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FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
MAR 07 2013
ALAN CARLSON, Clerk of the Court
BY L. HOYLE, DEPUTY

On behalf of Defendant Jay Cicinelli

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NUMBER: 11CF2575**
vs.	**NOTICE OF MOTION AND MOTION TO SEVER; SUPPORTING MEMORANDUM; NOTICE OF AND MOTION TO CONTINUE PURSUANT TO PENAL CODE SECTION 1050**
MANUEL RAMOS AND JAY CICINELLI, ***Defendants***	**Date: April 26, 2013** **Dept. C-40** **Time: 9 a.m.**

TO THE ABOVE ENTITLED COURT, AND TO THE DISTRICT ATTORNEY OF ORANGE COUNTY, STATE OF CALIFORNIA:

PLEASE TAKE NOTICE that on April 26, 2013 in Department C-40 at 9 a.m., or as soon thereafter as the matter may be heard, the defendant, Jay Cicinelli, will move that the Court to order defendant Cicinelli's case severed from that of co-defendant Manuel Ramos. Additionally, Defendant Cicinelli moves this Court to continue his trial to July 19, 2013. This motion will be based on the attached supporting memorandum, and the attached declaration, all papers filed and

all records in this action, evidence taken at the hearing on this motion, and argument at that hearing.

Date: March 6, 2013

Respectfully submitted,

Michael D. Schwartz, Esq.
Kasey A. Castillo, Esq.
Attorneys for Jay Cicinelli

SUPPORTING MEMORANDUM

I. THE TRIAL COURT SHOULD EXERCISE ITS DISCRETION TO SEVER DEFENDANT CICINELLI FROM DEFENDANT RAMOS, AND POTENTIAL DEFENDANT JOSEPH WOLFE

Presently, defendants Jay Cicinelli and Manuel Ramos are joined for trial in case number 11CF2575. A trial date of June 28, 2013 has been set by the Court in this matter. Joseph Wolfe is a potential co-defendant contemplated by the People, but as of the date of filing of this motion, has not be consolidated or joined to the above-mentioned case number. For the following reasons, defendant Jay Cicinelli moves the court for a severance from co-defendant Ramos and potential co-defendant Wolfe. Resolution of a motion to sever requires a balancing test on the part of the court in a determination of whether the defendant shown such a clear case of prejudice amounting to a denial of a fair trial so as to outweigh all other countervailing considerations. *People v. Williams* (1984) 36 Cal. 3d 441, 447-448; *People v. Hall* (1995) 34 Cal. App. 4th 727, 734.

A. THE TRIAL COURT SHOULD EXERCISE ITS DISCRETION TO ORDER SEVERANCE WHEN THE PROSECUTION PLANS TO USE THE EXTRAJUDICIAL STATEMENT OF A CO-DEFENDANT AND EFFECTIVE EXCISION IS NOT POSSIBLE

The right of confrontation, guaranteed by the Sixth Amendment to the United States Constitution precludes the introduction against a criminal defendant of "testimonial" hearsay, unless (1) the declarant is unavailable and (2) the defendant has had an opportunity to cross-examine the declarant. *Crawford v Washington* (2004) 541 U.S. 36, 158 L.Ed. 2d 177, 124 S.Ct. 1354.

In *Bruton v U.S.* (1968) 391 U.S. 123, 20 L.Ed. 2d 476, 88 S.Ct. 1620, the United States Supreme Court held that when a non-testifying co-defendant's out-of-court statement implicates

another co-defendant, the statement is inadmissible at a joint trial. *See also, People v Aranda* (1965) 63 Cal.2d 518, 47 CR 353; same, relying on California Constitution. The error cannot be cured by a limiting instruction admonishing the jury to consider the statement only as to the declarant. *Ibid. See also. People v Boyd* (1990) 222 Cal.App.3d 541, 271 CR 738.

Only if the trial court can effectively delete all parts of the extrajudicial statement implicating a codefendant, can the statement be used in a joint trial. "By effective deletions, we mean not only direct and indirect identifications of codefendants, but any statements that could be employed against nondeclarant codefendants once their identity is otherwise established." *People v Aranda* (1965) 63 Cal.2d 518, 528, 47 Cal.Rptr. 353; S*ee also, People v Fulks* (1980) 110 Cal.App.3d 609, 616, 168 Cal.Rptr. 203. A statement that contains a reference to another perpetrator has not been effectively redacted when the jury can immediately infer that the other perpetrator is the defendant. *Gray v Maryland* (1998) 523 U.S. 185, 140 L.Ed. 2d 294, 118 S.Ct. 1151.

When the incriminating portions of the extrajudicial statements cannot be effectively deleted, the trial court must grant severance or exclude the statements. *People v Song* (2004) 124 Cal.App.4th 973, 980, 22 Cal.Rptr.3d 118.

In the instant matter, it is anticipated that the People will attempt to utilize the out of court statements of defendant Ramos, and potentially, Wolfe, in a joint trial with defendant Cicinelli. The tenants of *Aranda-Bruton* should persuade this court to sever the matters, such that the prejudicial nature of Ramos' and possibly, Wolfe's statements, do not irrevocably bias any impartial jury empanelled to decide Cicinelli's case. Additionally, should the Court deny Defendant Cicinelli's Severance Motion and, at trial, the government seeks to admit portions of Defendant Ramos' or Wolfe's out-of-court statements, it is the position of Defendant

Cicinelli that pursuant to Evidence Code section 356, the remainder of those out of court statements should also be admitted as well.

B. THE COURT SHOULD GRANT A SEVERANCE WHEN, AS IN THIS CASE THE DEFENDANT WOULD BE SERIOUSLY PREJUDICED BY BEING TRIED TOGETHER WITH THE CO-DEFENDANT

A severance is proper under the following circumstances:

Potentially antagonistic defenses (*People v Graham* (1969) 71 Cal.2d 303, 330, 78 Cal.Rptr. 217); disparity in the weight of the evidence against each defendant (*People v Chambers, supra*, 231 Cal.App.2d at 29); evidence potentially prejudicial to the defendant will be admitted at trial, ostensibly against the codefendant (*People v Biehler* (1961) 198 Cal.App.2d 290, 298, 17 Cal.Rptr. 862; see also *People v Massie* (1967) 66 Cal.2d 899, 916, 59 Cal.Rptr. 733); the codefendant intends to offer evidence harmful to the defendant (*People v Graham* (1969) 71 Cal.2d 303, 331, 78 Cal.Rptr. 217); and the jury will be confused by evidence on multiple counts (see *Zafiro v U.S.* (1993) 506 U.S. 534, 122 L.Ed. 2d 317, 113 S.Ct. 933; *People v Hardy* (1992) 2 Cal.4th 86, 168, 5 Cal.Rptr.2d 796; *People v Chambers* (1964) 231 Cal.App.2d 23, 27, 41 Cal.Rptr. 551). All of these scenarios are highly likely in the matter before the Court given the timeline of events in this case and the different degrees of involvement of the parties. Based on the above, severance is proper, as there will be a clear showing of prejudice to defendant Cicinelli. *People v. Marquez* (1992) 1 Cal.4th 553, 572; *Williams, supra,* 36 Cal.3d at 447; *People v. Poon* (1981) 125 Cal.App.3d 55, 69.

In the present case, Defendant Cicinelli is in a materially different posture factually and as charged than Defendant Ramos, and would be in a significantly different posture factually than Wolfe should he be joined. As seen in the video (Preliminary Hearing, Defense Exhibit A),

Defendant Cicinelli was not one of the original officers investigating Mr. Thomas. Rather, Defendant Cicinelli responded through his dispatch to two "Code Three" dispatches to assist Ramos and Wolfe. As such, Defendant Cicinelli's involvement in the altercation with and attempt at arresting Mr. Thomas begins nearly half way into the videotape of the incident, which it the main piece of evidence in the prosecution's case-in-chief. As such, the first half of the videotape, while highly relevant to the case of Defendant Ramos and Wolfe, becomes much less relevant but, instead, highly prejudicial to Defendant Cicinelli, who had no specific knowledge or details as to what transpired before he arrived on scene. Moreover, as stated above Defendant Ramos is charged with 2nd Degree Murder, a much greater charge and significantly more serious than Defendant Cicinelli. That implication will have a prejudicial spill over and influence on how the jury views Defendant Cicinelli who stands charged with a much lesser crime. Should the cases be tried together, therefore, Defendant Cicinelli will be denied a fair trial which far outweighs any countervailing considerations. *Williams, supra*; *People v. Hall* (1995) 34 Cal.App.4th 727, 734.

C. THE COURT SHOULD EXERCISE ITS DISCRETION AND ORDER SEVERANCE BECAUSE THE DISTRICT ATTORNEY IS WAFFLING ON THE JOINDER OF ANOTHER CO-DEFENDANT, THUS IMPACTING THE DEFENSE OF JAY CICINELLI

At the last court appearance on January 18, 2013, the District Attorney indicated that he was uncertain when he would add Mr. Wolfe as a co-defendant in this case, if ever. On the record, the District Attorney indicated that Mr. Wolfe's presence as a co-defendant on this case was not required in order for him to move forward with the prosecution of Jay Cicinelli, and that if the trial was delayed because of Mr. Wolfe's defense preparation, that he would in fact, not be added to the same case number, and would be tried separately.

Given that the District Attorney has made on the record representations that 1) Mr. Wolfe is not necessary to the prosecution of Defendants Cicinelli and Ramos, 2) that utilizing additional resources in trying Mr. Wolfe separately is less important to the prosecution than litigating Defendant Cicinelli's and Ramos' cases sooner than later, and that, 3) the District Attorney has provided no indication when, if ever, Mr. Wolfe will be added, Defendant Cicinelli asks for a severance from Defendant Ramos and, potentially, Mr. Wolfe (should he be added to the same case number).

Again, as stated above, any argument that all three must be joined for judicial economy or based on the nature of the case or the events before for the court is meritless. The District Attorney has indicated that all three defendants together are not necessary, and he is pressing to move forward, with or without all potential defendants. Defendant Cicinelli agrees, and is, therefore, requesting a severance and continuance to July 19, 2013 to begin trial.

D. THE COURT SHOULD EXERCISE ITS DISCRETION AND ORDER SEVERANCE AS THE DEFENSE IN THIS CASE CAN BE READY IN JULY OF 2013, CO-DEFENDANT RAMOS CANNOT, AND THE DISTRICT ATTORNEY INDICATED IN COURT THAT THE OTHER POTENTIAL CO-DEFENDANT (WOLFE) IS NOT NECESSARY TO ITS CASE

The fact that the District Attorney has not made a motion to join Mr. Wolfe as a defendant in the above-captioned matter greatly impacts the defense preparation for Jay Cicinelli. Obviously, the inclusion of Mr. Wolfe brings forth additional considerations in preparing and litigating Defendant Cicinelli's case, as will preparation and litigation of a case without Wolfe as a co-defendant.

Defense counsel for Mr. Ramos has indicated he will not be available or ready for trial in this matter until October. Should Mr. Wolfe be joined, his attorney has indicated the same.

Jay Cicinelli's defense team can be ready closer in line with the prosecution's request for an earlier trial date, i.e., by July 19, 2013. To that end, and for the reasons stated above, Defendant Cicinelli should also be severed from Defendant Ramos.

CONCLUSION

Defendant Cicinelli requests that this severance motion be granted for the above reasons. Additionally, Defendant Cicinelli moves this court to continue his trial less than one month from the current trial date of June 28, 2013 to July 19, 2013, for the reasons set forth in The Declaration of Attorney Michael D. Schwartz, attached herein.

Date: March 6, 2013

Respectfully submitted,

Michael D. Schwartz, Esq.
Kasey A. Castillo, Esq.
Attorneys for Jay Cicinelli

DECLARATION OF COUNSEL MICHAEL D. SCHWARTZ

I, Michael D. Schwartz, under penalty of perjury, state as follows:

1. I am one of the attorneys of record representing Defendant Jay Cicinelli in the above-captioned matter.

2. Currently, Defendant Jay Cicinelli is charged with assault under the color of authority, a felony and involuntary manslaughter, a felony, in the death of Kelly Thomas. Co-defendant Manuel Ramos is charged with 2nd degree murder and involuntary manslaughter.

3. The trial in the above-captioned case is currently set for trial on June 28, 2013, in Department C-40 at 8:30 am.

4. That a continuance is necessary due to the need to prepare for the defense of Jay Cicinelli based on the filing of and ruling on the above Motion to Sever; additionally, there are several outstanding slides of Mr. Thomas still to be examined by Defense Pathologist Steven Karch, M.D. The parties in this matter (including Joe Wolfe and his attorney) have verbally agreed and further agreed to stipulate that those slides of decedent Thomas' heart, thyroid and brain can be released to an agent of Defendant Cicinelli's attorneys for transportation and/or forwarding to Dr. Karch in Alameda County for examination. This process, including the examination will take additional time. That, coupled with Attorney Schwartz's and Attorney Castillo's trial and hearing schedules preclude being ready for trial by June 28, 2013. It should be noted that at the time of this Declaration, however, the above-mentioned stipulation has not yet been signed by all the parties.

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5. That it is anticipated, and **dependent on the above rulings,** counsel for Jay Cicinelli can be prepared for trial by July 19, 2013; and to that end is asking for trial to be continued to that date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: March 6, 2013

Michael D. Schwartz, Esq.
Attorney for Jay Cicinelli

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 367 North Second Ave., Upland, California 91786.

On **March 7, 2013,** I served the following document described as **NOTICE OF MOTION AND MOTION TO SEVER; SUPPORTING MEMORANDUM; NOTICE OF AND MOTION TO CONTINUE PURSUANT TO PENAL CODE SECTION §1050** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope addressed as follows:

For the People of the State of California, Orange County: Tony Rackauckas, District Attorney Keith Bogardus, Dep. District Attorney Orange County District Attorney's Office 401 Civic Center Drive West Santa Ana, CA 92701 *(Via Personal Service Only)*	*For Co-Defendant Manual Ramos:* John D. Barnett, Esq. Barnett & Barnett 1 City Boulevard, Suite 500 Orange, CA 92868 *Email: john@barnettbarnett.com* *(Via US Mail and Electronic Mail)*
Vicki Podberesky, Esq. Nasatir, Hirsh et al 2115 Main Street Santa Monica, CA 90405 *Email: vpod@nhpklaw.com* *(Via Email Only)*	

[X] I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Upland, California.

[X] By Personal Service, I caused such envelope to be delivered by hand to the above addressee(s): Keith Bogardus, Dep. DA, OCDA,by Bruce Morgan/Safari Express

[X] By Electronic Mail, I caused the above-referenced document(s) to be transmitted via Electronic Mail to the above-named person(s)

Executed on March 7, 2013 at Upland, California.

[ ] By Overnight Courier, I caused the above referenced document(s) to be delivered To an overnight courier (UPS) for delivery to the above addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Bruce Morgan

Bruce Morgan