IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RUTHETTA LOIS HOPSON, Defendant and Appellant.	)	Case No. S228193

APPELLANT'S REPLY BRIEF ON THE MERITS

Fourth Appellate District, Division One, Case No. D066684
Riverside County Superior Court, Case No. RIF1105594
The Honorable Jeffrey J. Prevost, Judge

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INTRODUCTION

The issue on which this court granted review was thoroughly addressed in Ms. Hopson's opening brief on the merits ("OBM"). This reply brief on the merits addresses only contentions set forth in respondent's answer brief on the merits ("ABM") as to which Ms. Hopson believes further discussion may be useful to the court.

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ARGUMENT

I. DETECTIVE WHEELER'S TESTIMONY CONCERNING THE STATEMENTS MADE BY JULIUS THOMAS TO THE POLICE VIOLATED MS. HOPSON'S RIGHT TO CONFRONTATION UNDER THE SIXTH AMENDMENT.

A. Thomas's Statements to the Police Were Not Introduced for a Limited, Non-hearsay Purpose of Impeaching Thomas's Credibility.

Respondent states that "the Court of Appeal correctly determined that there was no confrontation clause problem with Thomas's statements because they were not offered for the truth." (ABM 1.) Respondent offers several theories as to "nonhearsay" purposes for which the statements were offered. (ABM 1-2, 23-35.) The first theory is that "the prosecution introduced Thomas's police statements for the nonhearsay purpose of challenging *Thomas's* credibility." (ABM 1.) The trial court relied on that theory, but the Court of Appeal rejected it. (See 3 RT 422-423; Opn. 16-17, 26.) For the reasons Ms. Hopson now explains, this court should reject it as well.

In a little more detail, respondent's theory is that (1) Ms. Hopson gave hearsay testimony about statements made to her by the late Julius Thomas; (2) Detective Wheeler's testimony about statements made to *him* by Thomas—statements which placed the primary blame for Laverna Brown's murder on Ms. Hopson—was admissible under section 1202 of the Evidence Code to impeach the credibility of Thomas, the hearsay declarant in Ms. Hopson's

testimony; and (3) the admissibility under California law (section 1202) of the testimony about Thomas's statements to the police somehow insulated it from the federal constitutional requirement that a criminal defendant have the opportunity to cross-examine the witnesses against her. (ABM 1, 23-28.)

Respondent begins by observing that the confrontation clause, as interpreted in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*), does not restrict the use of out-of-court statements "'for *nonhearsay* purposes.'" (AOB 23, quoting *People v. Cage* (2007) 40 Cal.4th 965, 975, fn. 6.) Ms. Hopson agrees, assuming that the phrase "nonhearsay purposes" has the same meaning this court attributed to it in *Cage*: "'purposes other than establishing the truth of the matter asserted.'" (*Cage*, at p. 975, fn. 6, quoting *Crawford*, 541 U.S. at p. 60, fn. 9.)

By the same token, an out-of-court statement which *is* offered to establish the truth of the matter asserted *is* hearsay evidence, even if it is admissible because of an exception to the hearsay rule. (Evid. Code, § 1200; *People v. Blacksher* (2011) 52 Cal.4th 769, 810 (*Blacksher*).) And if that hearsay is "testimonial"—a point not disputed here (ABM 13; Opn. 13)—then no state-law ground for admissibility can save it from exclusion under the confrontation clause, unless the declarant is unavailable *and* the defendant has

had a prior opportunity to cross-examine the declarant. (*Crawford, supra*, 541 U.S. at p. 61; *People v. Mayo* (2006) 140 Cal.App.4th 535, 554.)

The Court of Appeal noted that it was unclear from respondent's brief "whether the Attorney General is assuming that the rebuttal testimony affected the credibility of Hopson as the defendant, or Thomas as the declarant." (Opn. 25.) Respondent resolves that problem in this court by advancing *both* theories in separate sections of argument. But as the Court of Appeal noted, the "thrust of Hopson's defense case was her testimony that Thomas forced her to participate in the robbery and killing, by repeatedly threatening her and her adult son." (Opn. 12.) The evidence of threats was, of course, not admitted to prove that the threats were true, i.e., that Thomas intended to carry them out. As the Court of Appeal stated, Ms. "Hopson did not obtain admission of the truth of Thomas's 'threatening' statements, simply by the way she reported them." (Opn. 26.)

It is true that Ms. Hopson testified that Thomas *told* her that he had killed Brown. (2 RT 323-325.) But this was hardly the dramatic confession that respondent makes it out to be—as if the identity of Brown's killer would have been a mystery to Ms. Hopson, under her version of events, if Thomas had not "admitted" to her that he did it. (See ABM 1, 2, 14, 23.) Hopson essentially caught Thomas red-handed, according to her testimony. "Hopson

testified that when she responded to Thomas's telephone call that night by meeting him in the garage at her house, she was shocked to find Brown lying bloody and dead." (Opn. 13.) "After Thomas threatened to kill Hopson and her son if she did not help him, Hopson cleaned up the blood and helped Thomas hide Brown's body." (Opn. 13.) Thus, Ms. Hopson's testimony squarely placed the blame for Brown's murder on Thomas, based on what she saw and on his non-hearsay statements (i.e., his demands and threats), quite apart from any admission he made to her.

For that reason, the Court of Appeal was correct when it held that the trial court "did not properly apply section 1202," because Thomas's statements to Ms. Hopson "were not received in evidence as hearsay offered for the truth of the statements, pursuant to section 1200, subdivision (a)." (Opn. 26.) The prosecution did not introduce Detective Wheeler's testimony about Thomas's statements to the police in order to impeach *Thomas* as a hearsay declarant. "Read in context, the apparent purpose of the rebuttal testimony from Detective Wheeler was to attack the credibility of Hopson as a testifying defendant, with regard to her fear of Thomas as supposedly motivating her to cooperate with him in covering up the killing of Brown. According to Detective Wheeler, Thomas's statements to him blamed Hopson, which was

markedly different from how Hopson described the events in court." (Opn. 26.)[1]

Respondent asserts that *Blacksher, supra*, 52 Cal.4th 769, compels the conclusion that the admission of Thomas's statements to the police (through Detective Wheeler's testimony) did not violate the confrontation clause. (ABM 24-25.) In *Blacksher*, this court rejected, for various reasons, a series of confrontation clause challenges to the admission of testimony about statements the defendant's mother, Eva, had made. (*Blacksher*, at pp. 803-819.) Eva had testified at the preliminary hearing but was deemed incompetent to testify at trial because of dementia. (*Id.* at p. 803.)

At issue in the part of *Blacksher* on which respondent relies were statements Eva had made two days before the murders with which the defendant was charged, when Eva and her daughter Versenia (one of the murder victims) obtained a temporary restraining order (TRO) against the defendant. (*Blacksher*, *supra*, 52 Cal.4th at pp. 803-808.) In preliminary hearing testimony read to the jury at trial, Eva denied obtaining the TRO and writing that she was afraid of the defendant. (*Id.* at pp. 803-804.) To impeach that testimony, the prosecution called Ruth, another daughter of Eva, who had

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[1] Respondent's alternative theory that the hearsay evidence of Thomas's statements was admissible, over the confrontation clause objection, to impeach Ms. Hopson is addressed in Part B, *post*.

driven Eva and Versenia to the courthouse and watched them spending hours waiting in line and filling out TRO application forms. (*Id.* at p. 804.) Ruth's testimony included some statements Eva had made; the defendant objected on several grounds, including the confrontation clause. The trial court overruled the objections and "*instructed the jury that Eva's statements* to Ruth about obtaining the restraining order *were admissible only to impeach Eva's prior testimony* 'and for that purpose only.'" (*Ibid.*, emphasis added.)

This court began its analysis by rejecting the defendant's assertion "that Ruth's testimony was inadmissible to impeach Eva's preliminary hearing testimony because, under *Crawford*, Eva's failing memory effectively denied him his right to cross-examine her at the preliminary hearing." (*Blacksher, supra*, 52 Cal.4th at p. 805.) In addition to finding that the defendant had forfeited the claim, this court held that Eva's problems understanding questions and failure to recall some previous events "did not render defendant's cross-examination opportunity meaningless." (*Ibid.*) In the instant case, of course, Ms. Hopson never had *any* opportunity to cross-examine Thomas about his statements to the police.

Next in *Blacksher*, this court addressed "defendant's claim that Ruth's testimony impeaching Eva's former testimony was not admissible on confrontation grounds under either state or federal law." (*Blacksher, supra,*

52 Cal.4th at p. 806.) The court held that Eva's statements to Ruth "were admissible under Evidence Code section 1202, which governs the impeachment of hearsay statements by a declarant who does not testify at trial. *The jury was properly instructed on this point.*" (*Blacksher, supra*, 52 Cal.4th at p. 806, emphasis added.) After discussing two Court of Appeal opinions which disagreed about the meaning of section 1202, the court concluded:

> In sum, the confrontation clause does not prohibit the prosecution from impeaching the former testimony of its own unavailable witnesses with their inconsistent statements, *provided those statements are admitted only for impeachment purposes*. However, under Evidence Code section 1202, the prosecution may not offer for their truth the inconsistent statements of a declarant who does not testify at trial. . . .
>
> Here, Eva's statements to Ruth about the restraining order were not admitted for their truth. They were relevant for the limited purpose of impeachment and properly admitted.

(*Blacksher, supra*, 52 Cal.4th at p. 808, emphasis added.)[2]

A key difference between *Blacksher* and the instant case, as should be evident from the italicized language in several of the foregoing quotations, is that the trier of fact in *Blacksher* was instructed to consider Eva's out-of-court statements *only* for the limited purpose of impeachment of her testimony at the

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[2] Among other reasons why *Blacksher*'s holding is inapplicable to the instant case, the prosecution did not seek to impeach "the former testimony of its own unavailable witnesses" in this case. Thomas had never given testimony, unlike Eva Blacksher. (*Blacksher, supra*, 52 Cal.4th at p. 808.)

preliminary hearing. (*Blacksher*, *supra*, 52 Cal.4th at pp. 804, 806, 808.) In the instant case, the jury was perfectly free to accept Thomas's statements to the police as the true story of Brown's murder.

Respondent acknowledges that "the trial court did not instruct the jury as to the limited purpose of the statements" but asserts that this "is nobody's fault but" Ms. Hopson's. (ABM 27.) In respondent's view, Ms. Hopson's objecting "under *Crawford*" to the admission of Thomas's statements for the supposedly "limited purpose" (3 RT 422-423) was not enough; she, rather than the prosecution (the proponent of the evidence), was responsible for ensuring that the trial court instructed the jury that the evidence was not being admitted for its truth. Respondent is mistaken, for several reasons.

First, Ms. Hopson made in the trial court exactly the same objection she pursues on appeal—that the introduction of the evidence of Thomas's statements to the police violated the confrontation clause. The California cases cited by respondent—*People v. Cowan* (2010) 50 Cal.4th 401 and *People v. Hernandez* (2004) 33 Cal.4th 1040—were straightforward applications of the general rule that an appellant cannot seek reversal of the judgment based on an error which was not brought to the trial court's attention. In each case, the defendant asserted on appeal that the trial court had erred by failing to instruct the jury regarding the limited purpose for which certain evidence was

admitted. (*Cowan*, at p. 479; *Hernandez*, at p. 1051.) This court held, in each case, that the trial court had no sua sponte duty to give a limiting instruction; that defense counsel was at fault for failing to remind the trial court that it had agreed to give one; and that any error in failing to give one was not prejudicial. (*Cowan*, at p. 480; *Hernandez*, at pp. 1051-1052, 1054.)

Respondent seems to suggest that this court must analyze the evidence of Thomas's statements, for confrontation clause purposes, as if the jury *were* restricted to using the evidence for a "limited purpose," even though the jury was *not* so restricted. Respondent cites no Sixth Amendment case law which supports this notion. There is, however, Sixth Amendment case law which contradicts it. (E.g., *Adamson v. Cathel* (3d Cir. 2011) 633 F.3d 248, 251-252, 258-259 [written statements of accomplices were introduced, without objection, to impeach defendant's testimony that details in his own written confession came from those of accomplices; state appellate court, rejecting confrontation clause argument, noted trial court's failure to instruct jury to consider accomplice statements solely for impeachment but held that this was not "plain error"; federal appellate court disagreed, holding that "failure to instruct the jury regarding the proper use of the accomplice statements, statements which facially incriminated Adamson, was plain and obvious error that was directly contrary to" Supreme Court's holding in *Tennessee v. Street*

(1985) 471 U.S. 409, which "makes clear that a jury's understanding of the distinction between substantive and impeachment uses of inculpatory evidence cannot be taken for granted"].)

A recent example is *State v. Cole* (Mo.Ct.App. 2016) 483 S.W.3d 470, in which a police sergeant testifying for the prosecution began to relate what a confidential informant had told the police. Defense counsel objected on hearsay and confrontation clause grounds. The prosecutor stated, "I'm not offering it for the truth, your Honor," and the court agreed that "this is the basis of what he did so at this point I'm going to overrule your objection." The sergeant continued testifying about what the informant said. (*Id.* at p. 473.) After the defendant was convicted, he appealed, arguing that the sergeant's testimony violated his rights under the confrontation clause. (*Id.* at pp. 473-474.) The appellate court ruled as follows:

> We agree with Appellant that Sergeant Cheek's testimony exceeded the scope necessary to provide background and continuity for his investigation. Sergeant Cheek could have provided appropriate context without divulging the informant's incriminating statements to the jury. . . . Furthermore, *no limiting instruction was given to the jury, and there was nothing to prevent the jury from considering the informant's statements for their truth.* [Citation.] Therefore, the testimony regarding the informant's statements was inadmissible hearsay and violated Appellant's rights under the Confrontation Clause.

(*State v. Cole*, *supra*, 483 S.W.2d at p. 475, emphasis added.)

The not-for-publication Eleventh Circuit opinion cited by respondent (ABM 27-28), *United States v. Churchwell* (11th Cir. 2012) 465 Fed.Appx. 864, does not support respondent's position. In that case, the defendant argued "for the first time on appeal" that the introduction of certain out-of-court statements into evidence violated the confrontation clause. (*Id.* at p. 865.) The Eleventh Circuit stated that, although constitutional claims are usually reviewed de novo, "plain error" review would apply in *Churchwell*, because "Churchwell did not object to the pertinent testimony or argument at trial on any grounds, including the Confrontation Clause, nor did he ask the district court for a limiting instruction." (*Ibid.*) The court concluded that the statements "were introduced for non-hearsay purposes" and that, even if they were not, "the statements did not likely have a substantial effect on the outcome." (*Id.* at pp. 865-866.) Nothing in *Churchwell* supports the notion that Ms. Hopson had to ask for a limiting instruction in order for this reviewing court to acknowledge the historical fact that the jury was allowed to use the evidence of Thomas's statements to police for all purposes.

Even if there were some support in case law for the idea that this court must indulge a fiction that the trial court forbade the jury to use the hearsay statements as evidence of their truth, the prosecution should not be heard to make such an assertion with regard to Thomas's statements to the police in the

instant case, because the prosecutor directly, and repeatedly, exhorted the jury to conclude that those statements were true. (3 RT 516, 519, 547-548, quoted in OBM 40-41.) In this court, the prosecution belittles these exhortations as "fleeting references" (ABM 28), but the trial prosecutor asked the jury to find facts based *solely* on Thomas's statements, as relayed by Detective Wheeler—facts for which there was no other evidence, such as that Ms. Hopson "had the bloody knife, the butcher knife in her hand while she was leaning over the body of Laverna Brown" (3 RT 516) and that Ms. Hopson conceived a "plan that [Thomas] would hide in the garage, and she would create some secret plan to get Laverna out of her room and into the garage" (3 RT 519).

For the foregoing reasons, this court should reject, as did the Court of Appeal, respondent's contention that Julius Thomas's statements were properly admitted to impeach his own credibility.

B. Thomas's Statements to the Police Were Not Introduced for a Limited, Non-hearsay Purpose of Impeaching Ms. Hopson.

Respondent next argues that "Thomas's police statements were also independently admissible to impeach appellant's testimony," because they "cast doubt on appellant's explanation for why her story at trial was different from what she initially told the police" and "impugned appellant's claim that Thomas had really confessed to her." (ABM 2.) For the reasons Ms. Hopson now explains, respondent is incorrect.

1. Impeachment of Ms. Hopson's Explanation for Changing Her Story

Respondent asserts that "Thomas's police statements were admissible for the nonhearsay purpose of impeaching appellant's credibility" in several respects. (ABM 28.) Respondent's first theory in this regard is that "Thomas's statements to the police impeached the credibility of appellant's claim that she hid the truth because she was afraid of him. They suggested a different explanation for appellant's morphing narrative, namely, that appellant changed her story because she had to account for what Thomas told the police." (ABM 28.)

Reasons abound why respondent's theory cannot justify the admission into evidence, through Detective Wheeler, of Thomas's statements to the police. To begin with, the evidence was *not*, in fact, admitted for the limited purpose respondent hypothesizes. The prosecutor asked that Thomas's statements be "admitted under 1202 of the hearsay exception to *impeach the hearsay declarations* that came in through the defendant." (2 RT 422, emphasis added.) After defense counsel stated his *Crawford* objection, the trial court agreed with the prosecutor that the statements were admissible for that purpose "under 1202." (2 RT 422-423.) Neither the prosecutor nor the trial court ever mentioned impeachment of Ms. Hopson's testimony about why

she initially denied any involvement in Brown's murder as a reason for admitting Thomas's statements into evidence.

More importantly, the jury was never told of *any* limitations on the purposes for which it could use the evidence of Thomas's statements. Even if the trial court *had* ruled outside the jury's presence that the statements were admissible for the limited purpose respondent hypothesizes (which it did not), the absence of any limiting instruction means that, at least for purposes of confrontation clause analysis, the evidence was admitted for the truth of the matters asserted by Thomas. (*State v. Cole*, *supra*, 483 S.W.3d at p. 475, quoted *ante*, p. 11; *Adamson v. Cathel*, *supra*, 633 F.3d at p. 259, fn. 8 ["we and our sister circuits have acknowledged [*Tennessee v.*] *Street*'s teaching that a limiting instruction is necessary [to satisfy the confrontation clause] where, as here, nonhearsay use is made of expressly incriminating statements"]; *Sanabria v. State* (Del. 2009) 974 A.2d 107, 110 ["because there was no limiting instruction that the dispatcher's comments were not being admitted for the truth of their content, the Superior Court violated Sanabria's Sixth Amendment rights under the Confrontation Clause by permitting the police officer to testify about the dispatcher's statements"].)

Even if the confrontation clause would permit this court to indulge the contention that Thomas's statements were admitted for the limited purpose of

impeaching Ms. Hopson's testimony about why "she hid the truth" in her conversations with police (ABM 28), that would not have been a legitimate non-hearsay reason for admitting the statements. Contrary to respondent's assertion, the jury did not have "to decide if appellant changed her story for the reason she said – that she was too scared to do so earlier – or for some other reason." (ABM 29.) Ms. Hopson's motive for admitting at trial that she helped to dispose of Brown's body and to cover up the murder, rather than standing by her initial position that she was not involved at all, was not an issue in this case.[3]

Respondent's assertion that this case "is a lot like" *People v. Carter* (2003) 30 Cal.4th 1166 is incorrect; *Carter* bears no resemblance to this case. (ABM 29.) The issue in the part of *Carter* on which respondent relies was whether "the prosecutor engaged in misconduct in cross-examining" the defendant, during the *penalty phase* of his capital murder trial, concerning the extrajudicial statements of two accomplices. (*Carter*, at pp. 1205, 1208.) This court held that the prosecutor asked about the accomplices' statements "not to

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[3] Respondent asserts that the jury needed to decide whether Ms. Hopson "had crafted a story to match the details of Thomas's statements." (ABM 30.) Obviously, Ms. Hopson's story did *not* match the details of Thomas's statements, since she did not admit planning Brown's murder, kneeling over Brown with a bloody knife in her hand, rejecting Thomas's request to call the police after Brown died, and so on. (OBM 23-26 [summarizing Thomas's statements to police]; ABM 21-22 [same].)

establish the truth of the matters asserted therein but to shed light on defendant's state of mind in admitting his own involvement in the [crimes] and the credibility of his trial testimony that his admission was motivated by a desire to bring forth the truth." (*Id.* at p. 1209.) Of course, in the penalty phase of a capital trial, whether the defendant confessed for altruistic reasons or because he knew that accomplices already had implicated him *would* be relevant to the jury's consideration of mitigating circumstances. (See Pen. Code, § 190.3.)

2. Impeachment of Ms. Hopson's Testimony about Statements Thomas Made to Her

Respondent next hypothesizes that Detective Wheeler's testimony about Thomas's statements to the police "impeached the credibility of appellant's assertion that Thomas actually made the admissions that she ascribed to him." (ABM 30.) Notably, respondent does not characterize this as a "limited" purpose, and indeed, it is not. The jurors would have had to accept Thomas's statements for their truth (which they were free to do) in order to believe that they disproved Ms. Hopson's testimony about Thomas's admissions to her. In one paragraph, responding to Ms. Hopson's analysis of *Tennessee v. Street*, *supra*, 471 U.S. 409, respondent tries to posit a scenario in which the jurors could have both (1) *disbelieved* Thomas's statements to the police and (2) used those disbelieved statements to conclude that Thomas never told Ms. Hopson

that he killed Brown. (ABM 32-33.) Suffice it to say that this scenario is implausible.[4]

Assuming arguendo that the purpose hypothesized by respondent *was* a limited purpose, somehow distinct from introducing Thomas's police statements for their truth, the statements' introduction still violated the confrontation clause, because they were not introduced for that "limited" purpose. As Ms. Hopson has noted, so far as the confrontation clause is concerned, out-of-court statements are admitted for the truth of the matter asserted unless the jury is instructed that it may *not* use the statements as evidence of their truth. (*State v. Cole*, *supra*, 483 S.W.3d at p. 475; *Adamson v. Cathel*, *supra*, 633 F.3d at p. 259, fn. 8; *Sanabria v. State*, *supra*, 974 A.2d at p. 110.) Moreover, as Ms. Hopson also has noted, the prosecutor argued to the jurors, at least four times, that they should accept Thomas's statements as evidence that what Thomas told the police was true. (3 RT 516, 519, 547-548, quoted in OBM 40-41.)

For the foregoing reasons, Thomas's statements were not properly admitted at trial to impeach Ms. Hopson's credibility.

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[4] In all other respects, respondent's reliance on *Street* (ABM 30-32) is thoroughly addressed by Ms. Hopson's discussion of that case in her opening brief. (OBM 37-41.)

C. Ms. Hopson Did Not "Open the Door" to the Admission of the Statements Thomas Made to the Police.

1. The Purported "Opening the Door" Exception to the Rule Set Forth in *Crawford*

Respondent argues that, even if this court were to determine that the introduction of Thomas's police statements "crossed the line from nonhearsay to hearsay," it should still hold that there was no violation of Ms. Hopson's right of confrontation, because she "opened the Sixth Amendment door here." (ABM 35.) For the reasons she will explain, Ms. Hopson asks this court to reject respondent's argument, as well as the Court of Appeal's holding that Ms. Hopson "opened the door" to the admission of Detective Wheeler's rebuttal testimony. (Opn. 32-37.)

The Court of Appeal held that, "[e]ven if we assume there were [*sic*] a confrontation clause problem posed by Thomas's reported testimonial statements, in the nature of 'bleeding over' from impeachment into substantive evidence about the identity of the killer, we conclude the rebuttal testimony from Detective Wheeler was properly admitted because Hopson 'opened the door to its admission.'" (Opn. 36-37, quoting *People v. Reid* (N.Y. 2012) 971 N.E.2d 353, 357 (*Reid*).) *Reid* cited four federal appellate opinions which had "held that 'a defendant can open the door to the admission of evidence otherwise barred by the Confrontation Clause'" and one federal appellate

opinion which had held otherwise; *Reid* then concluded: "We agree with this consensus." (*Reid*, at pp. 356-357.) The Court of Appeal apparently agreed as well. (Opn. 32-33, 35-37.)

Respondent now cites *Reid* and several other cases, which respondent calls a "growing consensus," for the proposition that a defendant can "open the door" to the admission of prosecution evidence that otherwise would violate the confrontation clause. (ABM 35-39.) Strictly speaking, it is not necessary for this court to reach that issue, for as Ms. Hopson explains in Part 2, *post*, even by the standards employed in *Reid* and the other cases which held that the "door" was opened, her exercise of her right to testify in her own defense in the instant case did not open the door.

Ms. Hopson does, however, deem it worth noting that, even though a number of courts "have concluded that a defendant's trial strategy can open the door to the admission of evidence that the confrontation clause would normally bar" (ABM 35), those courts do not include either this court or the United States Supreme Court. In *Crawford*, the high court held unequivocally that the confrontation clause bars "admission of testimonial statements of a witness who did not appear at trial unless he was unavailable to testify, and the defendant had had a prior opportunity for cross-examination." (*Crawford*, *supra*, 541 U.S. at pp. 53-54.) The high court has not recognized an "opening

the door" exception to the rule it set forth in *Crawford*, and this court should not recognize one either.

Despite the use of the term "consensus" by *Reid*, by the Court of Appeal, and by respondent, the federal and other-state appellate courts which have considered the question have not all agreed that *Crawford* has an "opening the door" exception. Ms. Hopson urges this court to adopt the reasoning of the Sixth Circuit Court of Appeals in *United States v. Cromer* (6th Cir. 2004) 389 F.3d 662, 679 (*Cromer*), which she discussed in her opening brief on the merits. (ABM 50-52.) In *Cromer*, the Sixth Circuit stated:

> If there is one theme that emerges from *Crawford*, it is that the Confrontation Clause confers a powerful and fundamental right that is no longer subsumed by the evidentiary rules governing the admission of hearsay statements. Thus, the mere fact that Cromer may have opened the door to the testimonial, out-of-court statement that violated his confrontation right is not sufficient to erase that violation.

(*Cromer*, *supra*, 389 F.3d at p. 679; accord, *Freeman v. State* (Ga.Ct.App. 2014) 765 S.E.2d 631, 638 [officer testified that confidential informant stated he bought crack cocaine from someone with first name similar to defendant's; "we disagree with the trial court's assertion that Freeman opened the door to the admission of this evidence during his aggressive cross-examination of the lead officer as to why Freeman was targeted when there were at least four

other people at the residence at the time the search warrant was executed. . . . [A]lthough courts at times allow 'the use of otherwise inadmissible evidence, including hearsay statements, to clarify, rebut, or complete an issue opened up by defense counsel on cross-examination,' as the Supreme Court of the United States has explained, '[w]here testimonial statements are involved, we do not think the Framers meant to leave the Sixth Amendment's protection to the vagaries of the rules of evidence . . . .' Thus, the trial court erred in ruling that Freeman opened the door to the CI's statement"], fns. omitted.)

Ms. Hopson submits that the *Cromer* and *Freeman* courts were correct in holding that the confrontation clause, as interpreted in *Crawford*, prohibits the introduction of testimonial out-of-court statements for their truth even in situations where, under the applicable non-constitutional rules of evidence, the defense might be deemed to have "opened the door" to the prosecution's introduction of hearsay.

2. Ms. Hopson Did Not Waive Her Right to Confrontation by Testifying at Trial About Thomas's Role in Brown's Murder.

As respondent states, "[a]ssuming that a defendant can open the door to hearsay evidence, that raises the question of whether appellant did so in this case." (ABM 40.) Respondent acknowledges that no "single standard for determining whether a defendant has opened the door to hearsay evidence over

her right of confrontation" has emerged from the cases which have found that such an exception to *Crawford* exists. (ABM 40.) Ms. Hopson submits that none of those cases involved circumstances even remotely similar to those of the instant case.

Courts have found the "door" to testimonial hearsay opened in two basic situations: (1) when a defendant's counsel elicits testimonial hearsay evidence which the trial court determines objectively—i.e., without deciding the truth or falsity of the matter asserted—would leave an incomplete or misleading picture for the jury if the prosecution were not allowed to introduce other testimonial hearsay evidence to complete the picture, and (2) when a defendant's counsel intentionally waives the defendant's confrontation clause rights. Neither situation existed in Ms. Hopson's case.

As respondent points out, "[t]he Court of Appeal analyzed this issue through the prism of *People v. Reid*." (ABM 35, citing Opn. at 32-33, 37.) *Reid*, a murder case, involved an attempt by a defense attorney to elicit from witnesses favorable portions of testimonial out-of-court statements made by non-testifying declarants, while relying on the confrontation clause to prevent the prosecution from introducing other, unfavorable, testimonial hearsay. (*Reid*, *supra*, 971 N.E.2d at pp. 354-357.) The *Reid* court held that, "by eliciting from witnesses that the police had information that [another person]

was involved in the shooting, by suggesting that more than one source indicated that [the other person] was at the scene, and by persistently presenting the argument that the police investigation was incompetent, defendant opened the door to the admission of the testimonial evidence, from his nontestifying codefendant, that the police had information that [the other person defendant was trying to blame] was not at the shooting." (*Id.* at p. 357.)

Respondent "proposes that the Court adopt *Reid*'s test" for deciding "if the door was opened." (ABM 40-41.) *Reid* stated the test as follows:

> Whether a defendant opened the door to particular, otherwise inadmissible evidence presented to the jury must be decided on a case-by-case basis. The inquiry is twofold—"whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what if any otherwise inadmissible evidence is reasonably necessary to correct the misleading impression" [citation].

(*Reid*, *supra*, 971 N.E.2d at p. 357.)

By that standard, Ms. Hopson did not open the door; nothing like what happened in *Reid* occurred in this case. Ms. Hopson did not, for example, seek to admit parts of Thomas's testimonial statements to the police, use them to suggest that the police investigation was incompetent, and then try to keep out other portions of Thomas's statements which would have undermined that suggestion. Rather, Ms. Hopson consistently sought to exclude *all* of Thomas's statements to the police. (1 RT 8, 12; 3 RT 422-423.)

Respondent finds *People v. Rogers* (Colo.Ct.App. 2012) 317 P.3d 1280 "particularly instructive" (ABM 38); however, *Rogers* is distinguishable for much the same reasons as *Reid*. In *Rogers*, the defendant was convicted of unlawful firearm possession after the police found a gun in the car in which the defendant was a passenger. (*Rogers*, at pp. 1281-1282.) At trial, the defendant elicited police testimony about a hearsay statement made by the driver that the driver had handled the gun, which tended to exonerate the defendant; the trial court then permitted the officer to testify as to other statements the driver made, which inculpated the defendant. (*Id.* at pp. 1282-1284.)

The appellate court held that, because defense counsel had "introduced the driver's hearsay statement during the cross-examination of the arresting officer in order to elicit evidence that the driver knew of the gun and had tried to conceal it," the defendant "opened the door to the prosecution's redirect examination and the admission of statements implicating defendant." (*People v. Rogers*, *supra*, 317 P.3d at p. 1283.) Disagreeing with *Cromer*, the court stated that "admission of testimony that violates the Confrontation Clause may be proper if the defendant intentionally opened the door to its admission." (*Ibid.*) The court concluded "that in this case defense counsel intentionally opened the door to the Confrontation Clause violation by her strategic trial

decision to introduce the non-testifying driver's hearsay statement. Accordingly, defendant has waived the right to challenge the admission as error." (*Id.* at p. 1284.)

In *Rogers*, defense counsel tried to put before the jury an incomplete version of what the driver had told police—only the part that tended to exonerate the defendant. The trial court (and the appellate court) justifiably concluded, without reference to the truth or falsity of any of the driver's statements, that the jury would receive an incomplete, misleading account of what the driver had told the police if the prosecution were not allowed to introduce the driver's *other* statements to the police—the ones which tended to incriminate the defendant. In the instant case, of course, but for the trial court's contested ruling, the jury would not have had *any* account of what Thomas told the police; Ms. Hopson's counsel sought to exclude all of Thomas's police statements, not to introduce an incomplete version of them. And, of course, Ms. Hopson's counsel did not intentionally open the door to the prosecution's use of Thomas's statements.

Respondent also cites a number of other out-of-state appellate decisions which have held that a criminal defendant opened the door to otherwise inadmissible inculpatory evidence under circumstances similar to *Reid* and *Rogers*. (ABM 38, citing *State v. Fisher* (Kan. 2007) 154 P.3d 455, 481-483

[defense counsel's questioning of officer about testimonial hearsay statements of non-testifying declarant opened door to admission of declarant's entire written statement]; *McClenton v. State* (Tex.Ct.App. 2005) 167 S.W.3d 86, 93-94 [defense opened door to admission of statements of one codefendant by examining officer as to those statements, but did not open the door as to statements made by second codefendant]; *Tinker v. State* (Ala.Crim.App. 2005) 932 So.2d 168, 187-188 [defense counsel's questioning of officer about details of individual's statement opened door to admission of entire statement]; *State v. Brooks* (Hawaii Ct.App. 2011) 264 P.3d 40, 51 [defendant not entitled to introduce selected portions of codefendant's statement favorable to his defense and, at same time, use *Crawford* to preclude prosecution from introducing other portions of codefendant's statement]; *Lane v. State* (Ind.Ct.App. 2013) 997 N.E.2d 83, 93 [though a defendant can open door to evidence that otherwise would violate confrontation clause, "there is no indication in the record" that defendant *intentionally* waived his confrontation rights; therefore, trial court erred in concluding that defendant opened door to admission of testimonial statement].)

The cases on which respondent relies are all fundamentally different from the case before this court. In each of these cases, the "opening of the door" was done by trial counsel, asking questions of a witness (usually a police

officer) about statements made by an out-of-court declarant. As Ms. Hopson has noted, she did not introduce evidence of a portion of Thomas's testimonial hearsay statements and then try to keep the prosecution from introducing other portions. Moreover, in the case at bar, the defendant's own testimony at trial is the basis of respondent's assertion that she waived her right to confrontation by opening the door to the admission of Thomas's statements. The logical extension of respondent's argument is that, whenever a defendant testifies on her own behalf and denies committing a crime, that opens the door to all manner of hearsay evidence which contradicts and inculpates the defendant and which is not be subject to cross-examination.

Respondent also relies on *United States v. Lopez-Medina* (10th Cir. 2010) 596 F.3d 716 (*Lopez-Medina*). (ABM 37-39, 40, 43.) In that case, defense counsel, who had stated on the record that he was aware he might be opening the door to more evidence from the prosecution, asked a police officer on cross-examination about certain information provided to the officer by a confidential informant. (*Lopez-Medina*, at p. 732.) The prosecution then brought out more information about the confidential informant's statements on redirect examination, which formed the basis of the defendant's confrontation clause challenge on appeal. (*Ibid.*) The Tenth Circuit held that, because "[i]t was defense counsel, not the government, who first questioned [the officer]

regarding the specific information he obtained from the informant, Lopez-Medina cannot now complain [the officer] should not have been allowed to answer the government's related questions on redirect." (*Ibid.*)

The relevant procedural facts in *Lopez-Medina* are unusual. In that case, defense counsel expressly told the court: "'I think, Your Honor, [the government is] worried that I am going to bring in the confidential informant information. That's my full intention. *I don't care what door we open. If I open up a door, please feel free to drive into it.* But I am going to explore the entire case.'" (*Lopez-Medina*, *supra*, 596 F.3d at p. 731, emphasis added.) The Tenth Circuit stated: "It is clear from this statement that defense counsel intentionally relinquished his (or rather, his client's) confrontation right through his questioning of [the witness]." (*Ibid.*) Such a finding cannot be made here.

"Defendants can waive their constitutional rights, including the right to confront the witnesses against them as protected by the Sixth Amendment." (*United States v. Holmes* (8th Cir. 2010) 620 F.3d 836, 842.) "The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law. There is a presumption against the waiver of constitutional rights, [citation], and for a waiver to be effective it must be clearly established that there was 'an intentional relinquishment or

abandonment of a known right or privilege.'" (*Brookhart v. Janis* (1966) 384 U.S. 1, 4.)

No intentional relinquishment of Ms. Hopson's right to confrontation occurred in the case before this court. As of the time that Ms. Hopson testified, she and her counsel were under the impression that Thomas's statements to the police would not be admitted at trial, even though Ms. Hopson chose to testify. (1 RT 12, 18-19.) The trial court *did* qualify that ruling "in the event that the prosecution believes that Ms. Hopson may have opened the door with her testimony." (1 RT 19.)

Following Ms. Hopson's testimony on direct examination—in which she was not asked about, and made no mention of, any statements Thomas made to the police (see OBM 17-23; ABM 16-19)—and the first part of the prosecutor's cross-examination, the prosecutor asked the court to admit Thomas's police statements under Evidence Code section 1202 "to impeach the hearsay declarations" which came in through Ms. Hopson's testimony. (3 RT 422.) Unlike the facts of *Lopez-Medina*, Ms. Hopson's counsel made clear that Ms. Hopson did not intentionally waive her right to confrontation; he characterized her testimony as going to "her state of mind as to what happened in the garage, what she heard the killer say, I don't think that allows us to bring

in his statements that he told police days later. That was my objection under *Crawford*." (3 RT 422-423.)

Overruling the defense *Crawford* objection, the trial court ruled that Thomas's inconsistent statements could be admitted for "that limited purpose." (3 RT 422-423.) Knowing that Thomas's statements were coming in on rebuttal, defense counsel "used his redirect to make a preemptive effort at minimizing the evidence" of Thomas's statements to the police, asking Ms. Hopson if she was aware that Thomas had accused her of planning the events. (ABM 20, citing 3 RT 434.) The prosecution thereafter presented those statements through Detective Wheeler's testimony on rebuttal. (3 RT 444-450.)

Ms. Hopson submits that, under these facts, where her counsel presented her direct testimony with no expectation that Thomas's police statements were going to be admitted at trial, and where counsel did not seek to present the jury with an incomplete or misleading account of any testimonial hearsay statements, the Court of Appeal erroneously found that Ms. Hopson opened the door to the admission of Thomas's statements, despite her confrontation clause objection.

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D. The Improper Admission at Trial of Thomas's Statements through Detective Wheeler Was Not Harmless Beyond a Reasonable Doubt.

Ms. Hopson fully set forth in her opening brief on the merits the grounds on which she contends that the trial court error admitting Julius Thomas's statements through the rebuttal testimony of Detective Wheeler was not "harmless beyond a reasonable doubt" under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). (OBM 53-57.)

Respondent argues that any error in the admission on Thomas's statements is harmless under *Chapman*. (ABM 43-46.) Respondent states that, even without the admission of Thomas's statements to the police, "there was a mountain of physical and circumstantial evidence establishing that appellant and Thomas killed Brown together." (ABM 43.) Respondent describes the allegedly "crushing evidence" against Ms. Hopson. (ABM 44-45.) In so doing, respondent asserts that "[Ms. Hopson's] DNA, but not Thomas's, was on the van's steering wheel." (ABM 44, citing 2 RT 196-197.) This is not correct.

The DNA evidence was presented in "a DNA stipulation from the Department of Justice," which was signed by both the prosecutor and defense counsel. (2 RT 195-198.) That stipulation provided, in relevant part:

> The DNA from the swab of the steering wheel from Laverna Brown's van, item 13A1S, is a mixture from at least

> two people. The major donor profile matches Laverna Brown's reference DNA profile, and Ruthetta Hopson's reference DNA profile is included as a *possible* minor donor.
>
> Julius Thomas and Darcy Timm are excluded as possible donors to the minor DNA.

(2 RT 196-197; emphasis added.)[5]

Ms. Hopson agrees with respondent that there is substantial circumstantial evidence of her involvement with the events surrounding the murder of Brown. For the reasons Ms. Hopson stated in her opening brief (OBM 54-56), however, she respectfully submits that although the evidence demonstrated her guilt of *some* crime relating to the death of Laverna Brown, none of that evidence approached the devastating effect of the statements which Detective Wheeler testified Julius Thomas made to the police, especially with their admission occurring during the prosecution rebuttal.

Without the admission of Detective Wheeler's rebuttal testimony concerning what Thomas told the officers, the jurors may very well have found that Ms. Hopson participated in some fashion in the events relating to the

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[5] Respondent elsewhere erroneously states: "Appellant's DNA – but not Thomas's – was on the van's steering wheel." (ABM 10, citing 2 RT 196-197.) The significance of the stipulated DNA evidence as to what was found on the steering wheel is not significant in any event. Ms. Hopson testified at trial that she drove the van, among other things that she did out of fear that Thomas would follow through with the threats he made to harm her and her son if she did not do what he told her to do. (2 RT 323, 343-346.)

murder of Brown, but the prosecution cannot demonstrate beyond a reasonable doubt that she would have been convicted of first degree murder with the two special circumstances found true.

The prosecution cannot meet its burden of proving that the guilty verdict in this case "was surely unattributable to the error" at issue in this appeal. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Ms. Hopson respectfully submits that this court cannot conclude beyond a reasonable doubt that, had the trial court not erroneously permitted the prosecution to present Thomas's police statements on rebuttal, the verdict of first degree murder and the true findings as to the special circumstances would have been reached. Therefore, the judgment should be reversed. (*Chapman*, *supra*, 386 U.S. at p. 24.)

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CONCLUSION

For the foregoing reasons, and as more fully set forth in appellant's opening brief on the merits, Ms. Hopson respectfully asks this court to reverse the judgment of the Court of Appeal.

DATED: July 27, 2016

/s/ Gordon S. Brownell
GORDON S. BROWNELL, ESQ.
Attorney for Defendant and Appellant
RUTHETTA LOIS HOPSON

CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court, rule 8.520(c), I certify that my word-processing program indicates that this reply to respondent's answer brief on the merits consists of 7,472 words, excluding the tables, the caption, signature blocks, and this Certificate of Compliance.

/s/ Gordon S. Brownell
GORDON S. BROWNELL, ESQ.
Attorney for Defendant and Appellant
RUTHETTA LOIS HOPSON

PROOF OF SERVICE BY MAIL

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, declare that I am employed in the County of Sonoma, California. I am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On July 27, 2016, I served a copy of the attached Reply Brief on the Merits (CA Supreme Court) on each of the parties in said cause by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in United States mail at Sonoma, California, addressed as follows:

Court of Appeal, 4th District, Division 1
Clerk of the Court
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Judge of the Superior Court
Hall of Justice
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Riverside, CA 92501

Gregory Roach
Office of the Public Defender
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Ruthetta Lois Hopson
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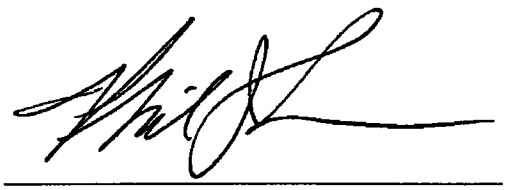
Chowchilla, CA 93610

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of July, 2016.

Phil Lane
(Name of Declarant)



(Signature of Declarant)

PROOF OF SERVICE BY ELECTRONIC SERVICE

Re: Ruthetta Lois Hopson, Court Of Appeal Case: D066684, Superior Court Case: RIF1105594

I the undersigned, am over the age of eighteen years and not a party to the within entitled cause. My business address is 4968 Snark Ave, Santa Rosa CA. On July 27, 2016 a PDF version of the Reply Brief on the Merits (CA Supreme Court) described herein was transmitted to each of the following using the email address indicated and/or direct upload. The email address from which the intended recipients were notified is Service@GreenPathSoftware.com.

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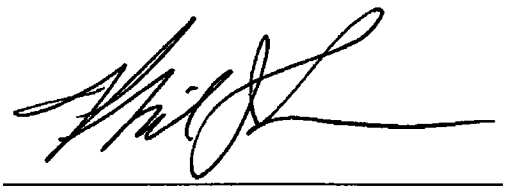
I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on this 27th day of July, 2016 at 08:56 Pacific Time hour.

Phil Lane
(Name of Declarant)



(Signature of Declarant)