiz*. In that case, the prosecutor was permitted, over objection, to elicit from various acquaintances of the victims that they had expressed fear of the defendant. In concluding this was error this Court held:

> Section 1250, subdivision (a), of the Evidence Code creates an exception to the hearsay rule for evidence of a declarant's statements regarding his or her then existing state of mind or emotion, when the declarant's state of mind or emotion is at issue in the case, or when the evidence is offered to prove or explain the declarant's acts or conduct. Under subdivision (b), however, evidence of a declarant's statement of memory or belief is not admissible as proof of the fact remembered or believed. *As our cases have made clear, "a victim's out-of-court statements of fear of an accused are admissible under section 1250 only when the victim's conduct in conformity with that fear is in dispute. Absent such dispute, the statements are irrelevant.*

The error in *Ruiz* was held to be harmless because the jury was given a limiting instruction. Here, no limiting instruction was given, and the error was prejudicial.

However, the court in *Ruiz* used the *Watson* state law prejudice standard, because the defendant failed to claim constitutional error. Here, because appellant claimed that this error violated both his state and federal constitutional rights to confrontation and due process, the *Chapman* standard of review is applicable for federal constitutional error.

Respondent cites two cases in California which purport to hold that a victim's fear is admissible to prove a defendant's motive, but neither is dispositive of the instant case.

Respondent argues that *Rufo v. Simpson*, a civil case, is persuasive. (Resp. Lt. Brf. 19). Not so. The difference lies in the nature of the case, civil versus a criminal, capital trial. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all *criminal* prosecutions, the accused shall enjoy the right. . .to be confronted with the witnesses against him." [emphasis added] Generally, the right is to have a face-to-face confrontation with witnesses who are offering testimonial evidence against the accused in the form of cross-examination during a trial. The Fourteenth Amendment makes the right to confrontation applicable to the states and not just the federal government, but the right only applies to

criminal prosecutions, not civil cases or other, e.g., administrative, proceedings. Therefore, a holding in a civil case has no precedential value, and does not control this Court's determination of the constitutional principle here.

Rather, after *Crawford* and its successors, the application of the Confrontation Clause issue hinges on whether the victim's statements were testimonial. If it's a question of an out of court statement, and it's testimonial, then its admission in a criminal case violates the defendant's Sixth Amendment right to confrontation.

Respondent argues that in *People v. Jablonski*, (2006) 37 Cal 4th 774, this Court held that a defendant's knowledge of a victim's fear was held admissible as non-hearsay circumstantial evidence to show the statements' effect on him. (RB at 22.)

Jablonski does not apply. The relevance in *Jablonski* was whether the murder was premeditated, and this Court held that evidence showing that the defendant believed the victim was afraid of him had some bearing on his mental state and how he planned to approach the victims by stealth, both of which were relevant to premeditation. (Id. At 821.)

In the case at bar, the defense was that the defendant did not go to Connie's house on the night of the murder. There was no contested issue of whether he was welcome there. He testified she had broken up with him, but he had hopes they would reconcile. She had

broken up with him many times in the past few months, and there was no evidence that this time was any different, from his point of view.

A capital case from Florida is precisely on point. In *Stoll v. State*, ___ So.2d ___, 2000 WL 350558 (Fla. April 6, 2000) a capital conviction was reversed where trial court erred in allowing hearsay evidence concerning the victim's fear of defendant. The court rejected the state's argument that the victim's statements fell under the state of mind exception. The Court held: On the facts of this case, where the defendant did not raise theories of self-defense, suicide, or accidental death, the victim's state of mind was not at issue. And statements about the victim's fear of defendant did not rebut defendant's testimony that he believed he had a happy marriage, which had already been rebutted by evidence of a prior domestic violence charge.

In finding that defendant was prejudiced by the erroneous admission of hearsay evidence concerning the victim's fear of defendant, the court noted that the hearsay statements were highly inflammatory in that they injected into the case not only the victim's fears for herself, but also her fears for her children; and the prosecution relied heavily on the hearsay evidence in its closing argument.

The similarities between *Stoll* and the case at bar are numerous: The prosecutor here repeatedly argued in closing that Connie lived in fear of appellant; he

relied heavily on the testimony of Marilyn Young, who testified to everything that Connie had allegedly told her, as well as what other people had told Connie. [Marilyn Young testified and was heard on tape as well, saying that Donnie Clapp told Connie that appellant was in a rage and she should stay away from him that weekend. Marilyn also testified that their astrologer told Connie that she was in danger that weekend.]

This Court cited *Commonwealth v. Qualls* (Mass. 1997) 680 N.E.2d 61, a state court case out of Massachusetts. In that case, the court reversed a murder conviction where the court allowed testimony concerning the victim's fear of the defendant. In that case, the court gave a limiting instruction, that the evidence was to be considered for the limited purpose as evidence of a possible motive. In reversing the conviction, the court held that in this context, the case against the defendant may have been significantly altered by the introduction of evidence that the victims -- in the hours, days and weeks prior to the murders -- expressed fear that the defendant was going to kill them. A victim's statements could have been seen by the jury as a prophesy of what might happen to him. His statements were certainly a voice from the grave casting an incriminating shadow on the defendant. The court reasoned that a jury might think that if the victim feared he would be killed by the defendant, and sure enough, the victim was killed, therefore the odds are good that the perpetrator was in fact, the

defendant. Thus, the danger that the statements of fear would be misused by the jury on the disputed issue of identity was high.

Here, Connie's statements of fear were not relevant to prove appellant's motive, and they were highly prejudicial on the issue of identity.

D. THE ERROR WAS NOT HARMLESS

Here, the victim's statements of fear were used for the improper purpose of implying that the defendant had committed the acts that caused the victim to fear him.

Respondent argues that any error was harmless, because the jury heard testimony that appellant repeatedly followed Connie, threatened men who were seen with her, etc. (Resp. Ltr. Brf. at 24.) But this very evidence is the hearsay evidence of fear to which appellant objected.

In a circumstantial case like the one at bar, evidence of Connie's fear was highly inflammatory, and made it impossible for the jury to fairly consider the evidence. The errors were so serious as to have deprived defendant of the fair guilt and penalty trials guaranteed to him by the Constitution. They were, therefore, prejudicial.

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III. THE TRIAL COURT HAD A SUA SPONTE DUTY TO GIVE A LIMITING INSTRUCTION CONCERING STATEMENTS PRESENTED AS CIRCUMSTANTIAL EVIDENC OF THE DECEDENT'S STATE OF MIND

A. THE ADMISSIONS VIOLATED THE CONFRONTATION CLAUSE

As argued in Part I, above, the admission of testimonial out-of-court statements, even if authorized by an exception to the hearsay rule, violates the confrontation clause. (*Crawford v. Washington* (2004) 541 U.S. 36.)

B. THE TRIAL COURT HADA DUTY

The court has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of justice. The adversarial nature of the proceedings does not relieve the court of the obligation of raising, on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial. *People v. Ponce* (1996) 44 Cal.App.4th 1380, 1387.) A limiting instruction is required where declarations are used as circumstantial evidence of the declarant's mental state, as naïve jurors are all too likely to use such statements for their prohibited purpose, to prove the matter asserted, without guidance; absent proper instructions, stating the declaration is not received for the truth of the matter stated and can only be used for the limited purpose offered, its improper use may

foster a tainted conviction. *People v. Ortiz* (1995) 38 Cal. App. 4th 377.) In *Ortiz*, the Court "correctly admonished the jury that they [the statements] were to be considered only to show her state of mind."

Although case law may indicate there is no duty to instruct absent a request, "there may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that sua sponte instruction would be needed to protect the defendant from his counsel's inadvertence." (*People v. Collie* (1981) 30 Cal.3d 43, 64.)

Such is the case here. The prosecutor presented copious amounts of inflammatory evidence on Connie's fear of appellant, even though it had no relevance to issues in dispute; this recital, particularly as emphasized by the lengthy interview and repeated summaries by Detective Purcell, could not help but frighten the jury into thinking appellant was guilty, even though the evidence should not have been admitted for the truth, but to show if anything, Connie's state of mind, to indicate that she would not have let appellant into her house.

IV. CONCLUSION

For the reasons set forth above and those contained in appellant's previous briefing, appellant

respectfully requests that the judgment and conviction and sentence of death be reversed.

Dated: July 8, 2011

Respectfully submitted,

Carla J. Johnson

Attorney for Appellant

PROOF OF SERVICE BY MAIL

I am a resident of the County of Los Angeles, I am over the age of 18 years and not a party of the within entitled action. My business address is: Attorney Carla J. Johnson, 3233 E. Broadway, CA 90803.

On July 8, 2011, I served APPELLANT'S SUPPLEMENTAL LETTER BRIEF, by placing true copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States mail at: Long Beach, California, addressed as follows:

Stephanie C. Brenan
Attorney General's Office
300 South Spring Street
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Att: Mel Greenlee
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101 Second Street, Suite 600
San Francisco, CA 94105

John Riccardi K24700
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San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 8, 2011, at Long Beach, California.

Carla J. Johnson