SUPREME COURT COPY

KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

300 SOUTH SPRING STREET, SUITE 1702
LOS ANGELES, CA 90013

Public: (213) 897-2000
Telephone: (213) 897-2282
Facsimile: (213) 897-6496
E-Mail: Margaret.Maxwell@doj.ca.gov

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SUPREME COURT
FILED

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Frank A. McGuire Clerk
Deputy

Supreme Court of the State of California
350 McAllister Street
San Francisco, CA 94102-4797

RE: *People v. John Leo Capistrano* **(Capital Case)**
Supreme Court of the State of California, Case No. S067394
Los Angeles County Superior Court Case No. KA034540

Dear Honorable Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to this Court's order filed March 19, 2014, respondent files this response to appellant's supplemental letter brief filed April 1, 2014.

Initially, appellant urges this Court to decline to address the application of *Crawford v. Washington* (2004) 541 U.S. 36, to the admission of Michael Drebert's statement to Gladys Santos (presented as a claim of *Bruton*[1] error in AOB Claim VI). (Ltr. Brf., pp. 1-3.) These arguments should be rejected.

Appellant observes that "the People conceded Drebert's statements were inadmissible against appellant under *Aranda/Bruton*" in opposing defendants' pretrial severance motion and characterizes *Crawford*'s interpretation of the evidence that falls within the scope of the Sixth Amendment's confrontation clause as a "new issue or theory of admissibility of evidence" for which he claims the factual record was not fully developed at trial. The ultimate legal issue and theory regarding the admission of Drebert's statement to Santos has always been and remains the application of the Sixth Amendment right to confront witnesses. Unlike the Fourth Amendment cases discussed in *Green v. Superior Court* (1985) 40 Cal.3d 126, 138 (Ltr. Brf., pp. 1-2), in *Crawford* and its progeny the United States Supreme Court has refined what it means to be a

[1] *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*).

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"witness" within the meaning of the Sixth Amendment confrontation clause. (*Davis v. Washington* (2006) 547 U.S. 813, 821 [only testimonial statements "cause the declarant to be a 'witness' within the meaning of the Confrontation Clause"].) The parties adherence in 1997 to the then-existing interpretation of the Sixth Amendment confrontation question is not a "concession" that applicable, binding legal precedent on the same issue would not apply.

As this Court stated in addressing *Crawford*'s application in other cases tried before the 2004 *Crawford* decision, "[a] new rule announced by the high court applies to all criminal cases still then pending on appeal. (*Schriro v. Summerlin* (2004) 542 U.S. 348, 351, 124 S.Ct. 2519, 159 L.Ed.2d 442; but cf. *Whorton v. Bockting* (2007) 549 U.S. 406, —, —, 127 S.Ct. 1173, 1181-1184, 167 L.Ed.2d 1 [*Crawford* not "watershed" rule retroactive to cases already final on appeal].)" (*People v. Cage* (2007) 40 Cal.4th 965, 974, fn. 4 [addressing admissibility of teenage victim's statements to treating physician and sheriff's deputy at hospital].) Appellant's appeal is not final. He has invoked *Crawford* and its progeny to challenge evidence where he has deemed the invocation advantageous to his own arguments. (See Supp. AOB Claim XXIV.)

Appellant asserts that the factual issues necessary to ascertain whether Drebert's statement was "testimonial" were not litigated below and complains that trial counsel had no reason, in 1997, to investigate the circumstances of Drebert's statement to Santos or present evidence relevant to an assessment whether Drebert's statement was testimonial. As is typical for appellate proceedings, the trial record does not reveal the full investigation undertaken by trial counsel or all information available to him at trial. Appellant now speculates that the proposed points of investigation were not, indeed, undertaken.[2] The circumstances applicable to a determination whether a statement is testimonial under *Crawford* are not so different from those otherwise relevant to the

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[2] Without belaboring the speculative points raised by appellant, respondent observes that Pritchard was charged with many of the same offenses as appellant and Drebert. Pritchard's representation by counsel and Fifth Amendment privilege could be reasonably expected to impact interview efforts and presentation of evidence from Pritchard. Santos's credibility and the veracity of Santos's recitation of statements made by Drebert and appellant would naturally be circumstances of interest to trial counsel even when the parties agreed to redact Drebert's statement to avoid the confrontation issue.

general investigation and litigation of the case such as to deny appellant his right to due process.

The current record is sufficient to determine that Drebert's statements to Santos were not testimonial. The record demonstrates that Drebert initiated the conversation with Santos in Santos's apartment. Santos was a "civilian" and was not acting as a law enforcement agent. Santos was a friend whose apartment served as a place of refuge for appellant, Drebert and their cohorts. Appellant suggests "an investigation could have been conducted to show that Drebert knew that he was soon to be arrested and that he was making the statement to Santos in order to cast the blame on Capistrano in the coming legal proceedings." (Ltr. Brf., p. 2.) This is an entirely unreasonable supposition. The conversation occurred weeks before the parties were arrested. Drebert would have to be clairvoyant to have known in the days before Christmas 1995 that he would arrested on January 19, 1996, with appellant, Vera, and Santos at Santos's apartment. The investigation of the Witters murder did not prompt their arrest; rather, their savage beating of Michael Martinez earlier that evening triggered the police search, police detained Pritchard driving a car witnesses connected to the crime, and Pritchard led police to Santos's apartment on January 19.

Regarding appellant's assertion that respondent forfeited the application of the holding in *Crawford* to appellant's challenge to Drebert's statement because respondent did not assert the application of the case in its respondent's brief (Ltr. Brf., p. 3), this argument essentially asks that this Court disregard applicable binding precedent on an issue squarely before this Court: whether the admission of Drebert's statement in redacted form violated appellant's Sixth Amendment right to confront the witnesses against him. Since the 2004 *Crawford* decision, the application of its rule has been frequently litigated and applied to an ever-increasing range of situations. In doing so, the high Court has made ever broader statements describing the testimonial versus nontestimonial distinction as a threshold question. (See *Giles v. California* (2008) 554 U.S. 353, 376 ["only testimonial statements are excluded by the Confrontation Clause"]; *Whorton v. Bockting*, *supra*, 549 U.S. at p. 420 ["Confrontation Clause has no application to [nontestimonial] statements and therefore permits their admission even if they lack indicia of reliability"); *Davis*, *supra*, 547 U.S. at p. 821 ["It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause"]). Neither this Court nor the United States Supreme Court has squarely applied the *Crawford* rule in

a situation that formerly would be governed by the principles articulated in *Bruton*, *Richardson v. Marsh* (1987) 481 U.S. 200, 211 (*Richardson*), and *Gray v. Maryland* (1998) 523 U.S. 185. While respondent apologizes for not urging this application in its 2007 brief, respondent submits the legal parameters of the Sixth Amendment confrontation clause are not subject to forfeiture.

As for the merits of the question posed by this Court, appellant contends that *Crawford* does not abrogate the *Bruton/Richardson* rule because "*Bruton* sets forth a different test that serves a different purpose" and rests on the Sixth Amendment right to an impartial jury and the Fourteenth Amendment right to due process in addition to confrontation clause. (Ltr. Brf., pp. 4-5.) The Sixth Amendment's protection of "the right to a speedy and public trial, by an impartial jury of the State and district where in the crime shall have been committed" refers to the jury selection process (i.e,. voir dire, peremptory challenges, fair cross section) rather than the presentation of evidence. (See generally *Morgan v. Illinois* (1992) 504 U.S. 719, 728 [discussing Sixth Fourteenth Amendment guarantees to right to an impartial jury]; *Duncan v. Louisiana* (1968) 391 U.S. 145, 149 [Sixth Amendment guarantee of "trial, by impartial jury . . ." in federal criminal proceedings applies to state criminal proceedings through the due process clause of the Fourteenth Amendment].) The *Bruton* opinion did not concern the right to an impartial jury but clearly and specifically held that the admission of the statement in that case "violated petitioner's right of cross-examination secured by the Confrontation Clause of the Sixth Amendment." (*Bruton*, *supra*, 391 U.S. at p. 126.)

Appellant claims the Supreme Court's citation and references to *Jackson v. Denno* (1964) 378 U.S. 368, in the *Bruton* decision supports his assertion that *Bruton* determination of prejudicial error turned in part upon a separate due process right. (Ltr. Brf., p. 5.) The *Bruton* opinion's reference to *Jackson* was tied to the court's determination that a jury could not be presumed to follow an instruction to disregard a codefendant's confession in a joint trial where the confession was expressly incriminating of the defendant and was otherwise inadmissible against the defendant. (*Id.*, 378 U.S. at pp. 128-129.)[3] The *Bruton* decision also included a footnote reference to *Pointer v.*

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[3] *Jackson* addressed a state rule that submitted the question of a voluntariness of a confession to the jury rather than first to a judge for screening (finding a jury could not be asked to determine voluntariness and then be expected to ignore the confession if involuntary).

Texas (1965) 380 U.S. 400, in which the Supreme Court held that the Sixth Amendment confrontation clause applied to the states via the Fourteenth Amendment. (*Id.* at p. 405 [introduction of preliminary hearing testimony of witness violated confrontation right where defendant not represented by counsel at prior hearing].) Neither *Bruton* nor *Pointer* purported to extend a separate and distinct right to confrontation of witnesses (i.e., the right to cross-examination) other than afforded by the Sixth Amendment.

The *Bruton* opinion stated, "We emphasize that the hearsay statement inculpating petitioner was clearly inadmissible against him under traditional rules of evidence"[4] (*Bruton*, *supra*, 391 U.S. at p. 128, fn. 3 [citing cases applying the federal rule for admission of statements of coconspirators]), specified that there was no recognized exception to the hearsay rule for the admission of the statement, and went on to state that "we intimate no view whatever that such exceptions necessarily raise questions under the Confrontation Clause." (*Ibid.*)[5] These statements make clear that *Bruton* did not purport to hold that all codefendant's statements were inadmissible in a joint trial of defendants.[6] Expressly removing nontestimonial statements from the reach of the *Bruton* rule and applying the traditional state rules of evidence to such statements does not violate a defendant's Sixth Amendment or Fourteenth Amendment rights.[7]

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[4] As an appeal from a federal criminal prosecution, the *Bruton* court necessarily referred to the Federal Rules of Evidence.

[5] *Bruton* itself concerned the admission of a codefendant's statement to an investigating law enforcement agent (a postal inspector investigating an armed postal robbery). The specific statement was elicited in violation of the codefendant's *Miranda* rights (and therefore should not have been admitted even against the codefendant). The codefendant's statement in *Bruton* would qualify as a testimonial statement.

[6] In deciding *Bruton*, the Supreme Court overruled its prior holding in *Delli Paoli v. United States* (1956) 352 U.S. 232.. In *Delli Paoli*, the court addressed whether, in a prosecution for conspiracy to possess and transport alcohol in unstamped containers and evade payment of federal alcohol taxes, a limiting instruction was sufficient to limit the jury's application of a codefendant's written confession to police agents that was made after the termination of the conspiracy.

[7] Respondent observes that the *Crawford* opinion, after remarking that most of the traditional hearsay exceptions concern nontestimonial statement, included a "cf." citation to *Lilly v. Virginia* (1999) 527 U.S. 116, 134, and a parenthetical with a quotation in from the plurality opinion: "[A]ccomplices' confessions that inculpate a criminal defendant are not within a firmly rooted exception to the hearsay rule." (*Crawford*, *supra*, 541 U.S. at p. 56.) In *Lilly*, the statement admitted at trial was made by a codefendant (the

Nearly two decades before the *Crawford* decision, the United States Supreme Court singled out the "testimonial" nature of a codefendant's confession as the distinguishing prejudicial characteristic targeted by *Bruton*, *Richardson*, and *Gray*:[8]

> "[T]he arrest statements of a codefendant have traditionally been viewed with special suspicion. Due to his strong motivation to implicate the defendant and to exonerate himself, a codefendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." [Citations.] *Lee v. Illinois*, 476 U.S. 530, 541, 106 S.Ct. 2056, 2062, 90 L.Ed.2d 514 (1986) (internal quotation marks omitted); see also *Bruton v. United States*, 391 U.S. 123, 136, 88 S.Ct. 1620, 1628, 20 L.Ed.2d 476 (1968); *Dutton v. Evans*, 400 U.S. 74, 98, 91 S.Ct. 210, 224 (1970) (Harlan, J., concurring in result)."

(*Williamson v. United States* (1994) 512 U.S. 594, 601 [holding federal exception to hearsay rule for statements against penal interest did not allow admission of nonself-inculpatory statements made by codefendant to police].)[9]

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defendant's brother) during police questioning; in the statement, the codefendant denied committed the killing and claimed defendant masterminded the offenses and killed the victim. (*Lilly*, *supra*, 527 U.S. at pp. 120-121.) The trial court admitted the codefendant's statements in their entirety under the Virginia state-law hearsay exception for declarations against penal interest. (*Id.* at p. 121.) The plurality observed, "[W]e note that the statements taken from petitioner's brother in the early morning of December 6 were obviously obtained for the purpose of creating evidence that would be useful at a future trial." (*Id.* at p. 125.) In other words, the confession at issue in *Lilly* was a testimonial statement that, if presented without an opportunity for cross-examination, would violate the Sixth Amendment right to confrontation. (*Crawford*, *supra*, 541 U.S. at pp. 68-69.)

[8] Each case examined statements made to police in response to custodial interrogation.

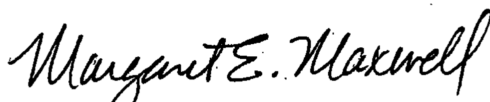
[9] *Lee v. Illinois* also examined confessions made by codefendants to police that were admitted as substantive evidence against the defendant at trial. (See *id.*, 476 U.S. at pp. 531-539.) In *Dutton v. Evans*, *supra*, 400 U.S. 74, the Supreme Court concluded that a Georgia rule permitting the introduction of a codefendant's statement to a cellmate did not violate the confrontation clause where the defendant had the opportunity to cross-examine the cellmate. (*Id.* at pp. 81-90.)

Drebert's statement to Santos was not "testimonial," and there was no violation of appellant's constitutional right to confrontation (including the right to cross-examination). The traditional rules of California evidence applied to Drebert's statement to Santos. Given that Petitioner's confrontation right was not implicated by the admission of Drebert's non-testimonial statement, the admission of the statement through Santos's testimony was not subject to *Bruton* and no due process violation could result from a denial of such a right.

For these reasons, in addition to the arguments previously presented in respondent's briefing, appellant's challenge to the admission of Drebert's statement to Santos should be rejected.

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
LANCE E. WINTERS
Senior Assistant Attorney General
JOSEPH P. LEE
Deputy Attorney General



MARGARET E. MAXWELL
Supervising Deputy Attorney General
Attorneys for Plaintiff and Respondent

MEM:

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. John Leo Capistrano*** **(CAPITAL CASE)**
No.: **S067394**

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.

On April 11, 2014, I electronically filed the attached **SUPPLEMENTAL RESPONSE LETTER BRIEF** with the Clerk of the Court using the Online Form provided by the California Court of Appeal, Second Appellate District.

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 with postage thereon fully prepaid that same day in the ordinary course of business.

On April 11, 2014, I served the attached **SUPPLEMENTAL RESPONSE LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope 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:

Kathleen M. Scheidel
Supv. Deputy State Public Defender
Office of the State Public Defender
1111 Broadway, 10th Floor
Oakland, CA 94607

Sherri R. Carter
Clerk of the Court
Los Angeles County Superior Court
111 N. Hill Street
Los Angeles, CA 90012

Maria Elena Arvizo-Knight
Death Penalty Appeals Clerk
Los Angeles County Superior Court
Criminal Appeals Unit
Clara Shortridge Foltz Criminal
Justice Center
210 West Temple Street, Room M-3
Los Angeles, CA 90012

The Honorable Jackie Lacey
Los Angeles District Attorney's Office
18000 Clara Shortridge Foltz Criminal
Justice Center
210 W. Temple Street
Los Angeles, CA 90012

Michael G. Millman
Executive Director
California Appellate Project
101 Second Street, Suite 600
San Francisco, CA 94105

Governor's Office
Attn: Legal Affairs Secretary
State Capitol, First Floor
Sacramento, CA 95814

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 11, 2014, at Los Angeles, California.

Bernie Santos	
Declarant	Signature

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