KAMALA D. HARRIS
Attorney General

COPY

State of California
DEPARTMENT OF JUSTICE

455 GOLDEN GATE AVENUE, SUITE 11000
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500
Telephone: (415) 703-1303
Facsimile: (415) 703-1234
E-Mail: Donna.Provenzano@doj.ca.gov

SUPREME COURT COPY

March 31, 2011

SUPREME COURT
FILED

APR 1 - 2011

Frederick K. Ohlrich Clerk

Deputy

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

RE: *People v. Erven Blacksher*
Supreme Court of the State of California, Case No. S076582

Dear Mr. Ohlrich:

This supplemental letter brief addresses the following issues, raised by the Court:

1) The significance of *People v. Osorio* (2008) 165 Cal.App.4th 603 to appellant's claim concerning the admissibility of Eva Blacksher's statements to Ruth Cole; and

2) The significance of *Michigan v. Bryant* (2011) 562 U.S. ___ [131 S.Ct. 1143] and *Davis v. Washington* (2006) 547 U.S. 813 to appellant's claim regarding the admissibility of Eva Blacksher's statements to Officer Nicolas Neilsen.[1]

I. EVA BLACKSHER'S STATEMENTS TO RUTH COLE WERE PROPERLY ADMITTED UNDER EVIDENCE CODE SECTION 1202 FOR IMPEACHMENT PURPOSES

Appellant offers several arguments in support of his claim that the trial court erred by admitting Eva's statements to her daughter Ruth. Appellant contends, among other things, that the statements were barred by a "rule" prohibiting a party—here, the People—from impeaching its own witness. (AOB 157-160; Reply Br. 48-51.) *People v. Osorio* (2008) 165 Cal.App.4th 603 (*Osorio*) makes clear that no such limitation on the use of impeachment evidence exists. Therefore, Eva's statements to Ruth were properly admitted for this purpose.

In *Osorio*, one of the victims described her attacker to a paramedic as being a "'white,' bald male, approximately 40 years old." (*Osorio*, *supra*, 165 Cal.App.4th at p. 615.) The description was admitted at trial as a spontaneous statement, pursuant to Evidence Code section 1240.[2] (*Ibid.*) Later in the trial, the court allowed the prosecutor to introduce the victim's subsequent statement at the hospital that her attacker had tan skin. The court admitted the victim's latter statement under section 1202[3] for the limited purpose of impeaching that portion of the victim's earlier statement to the paramedic describing her assailant as "'white.'" (*Ibid.*)

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[1] The spelling of the officer's name, according to the record. (RT 1868.)
[2] All further statutory references are to the Evidence Code, unless otherwise stated.
[3] Section 1202 provides, in relevant part:

The Court of Appeal held that admission of the latter statement was properly admitted to impeach the victim's initial perceptions. (*Osorio*, *supra*, 165 Cal.App.4th at pp. 616-618.) In rejecting the defendant's argument that the second statement was inadmissible under section 1202 because it was offered by the proponent of the witness' initial hearsay statement, the appellate court disagreed with the conclusion reached in *People v. Beyea* (1974) 38 Cal.App.3d 176 (*Beyea*)—a case upon which appellant heavily relies. (AOB 158-159; Reply Br. 44, 49-50.)

The *Osorio* court first observed that there was nothing in the statutory language of section 1202 which imposed such a restriction. (*Osorio*, *supra*, 165 Cal.App.4th at p. 616.) In fact, *Beyea* acknowledged that the plain language of section 1202 appeared to allow impeachment of a party's own witness. (*Ibid.*) However, insofar as *Beyea* found support in the related California Law Revision Commission's comments (Comments) suggesting the Legislature intended the purported prohibition, the *Osorio* court concluded that *Beyea* "exalted the Comments over the statutory language," the latter being "clear and unambiguous." (*Ibid.*) Further, any concerns reflected in the Comments about the party against whom the hearsay statement was offered were to be considered in the context of the law as it existed in 1965, when the Comments were drafted. At that time, a party could not impeach its own witness unless the party was surprised and damaged by its witness's testimony. (*Ibid.*) The *Osorio* court noted that the concern about using a prior inconsistent statement to impeach an out-of-court declarant was moot since a party "could never claim surprise or damage arising from his or her own introduction of an out-of-court statement." (*Ibid.*)

Moreover, *Osorio* pointed out that the Legislature abrogated the general prohibition against impeaching one's own witness when it passed section 785[4] in the same year that it passed section 1202. (*Osorio*, *supra*, 165 Cal.App.4th at pp. 616-617.) Given that the statutes were passed at the same time and concerned the same subject matter, they were to be "[r]ead together as a single statute" and "these two sections allow a prosecutor to use a prior inconsistent statement to partially impeach a hearsay statement the prosecutor had previously introduced." (*Id.* at p. 617.)

The *Osorio* court also noted that the trial court's limiting instruction directed the jury not to consider the victim's latter statement regarding the assailant having tan skin for the truth of the

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> Evidence of a statement or other conduct by a declarant that is inconsistent with a statement by such declarant received in evidence as hearsay evidence is not inadmissible for the purpose of attacking the credibility of the declarant though he is not given and has not had an opportunity to explain or to deny such inconsistent statement or other conduct. Any other evidence offered to attack or support the credibility of the declarant is admissible if it would have been admissible had the declarant been a witness at the hearing.

[4] Section 785 states: "The credibility of a witness may be attacked or supported by any party, including the party calling him."

matter, but only to assess the credibility of the victim's previous statements. (*Osorio*, *supra*, 165 Cal.App.4th at p. 618.) This, combined with the prosecutor's similar admonition during closing argument, ensured the jury would consider the evidence for proper purposes. (*Ibid.*)

Here, similar to the facts in *Osorio*, the prosecutor offered Eva's statements to Ruth to impeach a portion of Eva's former testimony—admitted at trial in the prosecution's case-in-chief—in which Eva essentially downplayed her willingness and involvement in seeking a restraining order against appellant shortly before the murders. (RT 2148-2150.) The trial court initially determined there were several bases for admitting the statements, including impeaching Eva's former testimony.[5] (RT 2163-2171.) However, after hearing argument from the parties, the court agreed to a limiting instruction, which, delivered during the course of Ruth's testimony, directed the jury to consider the subject statements "only as inconsistent statements for impeaching the previously read testimony of Eva Blacksher. And for that purpose only, as it relates to the restraining order." (RT 2169-2172.) The court later reiterated that certain portions of Ruth's testimony were admitted for a limited purpose. (RT 2840-2841.)

In closing argument, the prosecutor referenced the relevant portion of Ruth's testimony as impeaching Eva's testimony. (RT 2721-2722 ["And that sets up what we call some impeachment, because I'm sure the defense is going to be telling you a lot about what Eva Blacksher said five months later at a preliminary hearing"].) Therefore, the jury was aware that this part of Ruth's testimony could only be considered insofar as it called into question the credibility of Eva's earlier statements regarding the restraining order. As *Osorio* stated, "In the absence of evidence to the contrary, we presume the jury followed the court's instructions. [Citation.]" (*Osorio*, *supra*, 165 Cal.App.4th at p. 618.)

In short, the holding and reasoning of *Osorio* support the People's position that Eva's statements to Ruth about the restraining order were properly admitted for the purpose of impeaching Eva's former testimony and the record supports that the jury understood that it was to consider the evidence only in this context. Appellant's argument to the contrary, founded upon the holding and reasoning of *Beyea*, fails.

II. EVA BLACKSHER'S OUT-OF-COURT STATEMENTS TO OFFICER NEILSEN WERE NONTESTIMONIAL AND PROPERLY ADMITTED

Appellant contends Eva's statements to Officer Neilsen were testimonial in nature and inadmissible under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*). (AOB 116-122; Reply Br. 30-33.)

Not so. Admission of Eva's statements to Officer Neilsen did not violate appellant's Sixth Amendment right of confrontation. The statements were nontestimonial inasmuch as their primary purpose was to assist police abate an ongoing emergency, within the meaning of

[5] As we explained, the trial court admitted the statements for this purpose, but cited the wrong section of the Evidence Code. (RB 139-140.)

Michigan v. Bryant (2011) 562 U.S. ___ [131 S.Ct. 1143] (*Bryant*) and *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*).

In *Davis*, the United States Supreme Court considered whether a violation of the Confrontation Clause resulted from the admission of either (1) a recording of a 911 call made by a victim of domestic violence, or (2) a statement made by a second victim of domestic violence to officers. The Court concluded that the statements the first victim made to the 911 operator were not testimonial, but that the statement given to the officers by the second victim was testimonial. (*Davis*, *supra*, 547 U.S. at pp. 829-830.) The Court clarified when statements are testimonial within the meaning of *Crawford*: "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." (*Id.* at p. 822.)

Recently, in *Bryant*, the high court further defined "'primary purpose'" as it relates to police questioning and provided guidance for making such a determination. In *Bryant*, police officers were dispatched to a gas station parking lot where they encountered a gun-shot victim. He identified the shooter as the defendant, told the officers he had been shot outside the defendant's house, and stated that he had driven himself to the gas station. (*Bryant*, *supra*, 131 S.Ct. at p. 1150.) The Court held the victim's identification and description of the shooter and the location of the shooting were not testimonial statements because they had a "primary purpose . . . to enable police assistance to meet an ongoing emergency" within the meaning of *Davis*. Therefore, their admission at the defendant's trial did not violate the Confrontation Clause. (*Id.* at pp. 1166-1167.)

In setting out the analytical framework, the Supreme Court first noted that the "'primary purpose'" inquiry is objective. (*Bryant*, *supra*, 131 S.Ct. at p. 1156.) Among the most important considerations is whether an "'ongoing emergency'" exists. (*Id.* at p. 1157.) This is "a highly context-dependent inquiry," which focuses on the circumstances in which the encounter occurs. (*Id.* at p. 1158.) Some of the considerations in this regard are whether a weapon was involved in the crime, as well as the declarant's medical condition. The latter circumstance could help assess the purpose of the victim in providing information and whether such purpose was testimonial in nature. (*Id.* at pp. 1158-1159.) The Court noted that *Bryant* was the first of the high court's post-*Crawford* Confrontation Clause cases to involve the use of a gun. (*Id.* at p. 1164.)

The Court also clarified an additional consideration: whether the encounter was informal or formal in nature. (*Bryant*, *supra*, 131 S.Ct. at p. 1160.) Formality suggests the absence of an emergency and, consequently, a greater likelihood that the purpose of the interrogation was to establish or prove past events. (*Ibid.*) For example, the Court contrasted *Crawford*'s "formal station-house interrogation" with questioning at issue in *Bryant*, which "occurred in an exposed, public area, before emergency medical services arrived, and in a disorganized fashion." (*Ibid.*)

The lack of formality attending the latter situation supported the conclusion that the primary purpose of the encounter was to resolve an ongoing threat. (*Id.* at pp. 1160, 1166.)

Additionally, the high court instructed that the inquiry should focus on "the statements and actions of both the declarant and interrogators" when determining whether the statements were generated for the purpose of resolving a present emergency as opposed to ascertaining details of past events. (*Bryant*, *supra*, 131 S.Ct. at p. 1160-1161.) In this regard, the Court observed that "[p]olice officers' dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession." (*Id.* at p. 1161.) And, similarly, during an ongoing emergency, victims may want the threat to end, but they may not foresee prosecution. (*Ibid.*) Ultimately, it is the declarant's statements, and not the interrogator's questions, that must be evaluated under the Sixth Amendment. (*Id.* at p. 1162.)

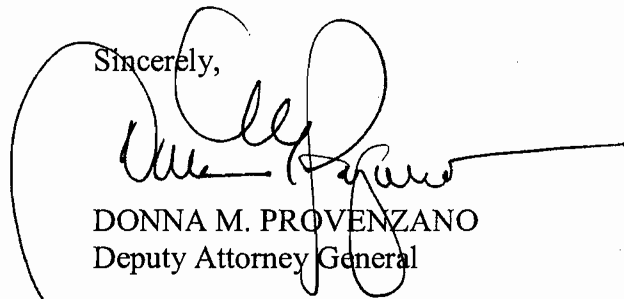
Application of *Davis* and *Bryant* to the facts of this case compels the conclusion that Eva's statements to Officer Neilsen were nontestimonial. Officer Neilsen was one of the first police officers to arrive on the scene in response to the 911 dispatch regarding gunshots fired at Eva's residence. (CT 555.) When Neilsen arrived within minutes of the murders, Eva was in a compromised condition. She was distraught, agitated, and anxious. (RT 1872-1873.) (See *Bryant*, *supra*, 131 S.Ct. at pp. 1158-1159 [medical condition of declarant a relevant consideration in primary purpose inquiry].) The conversation occurred in public, outside Eva's neighbor's home (RT 1870-1872), suggesting an informal encounter, akin to that in *Bryant*, which took place in a gas station parking lot. (See *Bryant* at pp. 1150, 1160, 1166.)

During the informal encounter, Eva told Neilsen that her daughter and her daughter's son had been shot and that she believed they were dead. She identified as the shooter, and said she did not know if appellant was still in the house. (RT 1873, 1882-1883.)

Officer Neilsen testified that he took notes and asked Eva for clarification on certain points so that police could take appropriate action when they entered her house. He did not take a formal statement from Eva. (RT 1874-1876, 1912.) The circumstances of the encounter comport with his stated purpose. At the time, Officer Neilsen knew that a gun was involved and that appellant's whereabouts were unknown. (RT 1869-1875.) (See *Bryant*, *supra*, 131 S.Ct. at p. 1159 [whether perpetrator is disarmed or apprehended is relevant to assessing whether threat is ongoing].) The encounter lasted only 10 to 15 minutes, just long enough to obtain basic information to assist police officers. Officer Neilsen then acted upon the information provided by Eva to search the back cottage for appellant. (RT 1875, 1884-1885.) These facts objectively demonstrate that Eva made her statements to Neilsen for the purpose of assisting police in their effort to abate the threat.

In sum, the circumstances in *Bryant* closely resemble those attending the encounter between Eva and Officer Neilsen. (See *Bryant*, *supra*, 131 S.Ct. at pp. 1163-1166.) Because Eva's responses to the officer's questions were made for the primary purpose of resolving an ongoing emergency, the statements were nontestimonial and their admission comported with the Sixth Amendment.

Sincerely,



DONNA M. PROVENZANO
Deputy Attorney General

For KAMALA D. HARRIS
Attorney General

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Erven Blacksher**
No.: **S076582**

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 1, 2011, I served the attached **LETTER TO THE HONORABLE FREDERICK K. OHLRICH** 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 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Kathy M. Chavez
Attorney at Law
P.O. Box 9006
Berkeley, CA 94709-9006
(2 copies)

The Honorable Nancy O'Malley
District Attorney
Alameda County District Attorney's Office
1225 Fallon Street, Room 900
Oakland, CA 94612-4203

Alameda County Superior Court
Criminal Division
Rene C. Davidson Courthouse
1225 Fallon Street, Room 107
Oakland, CA 94612-4293

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

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 1, 2011, at San Francisco, California.

Nelly Guerrero
Declarant

Signature

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