*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) 897-2056
Facsimile: (213) 897-6496
E-Mail: Stephanie.Brenan@doj.ca.gov

July 22, 2011



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

RE: *People v. John Alexander Riccardi* (Automatic Appeal)
California Supreme Court Case No. S056842
**Respondent's Reply Letter Brief to Appellant's Supplemental Letter Brief Pursuant to March 23, 2011 and July 13, 2011 Orders**

Dear Mr. Ohlrich:

On March 23, 2011, this Court requested that the parties submit supplemental letter briefing addressing three issues. Respondent filed its Supplemental Letter Brief on April 20, 2011. Appellant filed his Supplemental Letter Brief on July 11, 2011. Pursuant to this Court's March 23, 2011 and July 13, 2011 Orders, respondent hereby submits its Reply Letter Brief.

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

In his Supplemental Letter Brief, appellant argues that, by allowing the jury to hear the entire audiotaped police interview of Marilyn Young by Detective Purcell, the trial court: (1) violated appellant's federal constitutional right to confrontation because Detective Purcell's comments during the interview were "testimonial" under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177] (*Crawford*) (Appl't Supp. Ltr. Br. at pp. 3-9); and, (2) erroneously and prejudicially admitted the audiotape as a prior consistent statement (*id.* at pp. 10-15). As discussed below, both of appellant's assertions lack merit.

### A. Detective Purcell's Questions and Comments to Testifying Witness Marilyn Young Did Not Violate the Confrontation Clause

Appellant claims that allowing the jury to hear Detective Purcell's comments contained on the audiotape of his interview of testifying witness Marilyn Young violated his federal constitutional right to confrontation. (Appl't Supp. Ltr. Br. at pp. 3-9.) Specifically, he claims

that Detective Purcell's statements were "testimonial" under *Crawford* "because they were made for the primary purpose of establishing or proving past events potentially relevant to later criminal prosecution." (*Id.* at pp. 4-5; see *id.* at pp. 6-9.) Appellant asserted the same claim in his Supplemental Opening Brief. (Supp. AOB 4-6.) The claim is meritless.

In *Crawford*, the United States Supreme Court held that a testimonial statement from a witness who does not appear at trial is inadmissible against the accused unless the witness is unavailable to testify and the defendant had a prior opportunity to cross-examine the witness. (*Crawford, supra*, 541 U.S. at p. 59.) But, *Crawford* only applies to testimonial statements that are introduced to establish the truth of the matter asserted. (*Ibid.*; accord, *Davis v. Washington* (2006) 547 U.S. 813, 821-823 [126 S.Ct. 2266, 165 L.Ed.2d 224] [Confrontation Clause applies only to testimonial hearsay].) As *Crawford* acknowledges, when an out-of-court statement is introduced not for the truth of the matter asserted but for some other nonhearsay purpose, the Confrontation Clause is not implicated. (*Crawford*, supra, 541 U.S. at p. 59, fn. 9 ["The [Confrontation] Clause . . . does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted. [Citation.]"].)

In reaching this conclusion, the *Crawford* court relied on *Tennessee v. Street* (1985) 471 U.S. 409, 414 [105 S.Ct. 2078, 85 L.Ed.2d 425] (*Street*). (*Crawford, supra*, 541 U.S. at p. 59, fn. 9.) In *Street*, the United States Supreme Court held that "[t]he *nonhearsay* aspect of [the accomplice's] confession – not to prove what happened at the murder scene but to prove what happened when [the defendant] confessed – raises no Confrontation Clause concerns." (*Street, supra*, 471 U.S. at p. 414.) Further, in *Street*, the jury was "pointedly instructed by the trial court 'not to consider the truthfulness of [the accomplice's] statement in any way whatsoever.' [Citation.]" (*Id.* at pp. 414-415.) The Supreme Court in *Street* explained: "The assumption that jurors are able to follow the court's instructions fully applies when rights guaranteed by the Confrontation Clause are at issue." (*Id.* at p. 415, fn. 6.)

"An out-of-court statement is properly admitted if a nonhearsay purpose for admitting the statement is identified, and the nonhearsay purpose is relevant to an issue in dispute. [Citation.]" (*People v. Turner* (1994) 8 Cal.4th 137, 189, overruled on another ground by *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; accord, *People v. Davis* (2005) 36 Cal.4th 510, 535-536.) As previously discussed at pages 74 through 78 of the Respondent's Brief, Detective Purcell's questions and comments were not admitted for their truth. (Cf. Evid. Code, § 1200, subd. (a).) The trial court emphasized that the audiotape was being played so the jury could evaluate Young's testimony, not Detective Purcell's statements. (10RT 1784.) Specifically, during the playing of the audiotape, the trial court told the jury:

> When you hear the participants, that is, the witness [Young] and the investigating officer [Detective Purcell], talking and theorizing about what they think went on and things like that, *you're not to consider that at all*, all right? That's pure speculation on their part. *We're only interested in what the witness indicates she told the police officer.*

(*Ibid.*, emphasis added) Thus, the detective's statements were admitted because they gave context to Marilyn Young's answers. (Cf. *People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1224 [police dispatch tape in a vehicle pursuit case not hearsay because it was not offered for the truth of any matter, but to show how the pursuit unfolded].) Accordingly, because the statements had a nonhearsay purpose, the Confrontation Clause does not bar their admission. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 6.)

To the extent appellant claims that his "case bears many similarities to the challenged evidence" in *Ocampo v. Vail* (9th Cir. June 9, 2011, No. 08-35586) __F.3d __ [2011 WL 2275798], he is incorrect. (See Appl't Supp. Ltr. Br. at p. 6; see *id.* at p. 7.) In *Ocampo*, the Ninth Circuit held that the admission of detectives' testimony summarizing a non-testifying declarant's out-of-court statements, which had confirmed the defendant's presence at the scene of the crime and that the defendant was the shooter, constituted the introduction of testimonial statements against the defendant in violation of the Confrontation Clause. (*Ocampo*, *supra*, 2011 WL 2275798 at pp. 11-13.) The Ninth Circuit found that the detectives' testimony violated the *Crawford* because "the critical substance of [the non-testifying declarant's] testimonial statements were admitted against [the defendant] at trial" through the detectives' testimony. (*Id.* at p. 13.)

*Ocampo* is inapposite because, as discussed above, Detective Purcell's questions and comments, apart from not constituting summarizing testimony, had a nonhearsay purpose – namely, to give context to Marilyn Young's answers – and thus the Confrontation Clause does not bar their admission. (*Crawford*, *supra*, 541 U.S. at p. 59, fn. 6.)

Nevertheless, appellant claims that Detective Purcell "propounded opinions of appellant's behavior, guilt and dangerousness" during the audiotaped interview which "exposed" the jury to "numerous and inflammatory statements about the alleged danger to Marilyn Young as long as appellant was on the loose." (Appl't Supp. Ltr. Br. at p. 6; see *id.* at pp. 7-9.) Specifically, he points to two portions of the interview that he characterizes as "chilling" and claims "influence[d] the jury's decisions about [his] guilt and sentence. (*Id.* at p. 6) First, he claims that both Young and Detective Purcell "agree[d] that the best thing for [appellant] to do is to kill himself. [Citation.]" (*Ibid.*, citing Complete Trans. of Peo. Exh. 69 at 89; see *id.* at p. 8.) Second, he references Detective Purcell's comment to Young that, "'with [appellant's] crazy mind,'" the fact that she knew the information about appellant put her "'probably in just as much danger as if [appellant] thinks [she] told'" the police what she knew about him. (*Id.* at p. 6, citing Complete Trans. of Peo. Exh. 69 at 83; see *id.* at p. 8.)

Viewed in context, however, the detective's statements did not express opinions about "appellant's behavior, guilt or dangerousness" as appellant claims (*id.* at p. 8), but rather were made in an attempt to assuage Young's expressions of fear. (See, e.g., Complete Transcript of Peo. Exh. 69 at pp. 44, 86-90.)

For example, the challenged reference to appellant killing himself was prompted by Young's question to Detective Purcell, asking if "it would be wise for [her] to hire a bodyguard[.]" (Complete Trans. of Peo. Exh. 69 at p. 88.) In an apparent attempt to assuage her fear, Detective Purcell answered, "I don't think it's going to be necessary, but if I -- if I get to the point where I think it is, I'll tell you." At this point, Young said, "I'm hoping he killed himself, because that's what – [¶] . . . [¶] he's been threatening to do." (*Ibid.*) Detective Purcell responded: "Yeah, that would – I suppose officially I shouldn't hope that. But that would certainly end a lot of misery." (*Id.* at pp. 88-89.) Given the context, Detective Purcell's comment was an expression of support and understanding of why this fearful witness believed she would be better off if appellant had killed himself.

Similarly, the challenged reference to appellant's "'crazy mind'" and danger to Young if appellant thought she had told the police about him stemmed from Young's comment to Detective Purcell that she was "'really scared about telling [you] all of this.'" (Complete Trans. of Peo. Exh. 69 at p. 82.) Detective Purcell responded, "'Well, don't be.'" (*Ibid.*) Then, in an apparent attempt to assuage her fear, he told her that she was not in more danger because she was talking to the police and, given appellant's "'crazy mind,'" she may be in "more danger" if appellant thought she had not yet told the police. (*Id.* at p. 83.) But, Detective Purcell was careful to qualify his statement, telling her: "But, I mean, I'm just – I'm throwing these ideas out to you. And, I mean, *I don't know whether they're valid or not*, but that's what makes sense to me right off the bat." (*Ibid.*, emphasis added.) He then tried to reassure her that her cooperation with the police would not place her in any danger because appellant likely was not going to be in the area for long and the police eventually would capture him. (*Ibid.*)

Indeed, Detective Purcell expressly refrained from offering an opinion as to appellant's guilt when Young asked him if the police suspected anyone apart from appellant. (Complete Trans. of Peo. Exh. 69 at p. 65.) Detective Purcell told her that he did not know that and, when she pressed him as to whether he "d[id]n't know or [he] just wo[uld]n't tell [her]," Detective Purcell responded:

> I probably wouldn't tell you if I did know, but I really truthfully don't know. You see, it's just that *we're at the very early stages of this investigation*, and we've got other detectives out doing different things, and I don't know what they've found out. We, as a police department, may know that. [¶] . . . [¶] But I don't know it, because I haven't communicated with the other detectives, because I've been here interviewing you guys.

(*Ibid.*, emphasis added.)

Thus, the record shows that Detective Purcell did not offer any opinions about appellant's guilt and, to the extent he commented on appellant's behavior or dangerousness, it was merely in an attempt to assuage Young's stated fears. Accordingly, because Detective Purcell's questions and comments were not admitted for their truth, but rather had a nonhearsay purpose (giving

context to Marilyn Young's answers, and assuaging her fears), the Confrontation Clause does not bar their admission. (*Crawford, supra*, 541 U.S. at p. 59, fn.6.)

Regardless, the inclusion of Detective Purcell's comments was harmless. Here, as in *Street*, the trial court instructed the jury to ignore any statements by Young or Detective Purcell "theorizing about what they [thought] went on and things like that . . . ." (10RT 1784.) This Court must assume that the jury followed the court's instruction. (See *Street, supra*, 471 U.S. at p. 415, fn. 6; *People v. Davis, supra*, 36 Cal.4th at p. 537 [jury presumed to follow trial court's limiting instruction concerning use of out-of-court statements].)

### B. The Trial Court Properly Admitted the Recorded Interview Under Evidence Code Sections 1236 and 791

Appellant argues that the trial court committed prejudicial error when it permitted the jury to hear, during redirect testimony, the audiotaped interview of Marilyn Young's police interview as prior consistent statement. (Appl't Supp. Br. at pp. 10-15.) As previously discussed at pages 65 through 74 of the Respondent's Brief and pages 2 through 16 of Respondent's Supplemental Letter Brief, the trial court acted well within its discretion because: (1) the recording was admissible as prior consistent statement under Evidence Code sections 1236 and 791 because the defense, during the cross-examination of Young, had implied that Young fabricated her trial testimony; and, (2) the recording of the entire interview was admissible under Evidence Code section 356. None of appellant's current arguments merit a different result.

When a witness is implicitly accused of fabricating his or her testimony at trial, a prior consistent statement made before trial is admissible. (See, e.g., Evid. Code, §§ 791, 1236; *People v. Ainsworth* (1988) 45 Cal.3d 984, 1013-1015; *People v. Gentry* (1969) 270 Cal.App.2d 462, 473; accord, *People v. Williams* (2002) 102 Cal.App.4th 995, 1011-1012.) A defendant impliedly makes a charge of recent fabrication when he or she cross-examines witnesses as to their failure to tell officers facts to which they later testified. (*People v. Dennis* (1998) 17 Cal.4th 468, 531-532; *People v. Williams, supra*, 102 Cal.App.4th at p. 1011.) California has been described as one of the most liberal states in allowing the admission of prior consistent statement to rehabilitate the credibility of impeached witnesses. (See, e.g., *People v. Gentry, supra*, 270 Cal.App.2d at p. 474 [pointing to *People v. Duvall* (1968) 262 Cal.App.2d 417, 420-421, fn. 1, when observing that "California is one of the most liberal states as far as the admission of prior consistent statements is concerned"].)

Appellant does not challenge the second and fourth instances of defense trial counsel's allegations of fabrication when cross-examining Young; however, he finds fault with the first and third fabrication allegations by his trial counsel. (Appl't Supp. Ltr. Br. at pp. 10-11; see Resp. Supp. Ltr. Br. at pp. 4-12.)

As to first fabrication allegation – an alleged discrepancy between Young's trial testimony and her prior police statements regarding appellant breaking into Connie's home and watching her from the closet (10RT 1734-1737) – appellant claims that "Young's report" of

"what [Connie] had told a third party, and what he in turn, told Young" was "blatant hearsay" that "violat[ed] appellant's right to confront adverse evidence and witnesses." (Appl't Supp. Ltr. Br. at p. 10-11.) But, as previously noted by respondent (Resp't Supp. Ltr. Br. at p. 3), "Evidence Code section 1236 authorizes the admission of hearsay if the statement is consistent with a witness's trial testimony and is compliance with Evidence Code section 791." (*People v. Bolin* (1998) 18 Cal.4th 297, 320-321.) Thus, to extent appellant claims that Young's prior consistent statement was inadmissible because it was "blatant hearsay" (Appl't Supp. Ltr. Br. at p. 11), his argument fails because the statute expressly permits "the admission of hearsay" (*People v. Bolin, supra*, 18 Cal.4th at pp. 320-321).

To the extent that appellant challenges the prior consistent statements because they included Young's recollection of statements made to her by Connie to a third party and by that party to Young, his claim fails for two reasons. First, the prior consistent statements had a nonhearsay purpose. They were admitted to rehabilitate Young by showing that she had made the statements. (See 10RT 1779 [trial court ruling entire audiotape to be played because the "whole spectrum of the statement [Young] said she gave was a matter of cross-examination"]; see also 3CT 695 [CALJIC No. 2.13 – Prior Consistent or Inconsistent Statements as Evidence].) Thus, Young's reiteration of statements made to her by Connie or a third party were admissible because they had the nonhearsay purpose of rehabilitating Young's credibility.

Second, there was no confrontation violation. "The Sixth Amendment right to confront witnesses does not forbid the use of prior out-of-court statements by a declarant who testifies at trial and is subject to full cross-examination in regard to the prior statement. [Citations.]" (*People v. Hayes* (1990) 52 Cal.3d 577, 610; see *Crawford*, 541 U.S. at p. 59.) Here, Young testified at trial and was subject to full cross-examination regarding the prior statement. To the extent appellant challenges Young's recitation of what Connie and the third party acquaintance had said to her and to each other, appellant fails to show that those statements were testimonial. (See, e.g., *People v. Gutierrez* (2009) 45 Cal.4th 789, 812-813 [child's statement to his aunt "is more like 'a casual remark to an acquaintance' and is therefore not a testimonial statement under *Crawford*"]; *People v. Griffin* (2004) 33 Cal.4th 536, 579, fn. 19 [statement made by the victim to a friend at school does not constitute "testimonial hearsay" under *Crawford*]; see also *People v. Romero* (2008) 44 Cal.4th 386, 422 ["statements are not testimonial simply because they might reasonably be used in a later criminal trial"].) Accordingly, those included nontestimonial statements did not violate appellant's federal confrontation right. (See *Giles v. California* (2008) 554 U.S. 353, 376 [128 S. Ct. 2678, 171 L. Ed. 2d 488] ["only *testimonial* statements are excluded by the Confrontation Clause"; emphasis in original].)

As to the third fabrication allegation – about Young's statement to police that appellant had told Connie that he "could hurt [her] if [he] wanted to" (10RT 1750) – appellant claims that this "allegation of such a threat was obviously a red flag for jurors." (Appl't Supp. Ltr. Br. at p. 11.) But, he fails to provide any authority that this is a basis for finding that the statement was not a prior consistent one.

Appellant also argues that the "the evidence introduced at trial from Marilyn Young" and the "tape of Detective Purcell" should not have been played because it "went way beyond" the trial court's pretrial order granting the prosecution's motion to introduce evidence of Connie's fear. (Appl't Supp. Br. at p. 12.) The argument is baseless. The audiotape's admissibility was not constrained by the court's order permitting the prosecution to present "fear evidence." Rather, the trial court permitted the prosecution to play the recording during redirect examination because the defense, during cross-examination, had implicitly accused of Young of fabricating her testimony at trial, which made her prior consistent statements admissible. (See Evid. Code, §§ 791, 1236; 10RT 1779.) Because appellant had challenged portions of Young's police interview, the prosecution was entitled under Evidence Code section 356 to play the entire tape. (See *People v. Hamilton* (1989) 48 Cal.3d 1142, 1174 [allowing prosecutor to play entire tape of a conversation, excerpts of which had been introduced by the defense as prior inconsistent statements].)

Appellant claims that "[t]he fact that the prosecutor relied on the out of court information is important to this court's determination of prejudice." (Appl't Supp. Ltr. Br. at p. 12.) But, instead of explaining how he was prejudiced by the admission of the audiotape, appellant seems challenge the prosecutor's reference to any "evidence of Connie's fear," any part of "the testimony of Marilyn Young" (i.e., not limited to her police interview), and "the stalking evidence . . . that was proved the testimony of Marilyn Young and others." (*Id.* at pp. 12-14.) To the extent he does focus on the audiotape, appellant claims that Detective Purcell's "warnings" to Young to "hide" were "so chilling that the jury could not ignore them," and the impact of the "repeated hearsay" rendered the limiting instruction "futile." (*Id.* at p. 13; see *id.* at p. 15.) But, as discussed above, this Court must assume that the jury followed the court's instruction not to consider Young's and Detective Purcell's speculation about what may have occurred. (See *Street*, *supra*, 471 U.S. at p. 415, fn. 6; *People v. Davis*, *supra*, 36 Cal.4th at p. 537 [jury presumed to follow trial court's limiting instruction concerning use of out-of-court statements].)

Appellant alleges that the trial court's "errors" "not only violated state evidentiary rules against hearsay, but also constitute prejudicial error under the federal constitutional [sic] and analogous provisions of the California state constitution[," and thus is subject to prejudice analysis under *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (Appl't Supp. Ltr. Br. at p. 15.) But, as discussed above, the audiotape did not present any federal Confrontation Clause issues, and thus *Chapman* analysis would not apply. Apart from his meritless Confrontation Clause allegations, there is nothing but appellant's bare assertion that the admission of the audiotape amounted to prejudicial federal constitutional error. That, however, is insufficient. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 813.) Thus, because appellant "is unable to establish a federal constitutional violation," any alleged error is analyzed "under the test articulated in *People v. Watson* (1956) 46 Cal.2d 818, 836 . . . to 'evaluate whether "it is reasonably probable that a result more favorable to [appellant] would have been reached in the absence of the error."' [Citation.]" (*Ibid.*; see *People v. Andrews* (1989) 49 Cal.3d 200, 211, disapproved on other grounds in *People v. Trevino* (2001) 26 Cal.4th 237

[admission of tape recording of witness's prior police statement, played after defense implied on cross-examination that the witness lied, was reviewed for prejudice under *Watson*].)

Contrary to appellant's attempt to argue otherwise (Appl't Supp. Ltr. Br. at p. 14), appellant's identity as the person who shot and killed Connie and her friend Sue Jory, and committed the murders during a burglary, was overwhelmingly and conclusively established by the prosecution during the guilt phase. Appellant's fingerprints were found around the linen cabinet where Connie's body was found and on the door jamb leading to the master bedroom where Jory's body was found. (8RT 1311-1316, 1319-1321; 9RT 1494, 1551-1588.) Appellant's pattern of breaking into Connie's home and stalking her was compelling evidence of his motive and ability to enter the condominium and commit the murders. (See 9RT 1360-1376, 1506-1507; 10RT 1702; 11RT 1887-1888.) Appellant was seen with a gun immediately before the murders, and he left a nearby restaurant with sufficient time for him to get to the condominium by the estimated time of the murders. (11RT 1892.) Appellant fled Los Angeles immediately after the murders and, apart from his own self-serving testimony, he had no support for his alibi. (13RT 2381, 2393-2398, 2506-2508.) Additionally, he had documents instructing him how to change his identity dated a few days after the murders (13RT 2509), by the end of the month he had applied for a passport under the a different name, "William Failla" (11RT 2035, 2043-2044; 13RT 2531-2532), and about two years after the murders he underwent plastic surgery that altered his facial appearance (11RT 2023; 13RT 2447). At the time of his arrest eight years after the murders, appellant was living in Texas under the assumed "William Failla" name and denied for several days being John Riccardi. (11RT 2021, 2040-2041.) Seven guns were recovered from appellant's Texas home; based on rifling impressions, one of those guns – one of appellant's two .38-caliber Colt revolvers – could not be excluded as the murder weapon. (11RT 2023, 2050-2052; 12RT 2141, 2143-2146.)

Additionally, appellant had admitted to two people that he had committed the murders. Appellant's burglary partner, Samuel Sabatino, testified that a few weeks before the murders appellant had told him that Connie had left him and he "felt like he was going to kill himself and that he was going to kill her." (11RT 1964-1965.) Then, several weeks later, appellant confessed to Sabatino about committing the murders. (11RT 1966-1969, 2002-2003.) Similarly, appellant's stepmother, Rosemary Riccardi, testified that appellant had admitted to his father that he had committed the murders. (12RT 2163-2175.) Appellant attempts to lessen the impact of these confessions by discrediting Sabatino as a "felon" and his stepmother as a "fanatic with a motive to fabricate because she was writing a book about the murders." (Appl't Supp. Br. at p. 14.) But, this information about these witnesses was brought out at trial. (11RT 1950-1953; 12RT 2177-2179.) The jury's guilty verdict shows that the witnesses' backgrounds did not impact the jury's view of the evidence.

Moreover, as discussed in greater detail at pages 15 through 16 of Respondent's Supplemental Letter Brief, the crime scene did not support a robbery or theft theory as a motive to suggest third-party culpability, and instead it pointed to appellant as the perpetrator.

Finally, Young's recorded police interview was "substantially similar to [her] testimony at trial, and thus was largely cumulative." (*People v. Andrews*, *supra*, 49 Cal.3d at p. 211.)

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

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

Appellant argues that evidence of Connie's fear of him was improperly admitted at trial. (Appl't Supp. Ltr. Br. at pp. 15-22.) First, he claims that the use of her statements of fear violated the Confrontation Clause. (*Id.* at p. 16.) He also argues that his awareness of Connie's fear of him, and her actions in conformity with that fear, did not render her fearful state of mind relevant to prove his motive. (*Id.* at pp. 16-22.) He claims that the admission of this evidence was prejudicial. (*Id.* at p. 22.) As discussed below, all of appellant's arguments fail.

### A. The Admission of Connie's Statements of Fear to Her Friends and Family Did Not Violate the Confrontation Clause

Appellant claims that Connie's statements of fear – made to her friend Young and her ex-husband, James Navarro – were "testimonial out-of-court statements" under *Crawford* and thus their admission violated the Confrontation Clause. (Appl't Supp. Ltr. Br. at p. 16.) This claim is meritless. As discussed at pages 116 through 117 of the Respondent's Brief, Connie's statements to her intimate acquaintances are not testimonial under *Crawford*. (See, e.g., *People v. Gutierrez*, *supra*, 45 Cal.4th at pp. 812-813; *People v. Griffin*, *supra*, 33 Cal.4th at p. 579, fn. 19; see also *People v. Romero*, *supra*, 44 Cal.4th at p. 422.) Accordingly, the admission of Connie's nontestimonial statements did not violate appellant's federal confrontation right. (See *Giles v. California*, *supra*, 554 U.S. at p. 376.)

### B. The Trial Court Properly Admitted Evidence of Connie's Fear of Appellant Because His Awareness of Her Fear, and Her Conformity With That Fear, Rendered Her Fearful State of Mind Relevant to Prove Appellant's Motive

Appellant also argues that "Connie's statements of fear [of him] were not relevant to prove appellant's motive, and they were highly prejudicial on the issue of identity." (Appl't Supp. Ltr. Br. at p. 22; see *id.* at pp. 16-22.) But, as discussed at pages 17 through 24 of Respondent's Supplemental Letter Brief, appellant's awareness of Connie's fear of him rendered evidence of her fearful state of mind relevant to prove appellant's motive – namely, the "fear" evidence explained her conduct in ending the relationship, which in turn tended to show appellant's motive for murdering her.

As a general rule, "a victim's prior statements of fear are not admissible to prove *the defendant's* conduct or motive (state of mind)[]" because "[i]f the rule were otherwise, such statements of prior fear or friction could be routinely admitted to show that the defendant had a motive to injure or kill." (*People v. Ruiz* (1988) 44 Cal.3d 589, 609, emphasis in original.) But, *where there is a disputed issue as to the victim's state of mind*, evidence that tends to show how the victim was feeling about the defendant is admissible because it "tend[s] to explain [the victim's] conduct" toward the defendant, and that evidence may "in turn logically tend[] to show [the defendant's] motive to murder [the victim]." (*Rufo v. Simpson* (2001) 86 Cal.App.4th 573, 594; see also *id.* at p. 598 ["When the declarant's state of mind is relevant and the statements of threats or brutal conduct are circumstantial evidence of that state of mind, the evidence is admissible so far as a hearsay objection is concerned."].)

Appellant argues that evidence of Connie's fear of him was inadmissible because "[t]here was no contested issue as to [Connie's] state of mind." (Appl't Supp. Ltr. Br. at p. 17.) Appellant claims that "[t]here 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. [Citation.]" (*Ibid.*, citing *People v. Noguera* (1992) 4 Cal.4th 599, 621.) But, appellant's argument fails because it is too limited.

While the defense may not have disputed that appellant was not welcome in Connie's home on the night of the murders,[1] it did dispute the state of Connie and appellant's relationship. As previously discussed by respondent (see Resp't Supp. Ltr. Br. at pp. 20-22), Connie's state of mind was a disputed issue given the parties' conflicting views of Connie and appellant's relationship. Specifically, the prosecution's position was Connie "was trying to break up with [appellant] who was resisting her effort to break up." (8RT 1182; accord, 8RT 1197.) Appellant was obsessed with Connie (8RT 1185-1186, 1196), and in the months leading up to her murder, he was "stalking Connie Navarro . . . and was obsessive about her every move." (8RT 1183; see 15RT 2822-2823.) The defense disputed this, asserting that not only that appellant did not stalk her (8RT 1205), but also that he had no motive to kill Connie based on being "jilted" because they had a pattern of breaking up and getting back together. (See 8RT 1214 ["[Connie] doesn't close the door immediately on the relationship"]; 8RT 1223 ["the possibility was left open that they could see each other again"]; 16RT 3077-3078 ["the relationship went on and on"].)

Given the parties' conflicting views of the relationship, Connie's state of mind was a disputed issue making evidence of how she felt about appellant admissible because it tended to

---

[1] As respondent previously argued (Resp. Supp. Ltr. Brief at p. 24, fn. 12), evidence of Connie's fear of appellant was relevant to prove the burglary special circumstance, which required proof that appellant had no right to enter Connie's home – i.e., that Connie would not have consented to his entry. (*People v. Jablonski* (2006) 37 Cal.4th 774, 819-820 [evidence tending to show the victim's fear of the defendant may also be relevant when "'the victim's state of mind is directly relevant to an element of the offense'"].) Because the prosecution had to prove lack of consent, appellant's decision not to dispute lack of consent "is without effect[]" to the evidence's relevancy. (*People v. Waidla* (2000) 22 Cal.4th 690, 723.)

explain her conduct towards him, and that evidence in turn logically showed his motive to murder her – namely, that her ultimate rejection of him fueled his obsession such that it provoked him to kill her. (See *Rufo v. Simpson, supra*, 86 Cal.App.4th at pp. 591-592, 594-595 [murder victim's statements regarding her relationship with the defendant, her ex-husband, were admissible to show her state of mind and explain her conduct in terminating the relationship, "which in turn was alleged to have provoked [the defendant] to murder"].)

Moreover, as discussed in greater detail at pages 22 through 24 of Respondent's Supplemental Letter Brief, there was evidence that appellant was aware of Connie's fear of him and how he would likely respond to it – i.e., that he would retaliate against her when she finally terminated the relationship. (See *Commonwealth v. Qualls* (Mass. 1997) 425 Mass. 163 [680 N.E.2d 61, 64] ["The state-of-mind exception to the hearsay rule calls for admission of evidence of a murder victim's state of mind as proof of the defendant's *motive to kill* the victim when and only when there also is evidence that the defendant was aware of that state of mind at the time of the crime and would be likely to respond to it."; emphasis added; see also *People v. Jablonski*, *supra*, 37 Cal.4th at pp. 820-821 [evidence that defendant knew one of the victims "was afraid of him had some bearing on his metal state in going to visit the women . . .and how he planned to approach the victims (by stealth as opposed to open confrontation) both of which, in turn, were relevant to premeditation"].)

Thus, as in *Rufo v. Simpson*, this case is "not like the cases cited by [appellant] where the court found there was no legitimate disputed issues concerning the hearsay declarant's state of mind." (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at p. 595 [noting that defendant had relied on, inter alia, *People v. Ruiz*, *supra*, 44 Cal.3d at pp. 607-610, and *People v. Noguera*, *supra*, 4 Cal.4th at pp. 621-622; see Appl't Supp. Ltr. Br. at p. 17 [citing *Ruiz* and *Noguera*].)

This is the same reason why appellant's reliance on a Florida state case, *Stoll v. State* (Fla. 2000) 762 So.2d 870 – which he describes as being "precisely on point" (Appl't Supp. Ltr. Br. at p. 20) – is misplaced. In *Stoll*, the Florida Supreme Court held that the murder victim's statements to a friend that she feared the defendant (her husband) would kill her were inadmissible under the state of mind exception. (*State v. Stoll*, *supra*, 762 So.2d at pp. 874-875.) In so doing, the Florida court rejected the State's argument that the friend's testimony was relevant to rebut: the defendant's trial testimony that he thought he had a happy marriage until just days before the victim's death; his earlier statements about battering his wife only once, his wife's fear stemming from abuse by ex-husband, her desire for a divorce because she had a brain tumor, and his attempts to work things out with his wife to divorce "'admirably'"; and, the defendant's claim that a third person committed the murder. (*Id.* at p. 875.) The Florida court found that the friend's "statements regarding [the victim's] state of mind d[id] not rebut what [the defendant] thought about his marriage, nor d[id] they properly impeach his statement that someone else committed the murder." (*Ibid.*) The Florida court explained that the friend's statement regarding the victim's state of mind to impeach the defendant's contention that someone else committed the murder contradicted that court's "pronouncements . . . that a victim's state of mind is generally not a material issue in a murder case, except in very limited circumstances." (*Ibid.*, citing *Peede v. State* (Fla. 1985) 474 So.2d 808, 816 [trial court did not

abuse its discretion in admitting the victim's statements to her daughter just prior to her disappearance because they demonstrated "the declarant's state of mind at that time was not to voluntarily accompany the defendant outside of Miami or to North Carolina"].)

But, unlike the instant case, there is no suggestion in *Stoll* that the defendant's motivation to murder his wife was because she feared him and terminated their relationship. Rather, the instant case is like *Rufo v. Simpson*, where the victim's statements about her relationship with the defendant (her ex-husband) were admissible to show her state of mind and explained her conduct in terminating the relationship, "which in turn was alleged to have provoked [the defendant] to murder." (*Rufo v. Simpson*, *supra*, 86 Cal.App.4th at pp. 591-592; see *id.* at p. 594 [given the parties' contrasting view of the relationship, the victim's state of mind was relevant and the evidence explained "how [she] was feeling about [the defendant], tended to explain her conduct in rebuffing [him], and this in turn logically tended to show [his] motive to murder her"].) Here, Connie's statements about her relationship with appellant – including her statements of fear – were admissible to show her state of mind and explained her conduct in finally terminating her stormy relationship with appellant, which, given appellant's obsession with her, provoked him to kill her. (See *ibid.*) In other words, appellant's awareness of Connie's fear of him, and her conformity therewith, rendered her fearful state of mind relevant to prove motive.

Appellant, however, claims that *Rufo v. Simpson* is inapplicable because it was "civil case" that does not consider the applicability of the Sixth Amendment's Confrontation Clause to the admissibility of a victim's "testimonial" statements. (Appl't Supp. Ltr. Br. at pp. 18-19.) But, as discussed in the preceding section, Connie's statements to her intimate acquaintances are not testimonial under *Crawford.* Accordingly, appellant's attempt to distinguish *Rufo v. Simpson* on the basis of the Confrontation Clause fails.

In sum, because there was dispute as to Connie's state of mind and appellant was aware of Connie's fear of him and her conduct conforming to that fear (i.e., that she finally terminated the relationship with him), this evidence of her fearful state was relevant to prove his motive – i.e., that he broke into her home to assault her in retaliation for her rejection of him. (See *Jablonski*, *supra*, 37 Cal.4th at p. 821; *Rufo v. Simpson*, *supra*, 86 Cal.App.4th at pp. 591-592, 594-595; *Commonwealth v. Qualls*, *supra*, 680 N.E.2d at p. 64.)

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

Regardless, as discussed at pages 24 through 25 of Respondent's Supplemental Letter Brief, any error in admitting evidence of Connie's fear harmless under either the *Watson* standard for assessing the prejudicial effect of state law error, or the *Chapman* standard for assessing the prejudicial effect of federal constitutional error. (*People v. Jablonski*, *supra*, 37 Cal.4th at p. 821; but see *People v. Ruiz*, 44 Cal.3d at p. 610 [applying *Watson* harmless-error analysis only].)

Appellant disputes respondent's harmless-error analysis by claiming that respondent relies on the "*hearsay* evidence of fear to which appellant objected." (Appl't Supp. Ltr. Br. at p. 22, emphasis added.) Appellant misapprehends the argument. Respondent pointed to other witnesses' own actions and observations of appellant's conduct (e.g., Connie's son's testimony that appellant had broken into the home and handcuffed him; Craig Spencer's testimony that he saw appellant point his finger at Connie as if it was a gun and gesture as if shooting her; George Hoefer's testimony that appellant threatened him after Hoefer had drinks with Connie at a restaurant; Marilyn Young's testimony that she saw appellant follow Connie various times; James Navarro's testimony that appellant appeared uninvited at Connie's home and James's efforts to assist Connie with getting a restraining order) and nonhearsay evidence of Connie's state of mind (e.g., the testimony of Marilyn Young and James Navarro that Connie had told them that appellant had kidnapped her; and, the testimony of Marilyn Young and Carl Rasmusson that appellant broke into Connie's home).

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

As discussed at pages 25 through 26 of Respondent's Supplemental Letter Brief and as previously noted in footnote 37 at page 117 of the Respondent's Brief, the defense did not request a limiting instruction regarding the use of the "fear" evidence. Accordingly, the trial court did not err in not giving a limiting instruction because, absent a request, the trial court had no sua sponte duty to give such an instruction. (See *People v. Macias* (1997) 16 Cal.4th 739, 746, fn. 3 ["absent a request by defendant, the trial court has no sua sponte duty to give a limiting instruction"; citing, inter alia, Evid. Code, § 355 ["When evidence is admissible . . . for one purpose and is inadmissible . . . for another purpose, the court *upon request* shall restrict the evidence to its proper scope and instruct the jury accordingly."; emphasis added.); accord, *People v. Smith* (2007) 40 Cal.4th 483, 516; see *People v. Farley* (1996) 45 Cal.App.4th 1697, 1711 ["Although the court must instruct the jury on the general principles of law applicable to a case, this obligation does not extend to instructions limiting the purposes for which particular evidence may be considered. [Citation .]"]; see also *People v. Hamilton* (1961) 55 Cal.2d 881, 889-890 [limiting instruction given regarding use of decedent's state-of-mind declarations], overruled on another point by *People v. Wilson* (1969) 1 Cal.3d 431, 442.)

Appellant acknowledges California precedent holding that a trial court has no duty to give a limiting instruction absent a request. (Appl't. Ltr. Br. at p. 24.) Nevertheless, he argues that the trial court had a duty to do so in his case. (*Ibid.*) Specifically, he quotes from *People v. Collie* (1981) 30 Cal.3d 43, 64, where this Court stated, in dicta:

> 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.

Notably, however, appellant fails to include the immediately following sentence from *Collie*, where this Court stated: "But we *hold* that in this case, and in general, the trial court is under no duty to instruct sua sponte on the limited admissibility of evidence of past criminal conduct. [Footnote.]" (*People v. Collie*, *supra*, 30 Cal.3d at p. 64, emphasis added.) Given that California courts have repeatedly *held* that a trial court does not have a sua sponte duty to give a limiting instruction, appellant's reliance on dicta is insufficient to establish that the trial court had such a duty here. (See *Santisas v. Goodin* (1998) 17 Cal.4th 599, 620 ["An appellate decision is not authority for everything said in the court's opinion but only 'for the points actually involved and actually decided.' (*Childers v. Childers* (1946) 74 Cal.App.2d 56, 61 . . . .)"]; accord, *People v. Concepcion* (2008) 45 Cal.4th 77, 82, fn. 7; *People v. Evans* (2008) 44 Cal.4th 590, 599.)

Regardless, "assuming the exception applies, [appellant] would not benefit from it." (*People v. Rogers* (2006) 39 Cal.4th 826, 854.) While evidence of Connie's fear was an important part of the prosecution's case against appellant, "it was neither highly prejudicial nor minimally relevant." (*Ibid.*; see Resp. Supp. Ltr Br. at pp. 17 [arguing that evidence of Connie's fear of appellant was relevant and admissible to prove appellant's motive].) Moreover, as discussed above and at pages 24 through 25 of Respondent's Supplemental Letter Brief, any error in the admission of Connie's fear of appellant was harmless in light of other evidence presented to the jury. Thus, appellant's instructional claim fails. (See *People v. Rogers*, *supra*, 39 Cal.4th at p. 854.)

///

///

## IV. CONCLUSION

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

Dated: July 22, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
PAMELA C. HAMANAKA
Senior Assistant Attorney General
SHARLENE A. HONNAKA
Deputy Attorney General
JOSEPH P. LEE
Deputy Attorney General

STEPHANIE C. BRENAN
Deputy Attorney General
State Bar No. 183790

*Attorneys for Respondent*

SCB:

LA1997XS0008
60651444.doc

## DECLARATION OF SERVICE BY U.S. MAIL

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

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter.

I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On **July 25, 2011**, I served the attached **RESPONDENT'S REPLY LETTER BRIEF Pursuant To March 23, 2011 and July 13, 2011 Orders** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 300 South Spring Street, Suite 1702, Los Angeles, CA 90013, addressed as follows:

**Carla J. Johnson**
**Attorney at Law**
**3233 E. Broadway**
**Long Beach, CA 90803**
Attorney for John Alexander Riccardi
(Two Copies)

**Steve Cooley, District Attroney**
**Los Angeles County**
**District Attorney's Office**
**Santa Clarita Courthouse**
**23747 Valencia Blvd.**
**Santa Clarita, CA 91355**
(One Copy)

**John A. Clarke**
**Clerk of the Court**
**Los Angeles County Superior Court**
**111 N. Hill Street**
**Los Angeles, CA 90012**
(One Copy)

The one copy for the California Appellate Project was placed in the box for the daily messenger run system established between this Office and California Appellate Project (CAP) in Los Angeles for same day, personal delivery.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **July 25, 2011**, at Los Angeles, California.

Z. Salena
Declarant

Signature

LA1997XS0008
60656453.doc