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July 22, 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 July 13, 2011, this Court this ordered the parties to serve simultaneous reply briefs on July 27, 2011, addressing the issues described in the Court's prior order dated March 23, 2011.

Appellant now files this reply.

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

Appellant argued that the introduction of the untranscribed portion of People's Exhibit 69, including numerous testimonial statements by Detective Purcell, who was unavailable at the time of trial, violated the

right to confrontation under *Crawford v. Washington* (2004) 541 U.S. 36. While respondent's argument focuses on Marilyn Young's testimony, it does not address the blatant confrontation clause violations that occurred when the trial allowed Detective Purcell's statements to be played to the jury. Furthermore, the addition of uncorroborated testimony by a police detective is extremely prejudicial because juries hold police testimony to a higher standard of reliability because of an inherent trustworthiness in police officers. (*United States v. Gutierrez* (9th Cir. 1993) 995 F.2d 169, 172.) [The testimony of law enforcement officers often carries an aura of special truthworthiness.]

Respondent's argument that Marilyn Young's police interview is a prior consistent statement ignores the fact that her interview includes testimony by a police detective who was unavailable at trial and therefore violates appellant's Sixth Amendment right to confront witnesses against him, overriding the admissibility of Young's testimony as a prior consistent statement.

Respondent's argument that California is considered liberal in their admission of prior consistent statements once again does not address the fact that the exhibit contains testimonial statements by a police officer who was unavailable for cross-examination. (Resp. Ltr. Brf. at 3.)

Respondent's argument that the defense's accusations of fabrication make Young's statements

admissible also do not address Detective Purcell's testimonial statements included in People's Exhibit 69. Respondent mentions several instances of alleged fabrications but does not have a single reason for including Detective Purcell's testimony. The defense never accused Detective Purcell of any sort of fabrication because the defense never had an opportunity to question Purcell.

Out-of-court testimonial statements against a criminal defendant are not admissible unless the declarant is unavailable as a witness and the defendant had a prior opportunity to cross-examine him or her, or the declarant appears at trial. (*People v. Jennings* (2010) 50 Cal.4th 616, 651; *Davis v. Washington* (2006) 547 U.S. 813, 821.) Thus, under *Crawford,* the crucial question is whether an out-of-court statement is testimonial or not. (*People v. D'Arcy* (2010) 48 Cal.4th 257, 290.)

The *Crawford* court provided examples of clearly testimonial statements, such as ex parte in-court testimony, affidavits, custodial examinations, prior testimony and the like, but did not attempt to further define what statements are testimonial. (*Crawford,* supra, 541 U.S. at pp. 51-53; *People v. D'Arcy, supra,* 48 Cal.4th at p. 290.) In *Davis, supra,* 547 U.S. 813, the court began the process of elaborating a comprehensive definition of 'testimonial.' There, the victim told a 911 operator that her former boyfriend, Davis, was assaulting her with his fists. After the

victim answered the 911 operator's questions regarding her location, the boyfriend's name, and whether he had a weapon or had been drinking, the victim stated, 'He's runnin[g] now.' The 911 operator then asked a series of more detailed questions about the assault and about Davis. Police arrived shortly thereafter. The victim did not testify at Davis's subsequent trial for felony violation of a domestic no-contact order. Over Davis's objection, the trial court admitted the 911 call.

Davis rejected the defendant's contention that admission of the first portion of the 911 call violated his confrontation clause rights. The Court explained: "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 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*, supra, 547 U.S. at p. 822.) The victim in *Davis* spoke about events as they were actually happening. (Id. at p. 827.) The court also noted that the 911 call was made in an unsafe, nontranquil environment. (Ibid.) Under these circumstances, the first portion of the 911 call was nontestimonial. The primary purpose of the operator's questions was to enable police to meet an ongoing emergency. The victim was "not acting as a

witness; she was not testifying." (Id. at p. 828.) Her statements were not a weaker substitute for live testimony at trial. (Ibid.) However, a conversation which begins as an interrogation to determine the need for emergency assistance may " 'evolve into testimonial statements,' ... once that purpose has been achieved." (Ibid .) Thus, once the boyfriend had left the premises, the "emergency appear[ed] to have ended" and the responses to the 911 operator's subsequent "battery of questions" were likely testimonial. (Id. at pp. 828-829.)

The Court found statements testimonial in *Hammon v. Indiana*, a case consolidated and decided with *Davis*. (*Davis*, supra, 547 U.S. 813.) In *Hammon*, police responded to a domestic disturbance call at the home of Hershel and Amy Hammon. They discovered Amy alone on the front porch. Although she appeared somewhat frightened, she told the officer that nothing was wrong. Inside the house, officers discovered a broken gas heating unit emitting flames, with broken glass on the floor. Hershel informed police that he and Amy had argued but "everything was fine now." (Id. at p. 819.) Police interviewed Amy and Hershel separately, repelling Hershel's attempts to participate in Amy's interview. Amy then filled out and signed an affidavit indicating that Hershel had beaten her and broken the furnace and other items. (Id. at p. 820.) These statements, *Hammon* concluded, were testimonial. (Id. at p. 829.) The interrogation was part of an investigation

into past criminal conduct; there was no emergency in progress; officers did not hear or see an argument; the interrogations were somewhat formalized, in that the couple was separated; Amy told officers "things were fine," and there was no immediate threat to her person, given that officers were present. When the officer questioned Amy inside the house, he was not seeking to determine what was happening, "but rather 'what happened .'"(Id. at p. 830.) The primary, if not the sole, purpose of the interrogation was to investigate a possible crime. (Ibid.) The court thus rejected the view that all initial inquiries at a crime scene are nontestimonial. It was careful, however, to clarify that the converse was not true either: "we do not hold ... that no questions at the scene will yield nontestimonial answers." (*Davis*, supra, 547 U.S. at p. 832.) Officers called to investigate a domestic disturbance " 'need to know whom they are dealing with in order to assess the situation, the threat to their own safety, and possible danger to the potential victim.' Such exigencies may often mean that 'initial inquiries' produce nontestimonial statements." (Ibid.)

In *People v. Cage (2007) 40 Cal.4th 965, 969;* this Court further elucidated the definition of testimonial, explaining: "We derive several basic principles from Davis. First, ... the confrontation clause is concerned solely with hearsay statements that are testimonial, in that they are out-of-court analogs, in purpose and form, of the testimony given by witnesses at trial.

Second, though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony. Third, the statement must have been given and taken primarily for the purpose ascribed to testimony - to establish or prove some past fact for possible use in a criminal trial. Fourth, the primary purpose for which a statement was given and taken is to be determined 'objectively,' considering all the circumstances that might reasonably bear on the intent of the participants in the conversation. Fifth, sufficient formality and solemnity are present when, in a nonemergency situation, one responds to questioning by law enforcement officials, where deliberate falsehoods might be criminal offenses. Sixth, statements elicited by law enforcement officials are not testimonial if the primary purpose in giving and receiving them is to deal with a contemporaneous emergency, rather than to produce evidence about past events for possible use at a criminal trial." (*Cage*, supra, 40 Cal.4th at p. 984, fns. omitted.)

In *Cage*, the mother of a teenage boy had cut his face with a piece of broken glass. *Cage* concluded that statements made by the victim to a deputy sheriff, while waiting for treatment in a hospital waiting room, were testimonial. The deputy had earlier visited the mother's home after receiving reports of a domestic disturbance, and had observed blood and broken glass

there. An hour later, he was called to a location where the victim was seated on the curb, his face slashed. Emergency medical personnel were already treating him, and he was taken to the hospital in an ambulance. Thus, when the deputy questioned the youth, the crime had been over for more than an hour; the assailant and the victim were geographically separated; and the victim was no longer in danger. (Id. at p. 985.) The conversation was not to facilitate emergency medical treatment, but instead was aimed at investigating the crime by obtaining a fresh account of past events. There was no need to ensure the safety of other persons, because the police had already visited the defendant's residence. (Id. at p. 985, fn. 15.) Moreover, the deputy did not ask open-ended questions designed to elicit emergency information; instead, "on the basis of a suspicion derived from what he already knew, he posed a focused, accusatory, and investigatory inquiry; he asked what had happened 'between [the victim] and the defendant.' (Id. at pp. 985-986, fn. 15.) Further, the officer did not testify that he was motivated by concern about an ongoing situation that might require further immediate police intervention, and did not follow up on what the victim told him by initiating emergency action. (Ibid.)

In the case at bar, the *primary* purpose of Purcell's conversation with Marilyn Young was to produce evidence about past events for possible use at a criminal trial. Moreover, Purcell and Young's

conversation occurred under formal circumstances at the police station. While the setting is not dispositive, one of the factors expressly gleaned by *Cage* from *Davis* was that, "though a statement need not be sworn under oath to be testimonial, it must have occurred under circumstances that imparted, to some degree, the formality and solemnity characteristic of testimony." (*Cage*, at p. 984.)

Detective Purcell's statements in the untranscribed portion of People's Exhibit 69 are 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 prosecutions. Throughout Marilyn Young's interview, Detective Purcell made numerous comments to Marilyn Young about the case, appellant's relationship with the victim, as well as her personal danger from appellant. Purcell's lengthy summaries of what Marilyn Young had said could not help but frighten the jury. Thus, the inclusion of statements by Detective Purcell artificially inflated previous statements made by Marilyn Young because a jury cannot disregard statements made by a police officer concerning public safety.

Appellant did not have an opportunity to cross-examine Detective Purcell regarding his statements because he was unavailable at the time of trial. Thus, by admitting People's Exhibit 69, appellant's right to confront witnesses against him was violated. In this

case, Detective Purcell has never been available and as such appellant has never had an opportunity to cross-examine him. The essential element of the Confrontation Clause is a defendant's opportunity to cross-examine a witness' statements as well as allowing that witness to defend or explain his statements. Detective Purcell's unavailability clearly eliminates appellant's ability to cross-examine Detective Purcell about his statements and as such by admitting the tape, violates his Sixth Amendment rights.

Because admission of those statements violated the federal Constitution, the error may be found harmless only if, on appeal, respondent demonstrates beyond a reasonable doubt that the result would have been the same notwithstanding the error. (*Chapman v. California* (1967) 386 U.S. 18, 24.) Here, the admission of evidence that violates appellant's sixth amendment rights does not constitute harmless error because appellant lost his opportunity to confront Detective Purcell and the jury was subjected to uncontested testimony revolving around Purcell's opinions of appellant as well as the criminal justice system in general.

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

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 the

specific instances, as prior consistent statements. (AOB 73-97.)

Respondent argues that the prior consistent statements were admissible to rebut the defense claim fabrication. (Resp. Ltr. Brf, at 4-12.)

Respondent's argument is flawed for two reasons. First, a claim of fabrication, if there was one, should only have been impeached by specific instances in the taped interview. There were only three (cited in appellant's brief, or four (cited in respondent's letter brief) instances where Evidence Code 1236, prior consistent statements, would apply at all. The consistent statement must tend logically to rebut the inference raised by the impeaching fact. "The rehabilitation facts must meet the particular method of impeachment with relative directness. The wall, attacked at one point, my not be fortified at another and distinct point. Credibility is a side issue and the circle of relevancy in this context may well be drawn narrowly." *McCormick on Evidence* (3d ed. 1984 section 49, p. 116.)

Here, the court should have limited any evidence of rehabilitation to those three (or four) specific instances where Marilyn Young's credibility was attacked.

Second, this tape contained a plethora of third party hearsay about what Donnie Klapp and the astrologer said about Connie being in danger. It contained hours of testimony about what other people

told Marilyn. Most of this was hearsay, and was not admissible under any theory.

C. THE ENTIRE TAPE WAS INADMISSIBLE

Respondent argues that the entire taped interview was admissible under Evidence Code 356. Respondent's contentions are wrong on several fundamental levels.

First, Evidence Code section 356 states, part: When a part of an act, . . .or conversation is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a conversation is given into evidence, any other conversation necessary to make it understood may be given in evidence.

Here, the proponent of the portions of the tape was the prosecutor, who moved to admit the portions of the tape as prior consistent statements to rebut an allegation of fabrication. And here, the proponent [not the adverse party] was also the proponent of the entire tape. Moreover, the entire tape was not necessary to make Marilyn Young's testimony understood.

Section 356 is the statutory version of the common law rule of completeness, in which the opponent against whom a part of the utterance has been put in, may complement it by putting in the remainder. Here the opponent of the evidence was appellant. Evidence Code 356 does not apply where the proponent of the out-of-court statement then moves to admit the entire document

or statement. *People v Lawley* (2002) 27 Cal.4th 102, 155.

Respondent relies on two cases in his argument. Neither case applies. In both *People v. Hamilton* (1989) 48 Cal. 3d 1142, and *People v. Parrish* (2007) 152 Cal. App.4th 263, 269, (Resp. Ltr. Brf at 13), excerpts of a statement had been introduced by the defense, and the prosecutor then moved to introduce the entire statement under the rule of completeness.

Respondent cites *Hamilton* for the holding that the opponent is entitled to have placed in evidence all that was said. . .provided the statements have some bearing on the admission or declaration in evidence. But in *Hamilton*, the proponent of the full statement was not the proponent of the out-of-court statements used to impeach.

Respondent also argues that the trial court "implicitly reasoned that the jury needed to hear everything." (Resp. Ltr. Brf. at 13.) Respondent further argues that listening to the entire audio tape gave the jury the opportunity to evaluate the tenor of the interview and to evaluate Young's credibility both at the time of the interview and at trial. (Resp. Ltr. Brf. at 14.)

Respondent's position has no basis in law. There is no legal principle by which out-of-court statements become generally admissible whenever they might to deemed to supply content and tenor to other admissible out-of-court statements. Moreover, if respondent's

position were law, the passage of Evidence Code 356 was an unnecessary act because the statute would have no effect. The whole of a conversation would always be admissible. None of this made sense. If the Legislature had thought that all statements made during an out-of-court conversation were relevant to the credibility of the declarant, it would have indicated as much. It certainly would not have given only "the adverse party" the right to expand upon admissible out-of-court statements. Under respondent's theory, everything in a conversation would become admissible.

Here, the jury was able to evaluate the credibility of Marilyn Young, because she testified in court for hours on end. They heard hours of her fearful testimony about what Connie and others told her about Connie's fear. The defense impeached her with the portions of her prior statements that he had in hand. The prosecutor then was allowed to rehabilitate her with portions of her prior statement. But to allow the entire taped statement to be played was error.

In the case at bar, the trial court abused its discretion and violated appellant's right to confront and to a fair trial by allowing the entire tape to be played to the jury.

D. PREJUDICE

Respondent argues that if the court erred in allowing the tape to be played, any error is harmless. Respondent argues that appellant's identity as the killer was conclusive. (Resp. Ltr. Brf. at 14.)

Respondent is wrong. The case against appellant was far from overwhelming. 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. All the evidence was circumstantial, and without the overwhelming evidence of fear that permeated this trial, the outcome would have been different.

The prosecutor built his entire closing argument on the evidence of fear, and the testimony of Marilyn Young. The statements of Detective Purcell that Marilyn Young should hide so that appellant did not kill her next was 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. Since the entire case against appellant was circumstantial, the hearsay statements admitted against appellant cannot be found to be harmless beyond a reasonable doubt.

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

These errors are federal constitutional errors. (*Chapman v. California* (1967) 386 U.S. 18, 24.) The Chapman standard 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. CONNIE'S FEAR WAS NOT RELEVANT TO PROVE MOTIVE

A. HEARSAY EVIDENCE OF CONNIE'S FEAR

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 this was error because the statements were irrelevant hearsay, and violated his state and federal constitutional rights to due process and confrontation. (AOB claim 4-5, Supp. AOB at 7,8.)

No limiting instruction was given.

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

As argued in appellant's Letter Brief of July 8, 2011, 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*, supra.

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

Respondent argues that evidence of Connie's fear was 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. As argued in Appellant's Letter Brief of July 8, 2011, 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.)

As argued in appellant's letter brief of June 8, 2011, there was no dispute as to the victim's state of mind. There was no contested issue of whether appellant was welcome in Connie's apartment, he testified that he did not go to Connie's apartment that night.

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. This Court held that 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.

As appellant stated in his letter brief of June 8, 2011, *Rufo v. Simpson*, does not apply. (Resp. Ltr. Brf.

19). *Rufo* is a civil case. 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." 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. The right only applies to criminal prosecutions, not civil cases or other proceedings. Therefore, a holding in a civil case does not purport to contain a ruling defining a constitutional right in a criminal case and has no precedential value here. After *Crawford* and its successors, the application of the Confrontation Clause issue hinges on whether the victim's statements were testimonial. Hearsay is irrelevant to a confrontation analysis. If it's an out-of-court statement, and it's testimonial, then it violates the right to confront.

As argued in his letter brief of June 8, 2011, respondent's cite of *People v. Jablonski*, (2006) 37 Cal. 4th 774, is also inapplicable. The relevance in *Jablonski* was whether the murder was premeditated, and this Court held that evidence that the defendant believed the victim was afraid of him had some bearing on his mental state, 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.

As argued in appellant's letter brief of June 8, 2011, 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 case at bar is directly on point. The prosecutor repeatedly argued in closing that Connie lived in fear of appellant, he relied heavily on the testimony of Marilyn Young, who testified to everything Connie told her, as well as what other people told Connie.

Commonwealth v. Qualls (Mass. 1997) 680 N.E.2d 61, is also instructive. 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 that the victims in the hours, days and weeks prior to the murders, expressed fear that the defendant was going to kill them. The 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 held 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 it was the defendant. Thus the danger that the statements

of fear would be misused by the jury on the disputed issue of identity is high.

Here, Connie's statements of fear were not relevant to prove appellant's motive.

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. Here, those errors were so serious as to have deprived defendant of the fair trial guaranteed to him by the Constitution. They were, therefore, prejudicial.

III. THE TRIAL COURT HAD A SUA SPONTE DUNTY TO GIVE A LIMITING INSTRUCTION

A. ADMISSION OF SO CALLED NON HEARSAY STATEMENTS, IF MADE BY THE DECEASED, VIOLATED THE CONFRONTATION CLAUSE

As argued in appellant's letter brief of June 8, 2011,the admission of testimonial out-of-court statements, even if authorized by an exception to the

hearsay rule, violate the confrontation clause under *Crawford v. Washington* (2004) 541 U.S. 36.

B. THE TRIAL COURT HAD A SUA SPONTE DUTY TO GIVE A LIMITING INSTRUCTION

As argued in appellant's letter brief of June 8, 2011, 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 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 offered. *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 indicates 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 evidence of Connie's fear of appellant, even though there was no relevance, which could not help but have frightened the jury into thinking appellant was guilty, even though the evidence should not have been admitted. [i]

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 22, 2011

Respectfully submitted,

Carla J. Johnson

Attorney for Appellant

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[i] At page 24, in appellant's letter brief of July 8, 2011, appellant inadvertently wrote that 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. This was written in error. It is appellant's position that evidence of Connie's fear was not admissible to show that she would not have let appellant into the house, because that issue was not disputed.

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 22, 2011, I served APPELLANT'S SUPPLEMENTAL REPLY 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
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101 Second Street, Suite 600
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John Riccardi K24700
San Quentin State Prison
San Quentin, CA 94974

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 22, 2011, at Long Beach, California.

Carla J. Johnson