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SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE, CENTRAL JUSTICE CENTER

THE PEOPLE OF THE STATE OF CALIFORNIA Plaintiff, vs. MANUEL ANTHONY RAMOS JAY PATRICK CICINELLI, Defendants	Case No.: 11CF2575 **PEOPLE'S COMBINED MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANTS' PRE-TRIAL MOTIONS**

The People respectfully submit the following combined memorandum of points and authorities in opposition to defendants Ramos' and Cicinelli's pre-trial motions *in limine* in this matter.

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MEMORANDUM OF POINTS & AUTHORITIES

I. THE DEFENDANTS' MOTIONS TO INTRODUCE EVIDENCE OF PRIOR CONDUCT BY KELLY THOMAS.

As anticipated the defendants have moved to introduce a remarkably broad history of alleged prior conduct by Kelly Thomas. To the extent that the defendants' motions rest on Evidence Code section 1103(a) as a grounds for admission, the People's opposition to this evidence has already been stated in the "People's Pre-Trial Motion No. 1." In his motion *in limine,* defendant Ramos has cited this court to Evidence Code sections 1101(b), 1105, and 1202 as additional grounds for admitting evidence of Thomas prior conduct. Both defendants further claim that the prior conduct evidence should be admissible because it supports their theory of Thomas' cause of death. The People will address these additional contentions in turn.

A. EVIDENCE OF THOMAS' PRIOR CONDUCT IS NOT ADMISSIBLE TO IMPEACH HIS CREDIBILITY BECAUSE THE PEOPLE ARE NOT OFFERING ANY HEARSAY STATEMENTS OF THOMAS

Defendant Ramos has identified three instances of prior conduct by Thomas which he claims are admissible as evidence tending to impeach Thomas' credibility as a hearsay declarant. Those instances are: 1) the 1995 assault involving Thomas' grandfather; 2) the 1996 report by Ron Thomas that Kelly Thomas took his guitar without consent; and 7) the 2007 "ped-check" of Thomas during which Thomas identified himself as Jesse James Jr. and Thomas Kelly James.[1] This evidence, however, is not admissible to impeach Thomas' credibility as a hearsay declarant because the People are not seeking to introduce any of the statements by Thomas as hearsay (i.e., for their truth).

Evidence Code section 1202 permits the admission of evidence of conduct of a **hearsay declarant** to impeach that declarant's credibility. "Section 1202 provides that evidence of a

1 The number refers to the enumerated paragraph of the People's Pre-Trial Motion No. 1 wherein the circumstances of this prior incident are explained. (See pages 17-25 of the "People's Pre-Trial Motion No. 1).

'statement or other conduct' **of a hearsay declarant** which is inconsistent with the evidence presented by the declarant may be introduced to attack the declarant's credibility." (*People v. Jacobs* (2000) 78 Cal.App.4th 1444, 1449 [emphasis added]). "Taken together, sections 1202 and 788 seem to provide that evidence of prior felony convictions is admissible to attack the credibility **of a hearsay declarant**." (*Id.* [emphasis added]). The operative phrase here being "hearsay declarant." A hearsay declarant is one whose statement is introduced as hearsay, that is introduced in order to prove the truth of the matter asserted within the statement. (See, e.g., Cal. Evid. Code §1203 defining a hearsay declarant as "[t]he declarant of a statement that is **admitted as hearsay evidence";** Cal. Evid. Code §135 [declarant is a person who makes a statement] & §1200 [hearsay is a statement "offered to prove the truth of the matter stated."]). This, of course, makes sense because when a declarant's statement is offered for its truth, the credibility of the declarant is at issue. Here, however, the People are not offering any of the statements made by Thomas for their truth. "'[A] statement that is offered for some purpose other than to prove the fact stated therein is not hearsay.'" (*People v. Bolden* (1996) 44 Cal.App.4th 707, 714). As such, the defendant cannot avail himself of section 1202 as a basis to admit evidence of Thomas' prior conduct evidence.

A statement by a declarant does not constitute hearsay if it is offered, not for its truth, but to show the mental state or attitude of the person who heard it. (See, *People v. Marsh* (1962) 58 Cal.2d 732, 737; *People v. Mendoza* (2007) 42 Cal.4th 686, 697; *People v. Reeder* (1978) 82 Cal.App.3d 543, 550; *Stewart v. Estate of Bohnert* (1980) 101 Cal.App.3d 978, 990; *People v. Bolden* (1996) 44 C.A.4th 707, 715). As the California Supreme Court explained in *People v. Marsh* (1962) 56 Cal.2d 732:

> The gist of hearsay is that it is an out-of-court utterance offered to prove the truth of what is asserted in the utterance. But here the evidence was offered not to prove the truth of the statements, but to show the mental state of the defendants… Such letters, reports, and conversations offered for such purpose are not hearsay and are admissible. McCormick, Evidence (1954) states the proper rule as follows…: "When it is proved that D made a statement to X, with the purpose of showing ... the information which X had as bearing on the reasonableness or good faith of the subsequent conduct of X, the evidence is not subject to attack as hearsay." Wigmore says, "Wherever an utterance is offered to evidence the *state of mind* which ensued *in another person* in consequence of the

> utterance, it is obvious that no assertive or testimonial use is sought to be made of it, and the utterance is therefore admissible, so far as the Hearsay rule is concerned." (6 Wigmore, Evidence (3d ed. 1940) p. 235. See also 1 Wharton, Criminal Evidence (12th ed. 1955) p. 591, "The question is merely whether they had any effect upon the mental state of the defendant.")
>
> California is in accord with this general rule. Thus, it has consistently and properly been held that the statements a police officer relies upon to make an arrest are admissible against hearsay objections, not to prove the truth of such statements, but to show the officer's state of mind (probable cause) in making the arrest. (*People v. Fischer,* 49 Cal.2d 442, 446 [317 P.2d 967]; *People v. King,* 140 Cal.App.2d 1, 5 [294 P.2d 972]; *People v. Paul,* 147 Cal.App.2d 609, 618 [305 P.2d 996].)

(*People v. Marsh* (1962) 58 Cal.2d 732, 737-38). Similarly, the People wish to offer the statements of Kelly Thomas, not for their truth, but to show knowledge of those statements by the defendants.

In the now well-worn refrain, the reasonableness of the defendants' conduct is to be judged objectively, based upon the facts and circumstances known or apparent to them. The statements of Thomas – such as "I can't breathe" – are facts known to the defendants. Statements made to an officer are admissible for the non-hearsay purpose of proving the officer's knowledge and thus the reasonableness of his conduct. This includes the reasonableness of the force he subsequently uses. The California Supreme Court's decision in *People v. Mayfield* (1997) 14 Cal.4th 668 provides an apt illustration. In *Mayfield*, an out-of-court statement to an officer that the defendant had a gun was admitted into evidence over the defendant's hearsay objection. In upholding the ruling, the Supreme Court explained:

> The trial court's ruling was correct. The evidence was admissible for a nonhearsay purpose. One of the issues in the case was whether Sergeant Wolfley had used excessive force or behaved improperly in his confrontation with defendant. ... Evidence that Sergeant Wolfley had received information that defendant might be armed with a gun was relevant on this issue. Although evidence of Thomas's statement to Sergeant Wolfley was not admissible to prove that defendant in fact possessed a gun, it was admissible for the nonhearsay purpose of establishing Sergeant Wolfley's state of mind and the appropriateness of his ensuing conduct.

(*People v. Mayfield* (1997) 14 Cal.4th 668, 751). The same is true here. The statements made by Kelly Thomas were part of the collective facts known or apparent to the defendants and thus

relevant to a determination of whether each acted reasonably in light of the statements each heard. That is, whether the degree of force or threat of force each used was reasonable under the circumstances.

Irrespective of their truth, the statements of Kelly Thomas are also relevant to a determination of the mental state with which each defendant acted (i.e., whether there was implied malice or criminal negligence). Implied malice requires proof that the defendant knew that his conduct endangered the life of another. (*People v. Knoller* (2007) 41 Cal.4th 139, 153). Whereas criminal negligence requires proof that a reasonable person in the defendant's position would have been aware of the danger his conduct created. (*People v. Valdez* (2002) 27 Cal. 4th 778, 783). In either case, the statements of Kelly Thomas – such as "I can't breathe" – are relevant proof of the danger the defendant was aware of (implied malice) or the danger a reasonable person in his position would have been aware of (criminal negligence).

B. EVIDENCE OF THOMAS' PRIOR CONDUCT IS NOT ADMISSIBLE AS EVIDENCE OF HABIT OR CUSTOM WITHIN THE MEANING OF EVIDENCE CODE §1105

Defendant Ramos claims that a number of instances of prior conduct by Thomas are admissible under Evidence Code section 1105 as evidence of Thomas' habit to engage in certain behavior. In particular, the defendant claims that the following instances of prior conduct evince the following habits: 1) the 1995 assault of his grandfather evinces a habit of Thomas "manifesting an obsession with and fixation upon his crotch;" 7) the 2007 "ped-check" of Thomas during which Thomas identified himself as Jesse James Jr. and Thomas Kelly James evinces a "habit of deliberately giving false names to law enforcement;" 8) the 2009 incident of Thomas trespassing at a 99 Cent store evinces "a habit of trespassing and aggressiveness;" 9) the 2009 FI of Thomas looking in vehicles evinces a habit of "surreptitiously looking into vehicles." This conduct, however, does not constitute evidence of habit within the meaning of Evidence Code section 1105. Moreover, it is irrelevant. Accordingly, this proffered ground for admissibility should be rejected.

1. THE PRIOR CONDUCT DOES NOT EVINCE A HABIT WITHIN THE MEANING OF EVIDENCE CODE §1105

Under Evidence Code section 1105, "evidence of habit…is admissible to prove conduct on a specified occasion in conformity with the habit…" (Cal. Evid. Code §1105). "Habit" within the meaning of this section is "a person's regular response to a repeated situation." (*People v. Memro* (1985) 38 Cal.3d 658, 681, fn. 22). It is a "person's regular practice of meeting a particular kind of situation with a specific type of conduct thus indicating that the doing of the act is semi-automatic." (*Webb v. Van Noort* (1966) 239 Cal.App.2d 472, 478). "Custom or habit involves a consistent, semi-automatic response to a repeated situation." (*Bowen v. Ryan* (2008) 163 Cal.App.4th 916, 926).

Evidence of a singular instance of behavior, such as the defendant is offering here, is insufficient to prove habit. That is the defendant is offering a single instance of Thomas alleging "looking in cars," to prove he has a habit of doing the same; a single instance of Thomas identifying himself by a name other than his own to prove he has a habit of doing the same; etc. One prior instance, however, does not establish a habit. Habit may only be proven through evidence of a frequent and uniform response to a particular situation. It must be a "person's regular practice," "a consistent…response to a repeated situation." (*See, e.g., People v. Hughes* (2002) 27 Cal.4th 287, 337 [evidence that "on occasions when [the victim] cleaned her apartment she would leave open the top half of her Dutch door" was "insufficient to establish any habit or custom."]; *Bowen v. Ryan* (2008) 163 Cal.App.4th 916 [evidence of nine prior incidents of dentist choking and shoving patients over course of career did not constitute evidence of habit or custom]).

2. THE PRIOR CONDUCT IS IRRELEVANT AS HABIT EVIDENCE

Evidence of habit is admissible under Evidence Code section 1105 "to prove conduct on a specified occasion in conformity with the habit or custom." (Cal. Evid. Code §1105).

Assuming *arguendo,* that the prior conduct tendered by the defendant evinced the habits he claimed, the evidence then would only be admissible to prove that Thomas acted in conformity with that habit on the charged occasion (i.e., had a habit for "fixating on his crotch as evidence that he fixated on his crotch on July 5, 2011; had a habit for looking into vehicles as evidence that he looked into a vehicle on July 5, 2011; etc.) Evidence of conduct in conformity with those alleged habits, however, is irrelevant to the issues at bar. (See People's Pre-Trial Motion No. 1 pages 29-30 discussing irrelevance of conduct in conformity with this behavior, albeit in the context of Evidence Code section 1103).

C. EVIDENCE OF THOMAS PRIOR CONDUCT IS NOT ADMISSIBLE UNDER EVIDENCE CODE §1101(B)

Defendant Ramos summarily cites this court to Evidence Code section 1101(b) as an alternative basis to admit evidence of Thomas' prior conduct. For example, without explanation, the defendant claims that evidence of Thomas' 1995 assault on his grandfather and the 1996 report of him taking his father's guitar without consent are admissible under section 1101(b) as evidence of Thomas' motive to flee from the police **fifteen to sixteen years later** on July 5, 2011. The defendant is wrong. Such prior conduct does not evince any motive by Thomas to flee from defendant Ramos.

The defendant similarly claims that evidence of Thomas wrongly identifying himself as "Jesse James Jr." in 2009 is admissible under section 1101(b) as evidence of Thomas' character trait for "giving a false name" while Thomas' 2009 trespassing at a 99 Cent store is admissible under section 1101(b) as "a character trait for defiance or aggress[ion]." Although he fails to articulate just how such evidence would be admissible under section 1101(b) for those stated purposes, the defendant seems to suggest that this evidence is admissible for a propensity purpose (i.e., evidence of Thomas acting defiantly or aggressively before offered to prove he acted defiantly or aggressively on the charged occasion). Evidence of prior conduct to prove

propensity, however, is prohibited under Evidence Code section 1101. "[E]vidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." (Cal. Evid. Code § 1101, subd. (a)). Propensity use of prior conduct evidence is the subject of Evidence Code section 1103, not 1101. And the People have already addressed the inadmissibility of this same evidence under section 1103 in the People's Pre-Trial Motion No. 1.

D. IN THE ABSENCE OF A FURTHER SHOWING, EVIDENCE OF THOMAS' PRIOR CONDUCT IS NOT ADMISSIBLE ON THE PURPORTED GROUNDS THAT IT SUPPORTS THE DEFENDANTS' THEORY OF THOMAS' CAUSE OF DEATH.

The defendants offer an additional, rather strained argument that evidence of Thomas' prior conduct is admissible because it is supportive of their theory of Thomas' cause of death. The argument of the defendants in this regard proceeds through four steps of reasoning as follows: 1) Dr. Karch will testify on behalf of the defense that Thomas died as a result of methamphetamine cardiomyopathy; 2) methamphetamine cardiomyopathy may be suffered by individuals who chronically abuse methamphetamine; 3) some individuals who have chronically abused methamphetamine may develop episodes of psychosis; 4) evidence of Thomas' prior conduct demonstrates periods of psychosis therefore supporting the conclusion he chronically abused methamphetamine therefore supporting the conclusion of Dr. Karch that he died as a result of methamphetamine cardiomyopathy. The principal flaw with this argument, however, is with step four.

Preliminarily, the defendant has made no showing of the fact that methamphetamine abusers may suffer episodes of psychosis other than tendering – as an offer of proof - the bare, unqualified statement of Dr. Karch that this is so. The defendant has also made no showing of what type of psychoses may be experienced by chronic methamphetamine abusers that would be supportive of Dr. Karch's opinion or, more importantly, that the proffered conduct of Thomas

actually evinces such psychosis. In summary fashion the defendants simply conclude that the proffered prior conduct of Thomas demonstrates a "pattern" of "seemingly psychotic behavior" rendering it admissible to prove their cause of death theory. That is hardly an adequate offer of proof. The evidence proffered by the defendant is only relevant on this ground if it does, in fact, consist of evidence of methamphetamine induced psychosis. The defendant has failed to make any preliminary showing – by offer of proof or otherwise – that it does.

E. THE DEFENDANTS HAVE FAILED TO MAKE AN ADEQUATE OFFER OF PROOF REGARDING PRIOR CONDUCT EVIDENCE EACH SEEKS TO ADMIT

As an offer of proof regarding the prior conduct of Thomas that each defendant seeks to admit, the defendants have provided the court with copies of police reports memorializing those incidents. Under the circumstances, that offer of proof is inadequate with respect to at least nine instances of prior conduct sought to be admitted. As such, the People are objecting to the defendants' offers of proof as well.

An offer of proof must clearly describe the "substance, purpose, and relevance" of the evidence sought to be introduced. (Cal. Evid. Code §354, subd. (a)). This entails disclosing the manner in which the facts sought to be admitted would be proven as well as demonstrating that the disputed evidence is available at trial. The Court of Appeal's decision in *Moore v. Rogers* (1958) 157 Cal.App.2d 192 is instructive in this regard.

> The controlling question on this appeal is as to whether the appellant made a sufficient offer of proof under the circumstances then existing, and whether the court erred in sustaining an objection to that offer in the form in which it was made. In *Douillard v. Woodd,* 20 Cal.2d 665 [128 P.2d 6], the court said: "A mere general offer of proof without producing the witness or stating the evidence whereby the fact in issue is to be proved, or, if the witness be present, without putting a question to him in such form as to give opportunity for objection, is not correct trial procedure and it affords no ground for appeal." .... In general, the rule is that in order to be sufficient an offer of proof must show, in effect, that a witness or witnesses are available and the particular facts which it is expected will be brought out through the testimony offered.

(*Moore v. Rogers* (1958) 157 Cal.App.2d 192, 197; quoting *Douillard v. Wood* (1942) 20 Cal.2d 665, 670; *see also, In re Fries' Estate* (1963) 221 Cal.App.2d 725, 729-30 [same]). "[A]n offer

of proof must be specific. It must set forth the actual evidence to be produced and not merely the facts or issues to be addressed and argued." (*People v. Foss* (2007) 155 Cal.App.4th 113, 128). "The trial court may reject a general or vague offer of proof that does not specify the testimony to be offered by the proposed witness." (*People v. Carlin* (2007) 150 Cal.App.4th 322, 334).

An offer of proof may be objectionable because it fails to disclose sufficient information to enable the opposing party and the trial judge to determine whether the offered evidence will be admissible. Here, the defendants have failed to disclose the manner in which at least nine of the prior instances of Thomas' conduct would be proven or even demonstrated that this disputed evidence is available at trial. With regard to these instances, the defendants have not identified a single percipient witness to the alleged conduct of Thomas as a prospective defense witness in this trial. Below is a list of those prior instances of conduct sought to be admitted by the defendants along with the identity of the percipient witness. None of these percipient witnesses have been identified as a prospective defense witness in this trial.

No.[2]	Alleged Prior Conduct	Percipient Witness
3	2004 battery at Alano Center	Dale Roberts
4	2005 trespassing incident at Albertons	Theresa Ramirez
7	2009 Thomas loitering at Target	FPD Officer Wilkerson
8	2009 trespassing incident at .99 Cent Store	Cynthia Valles
9	2009 FI of Thomas looking in cars	PPD Officer Peterson
10	2009 incident of Thomas kicking cardboard box	Joseph Lo Nigro
13	2010 Thomas observed in possession of matches	FPD Officer Lira
14	2010 suspect throwing metal chair at car	Maribel Rocha
16	2011 payphone vandalism at 7-11	Raj Atwal

Absent proposed testimony from the percipient witnesses to this alleged conduct, the defendants' offers of proof are inadequate. They do not identify the manner in which each defendant would intend to prove this prior conduct by Thomas if permitted.

2 The number refers to the enumerated paragraph of the People's Pre-Trial Motion No. 1 wherein the circumstances of this prior incident are explained. (See pages 17-25 of the "People's Pre-Trial Motion No. 1).

II. DEFENDANT RAMOS' MOTION TO ADMIT EVIDENCE OF JEANNETTE DEMARCO'S REPORT TO THE FULLERTON POLICE DEPARTMENT ON JULY 5, 2011

Defendant Ramos has moved to introduce evidence of Jeanette DeMarco's "report to the Fullerton Police Department" on the night of July 5, 2011 regarding her observations of Kelly Thomas. As explained in the "People's Pre-Trial Motion No. 1," this evidence is inadmissible. In his motion, defendant Ramos claims that this evidence is "relevant and admissible to show that Officer Manuel Ramos had reasonable suspicion to detain Kelly Thomas at the time in question and probable cause to arrest him on July 5, 2011." (Trial Brief of Defendant Ramos, p. 13). The defendant is wrong.

As explained in the People's pre-trial motion, the reasonableness of the defendant's conduct is to be determined solely on the basis of the facts known or apparent to him at the time of his conduct. This same analysis applies to the determination of whether defendant Ramos had reasonable suspicion or probable cause. The existence of reasonable suspicion or probable cause is determined objectively, from the perspective of the officer, based upon the facts and circumstances actually known to him at the time of his action. "'Probable cause exists when **the facts known to the arresting officer** would persuade someone of "reasonable caution" that the person to be arrested has committed a crime.'" (*People v. Scott* (2011) 52 Cal.4th 452, 474, quoting *Dunaway v. New York* (1979) 442 U.S. 200, 208, fn. 9, [emphasis added]). "[W]e must judge the constitutionality of [the officer's] conduct **in light of the information available to them** at the time they acted." (*Maryland v. Garrison* (1987) 480 U.S. 79, 85 [emphasis added]). "The question of the reasonableness of the officers' conduct is determined on the basis of **the information possessed by the officer** at the time a decision to act is made." (*People v. Gale* (1973) 9 Cal.3d 788, 795 [emphasis added]). "In California, 'an officer has probable cause for a warrantless arrest 'if the **facts known to him** would lead a [person] of ordinary care and prudence to believe and conscientiously entertain an honest and strong suspicion that the person is guilty of a crime." (*Blakenhorn v. City of Orange* (9th Cir.2007) 485 F.3d 463, 471 [emphasis added]; see also *People v. Price* (1991) 1 Cal.4th 324, 410.) "Probable cause exists when 'the

facts and circumstances **within [the officers'] knowledge** and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.'" (*Hart v. Parks* (9th Cir. 2006) 450 F.3d 1059, 1065-66 [alterations original, emphasis added]).

The only information known to defendant Ramos regarding the alleged conduct of Kelly Thomas was the police dispatch that there was: "A transient problem, 123 S. Pomona. A male transient, no shirt, with a backpack, blue jeans, in the parking lot trying door handles, 125." (See People's Pre-Trial Motion No. 1, Exhibit 2b). This evidence the People concede is admissible. Any further observations or statements by Miss DeMarco, however, that were not communicated to defendant Ramos are inadmissible to judge the reasonableness of any of his conduct, including whether he possessed "reasonable suspicion to detain Kelly Thomas or…probable cause to arrest him…"

III. DEFENDANT CICINELLI'S MOTION TO ADMIT EVIDENCE OF "PRIOR COMMENDATIONS."

Defendant Cicinelli has moved to admit "evidence in the form of a letter written by Deputy District Attorney…Rinauro and a commendation from his command staff…" (Defendant Cicinelli's Motions *In Limine,* p. 10-11). According to the defendant, this letter and written commendation are admissible as evidence of his character pursuant to Evidence Code section 1102. The defendant is wrong. This proposed evidence is entirely inadmissible under Evidence Code sections 1102 and 1200. Therefore, the People object to this motion.

A. THE PROPOSED EVIDENCE DOES NOT QUALIFY FOR ADMISSION UNDER EVIDENCE CODE SECTION 1102

Evidence Code section 1102 provides a statutory exception to the general bar on admitting evidence of a defendant's character. Under Evidence Code section 1102,

evidence of the defendant's character or a trait of his character in the form of an opinion

> or evidence of his reputation is not made inadmissible by Section 1101 if such evidence is: (a) Offered by the defendant to prove his conduct in conformity with such character or trait of character.

(Cal. Evid. Code §1102, subd. (a)). This provision for introducing evidence of a defendant's character, however, is subject to several restrictions. Character evidence in the form of opinion testimony must: 1) be based upon facts personally observed by the witness; 2) relate an opinion regarding relevant character traits only; and 3) it cannot recount prior acts of specific conduct by the defendant. The defendant's proposed character evidence here violates every single one of these restrictions. As such, the inadmissibility of this proposed evidence is abundantly clear.

1. THE WITNESS MUST HAVE PERSONALLY PERCEIVED THE FACTS UPON WHICH HIS OR HER OPINION IS BASED.

Opinion evidence under section 1102 is only admissible when it is based upon the witness's personal observation of the facts upon which the opinion is based. (*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-1307). Personal knowledge is a prerequisite to the testimony of any witness as to either facts or opinions. (Cal. Evid. Code §702, subd. (a) ["the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter"]; Cal. Evid. Code §800, subd. (a) [to be admissible, lay witness opinion must be "[r]ationally based on the perception of the witness."]) A witness is simply not competent to testify as to any matter if he or she lacks personal knowledge of it. **"[W]hen a lay witness offers an opinion that goes beyond the facts the witness personally observed, it is held inadmissible**." (*McAlpin* , *supra,* 53 Cal.3d at 1308 [emphasis added]). As the Supreme Court explained in *McAlpin*,

> we now read Evidence Code section 800 into section 1102 and inquire whether lay opinion testimony...satisfies the requirements of the former. Evidence Code section 800 limits lay opinion testimony to an opinion that is "(a) Rationally based on the perception of the witness; and (b) Helpful to a clear understanding of his testimony." Our focus is on the requirement of subdivision (a) of this statute. The meaning of subdivision (a) is clear: "A witness who is not testifying as an expert may testify in the form of an opinion *only if the opinion is based on his own perception.*" (Cal. Law Revision Com. com., 29B West's Ann. Evid. Code (1966 ed.) § 800, p. 376, italics added.) As the drafters

> acknowledge (*ibid.*), this was also the common law rule. (See, e.g., *Stuart v. Dotts* (1949) 89 Cal.App.2d 683, 686-687 [201 P.2d 820]; *Manney v. Housing Authority* (1947) 79 Cal.App.2d 453, 459 [180 P.2d 69].) In this context, moreover, the drafters define "perception" as the process of acquiring knowledge "through one's senses" (Evid. Code, § 170), i.e., by personal observation.
>
> The cases allowing lay opinion testimony uniformly note that it was based on the witness's personal observation.

(*People v. McAlpin* (1991) 53 Cal.3d 1289, 1306-07 [italics original]). Personal knowledge only exists when the witness has a "present recollection" of the facts underlying the opinion which was "derived from the exercise of the witness' own senses." (Cal. Evid. Code §702, Law Rev. Com. Comment). The opinions of Deputy District Attorney Rinauro and the defendant's commending supervisors **<u>are not</u>** based upon their personal observation of the facts underlying their opinions. Instead, they are based upon those individuals' post-hoc review of records prepared by others. As such, these witnesses are not competent to render an opinion regarding the defendant's character on the basis of facts not personally observed.

The California Court of Appeals decision in *People v. Felix* (1999) 70 Cal.App.4th 426 offers a fitting example of the inadmissibility of this proposed defense evidence. In *Felix,* a defense witness, Janice Huibregtse, was permitted to testify to the defendant's character under Evidence Code section 1102. Huibregtse, a juvenile probation officer, opined that the defendant only used heroin, as opposed to selling it. Huibregtse's opinion in this regard, however, was not based upon her personal observations but upon her review of records and conversations with the defendant and others. In finding the admission of this evidence was in error, the Court explained:

> Lay opinion testimony is admissible under section 1102 when it is based on the witness's personal observation of the defendant's course of behavior. [Citation]. ... Huibregtse admitted she never saw defendant use drugs. **Her knowledge** of his drug use **was based on her review of records and conversations with both him and others** at the conservation camp. Thus, Huibregtse should not have been allowed to express a lay opinion on defendant's drug use.

(*People v. Felix* (1999) 70 Cal.App.4th 426, 429 [emphasis added]). The circumstances of *Felix*

are identical to the case at bar. Neither Deputy District Attorney Rinauro nor the defendant's commending supervisors personally observed the facts upon which they based their opinions. Instead, their opinions are based upon a review of records and conversations they may have had with the defendant and others. Such evidence is inadmissible.

The Court in *McAlpin* drew the same conclusion. In *McAlpin,* the defendant was charged with molesting the daughter of a woman he had been dating. The Supreme Court upheld the trial court's ruling excluding opinion testimony of the defendant's character under section 1102 that was not based upon facts personally observed by the character witness. Observing the rule that opinion testimony must be based upon facts personally observed by the witness, the court explained:

> In the case at bar we apply this rule to the proposed testimony of defendant's three additional character witnesses that in their opinion defendant is not a "sexual deviant," i.e., in the words of defendant's offer of proof, "a person of lustful or lewd conduct with children." The proposed opinion testimony of the male character witness to this effect was not based on personal observation of defendant's "conduct with children"; under the foregoing cases, therefore, the trial court did not abuse its discretion in disallowing his testimony. To the extent that the same opinion of the women character witnesses was based on their private sexual experiences with defendant rather than on their observation of his behavior with their daughters, the trial court could disallow it for the same reason.

(*McAlpin, supra,* 53 Cal.3d at 1308-09). Accordingly, the proffered character evidence here should be excluded in its entirety on this ground alone.

2. <u>EVIDENCE OF A DEFENDANT'S CHARACTER IS LIMITED TO RELEVANT TRAITS.</u>

In addition to the fact that the defendant's proposed evidence is inadmissible because it is based upon facts not personally observed, it is also inadmissible to the extent that it consists of opinions regarding irrelevant character traits. "Under Section 1102, the accused in a criminal case may introduce evidence of his good character to show his innocence of the alleged crime--**provided that the character or trait of character to be shown is relevant to the charge made against him.**" (Cal. Evid. Code §1102, Law Rev. Com. Comment [emphasis added]). Indeed,

"[t]he character evidence permitted a defendant under section 1102 is limited to evidence of the character or trait of character relevant to the offense charged." (*People v. Taylor* (1986) 180 Cal. App. 3d 622, 629 (holding evidence of character traits not relevant to the elements of the charged offense itself inadmissible under section 1102)). Although section 1102 allows a defendant to offer opinion or reputation evidence of his character or a trait of his character to prove his conduct in conformity therewith, "[t]he character or character trait must, of course, be **relevant** to the offense charged." (*People v. Qui Mei Lee* (1975) 48 Cal. App. 3d 516, 526 [emphasis added]; *see also, People v. Kramer* (1968) 259 Cal.App.3d 452, 466). The purpose of the evidence as to the character of the accused is to show his disposition, and to base thereon a probable presumption that he would not be likely to commit, and, therefore, did not commit, the crime with which he is charged. Logically then, the character evidence offered by the defendant must be relevant to prove such a propensity.

The proposed character evidence here relates opinions of character traits which are not relevant to the elements of the charged offense. Deputy District Attorney Rinauro, for example, opined in 2002 that defendant Cicinelli had displayed heroics, was helpful in her preparing her prosecution, had an "incredible work ethic…sense of justice and integrity" and exhibited professionalism. (See Exhibit D to Defendant Cicinelli's Motions *In Limine*). Opinion evidence of such character traits are irrelevant are therefore inadmissible.

3. EVIDENCE OF PRIOR ACTS OF SPECIFIC CONDUCT ARE INADMISSIBLE UNDER SECTION 1102.

By its very terms, section 1102 limits the admissibility of character evidence to "the form of an opinion or evidence of...reputation..." (Cal. Evid. Code §1102). A defendant may not introduce character evidence in the form of prior acts of specific conduct. Under section 1102, evidence of specific acts of a defendant themselves are inadmissible to prove either good or bad character.

> With respect to evidence of specific acts, on the other hand, the comment explains that section 1102 codifies the preexisting rule precluding the use of such evidence to prove the defendant's character. ...Thus, as this comment makes clear, Evidence Code section 1102 specifically authorizes a defendant to establish his character through either reputation evidence or opinion evidence...

(*McAlpin, supra,* 53 Cal. 3d at 1317; *see also, e.g., People v. Cordray* (1962) 209 Cal.App.2d 425, 439 (rejecting evidence of defendant's education and scholastic honors as inappropriate character evidence; and *People v. Doolin* (2009) 45 Cal. 4th 390, 437, fn 31). Here the defendant seeks to admit evidence of specific acts of his prior conduct. In fact, the proposed evidence recounts in detail the specific prior conduct of defendant Cicinelli. Such evidence is inadmissible.

B. <u>THE PROPOSED EVIDENCE CONSTITUTES INADMISSIBLE HEARSAY</u>

According to the defendant, the character evidence he is proposing to admit is "in the form of a letter written by Deputy District Attorney…Rinauro" and a written "Commendation Incident Report" "from his command staff." (See, Defendant Cicinelli's Motions *In Limine*, Exhibits D & E and p. 10-11). The People construe this proposal to mean that the defendant wants to introduce a copy of the letter itself and a copy of the written commendation itself as evidence in this matter. In addition to the grounds set forth above, such evidence is also inadmissible under Evidence Code section 1200 because it constitutes hearsay. In fact, it contains multiple layers of hearsay. The entirety of the letter authored by Deputy District Attorney Rinauro contains her out-of-court statements as well as her recounting the hearsay declarations of countless others (e.g., statements of others regarding the defendant's conduct in an April 2002 event heard or read by Miss Rinauro, statements of jurors and judges to Miss Rinauro). The "Commendation Incident Report" is the same, consisting entirely of out-of-court statements of the authors of those reports which, themselves, contain hearsay declarations of countless others. This evidence is inadmissible, not only because it constitutes improper character evidence under section 1102 but because it consists entirely of hearsay and multiple-layer hearsay statements prohibited by Evidence Code sections 1200 and 1201.

IV. THE DEFENDANTS' PROPOSED EXPERT MEDICAL TESTIMONY OF DR. STEVEN KARCH

The People concede that expert medical testimony offered by the defense to establish an alternative cause of Kelly Thomas' death would be relevant, admissible evidence. With one exception, the People are offering no preliminary motions with regard to the proposed testimony of Dr. Karch. The People would only seek to reserve its right to object to the testimony of Dr. Karch if an adequate foundation is not established to qualify him to render the opinions called for (Cal. Evid. Code §720(a)) or if any of the opinions called for do not constitute proper opinion testimony (Cal. Evid. Code §801). The one exception to that preliminary position, however, revolves around the prospect of Dr. Karch relaying hearsay evidence in guise of opinion basis testimony.

In his report, Dr. Karch opines about the conduct of methamphetamine abusers in general and states that Thomas was "alleged to have been one…" (Exhibit 21 of defendant Ramos' "Trial Brief"). It is unknown what source of information Dr. Karch relied upon in offering the statement that Thomas was an alleged methamphetamine abuser. Nevertheless, the People object to Dr. Karch relating any hearsay statements regarding Thomas' alleged prior drug use under the guise of the doctor explaining the basis of his medical opinion. Such testimony is impermissible and should be excluded.

> While an expert may state on direct examination the matters on which he relied in forming his opinion, he may not testify as to the details of such matters if they are otherwise inadmissible. The rule rests on the rationale that while an expert may give reasons on direct examination for his opinions, including the matters he considered in forming them, he may not under the guise of reasons bring before the jury incompetent hearsay evidence.

(*People v. Coleman* (1985) 38 Cal.3d 69, 92 [internal citations omitted]; *see also, People v. Price* (1991) 1 Cal.4th 324, 416).

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V. DEFENDANT CICINELLI'S MOTION REGARDING EVIDENCE OF "OVERLAY TRACING," "IMPACT PATTERNS" OR BLOOD STAIN PATTERN ANALYSES.

Defendant Cicinelli has moved this court for an order excluding the testimony of Forensic Scientist Kevin Andera regarding: 1) overlay tracings he made of wounds to Thomas' face; 2) impact patterns he observed on defendant Cicinelli's taser; and 3) blood stain patterns he observed on defendant Cicinelli's taser. In the alternative, the defendant requests that the People be required to make a foundational showing of scientific reliability for this evidence prior to its introduction pursuant to *Kelly-Frye*. With regard to the overlay traces, the defendant also claims he has not been provided discovery of this evidence.

The overlay traces, as with all physical evidence gathered in the course of the autopsy, is in the custody of the Orange County Sheriff's-Coroner's Office and has always been available to the defense for their viewing, upon request. No such request was ever made. Nevertheless, the People **are not** seeking to introduce evidence of any overlay traces performed on Thomas' wounds or any opinions regarding purported impact patterns observed on defendant Cicinelli's taser in its case-in-chief. If, following the presentation of defendant Cicinelli's defense, the People deem it prudent to seek the admission of this evidence in rebuttal, the People will first request to address the admissibility of this evidence with the court, outside the presence of the jury.

With regard to any blood stain patterns observed on defendant Cicinelli's taser, such evidence is not subject to a *Kelly-Frye* showing of general scientific acceptance and reliability. (*People v. Cook* (2007) 40 Cal.4th 1334, 1345; *People v. Combs* (2004) 34 Cal.4th 821, 848; *People v. Clark* (1993) 5 Cal.4th 950, 1018). In *People v. Clark* (1993) 5 Cal.4th 950, 1018 the California Supreme Court held that bloodstain interpretation testimony was admissible without proof that the evidence was generally accepted in the scientific community:

> The testimony at issue here raises none of the concerns addressed by *Kelly/Frye*. "The methods employed are not new to [science] or the law, and they carry no misleading aura

> of scientific infallibility." [Citation]. In fact, the admissibility of "blood-spatter" or "blood dynamics" testimony in this state predates our [*People v. Kelly,* 17 Cal.3d 24, 130 Cal.Rptr. 144, 549 P.2d 1240 (1976)] decision. [Citation] Moreover, neither the experiments conducted in connection with such analysis nor the principles underlying it produce an "aura of scientific infallibility." Rather, it is a matter of common knowledge, readily understood by the jury, that blood will be expelled from the human body if it is hit with sufficient force and that inferences can be drawn from the manner in which the expelled blood lands upon other objects. The *Kelly/Frye* rule is inapplicable.

If the People elect to present this evidence, the People will be prepared to establish an adequate foundation for the testimony of Forensic Scientist Kevin Andera and his qualifications to testify to bloodstain interpretation.

CONCLUSION

On the basis of the foregoing points and authorities and upon any other argument which may be offered upon a hearing of the instant opposition, the People respectfully request that this court grant the relief requested herein.

Dated this 7th day of November, 2013.

TONY RACKAUCKAS, DISTRICT ATTORNEY
COUNTY OF ORANGE, STATE OF CALIFORNIA

By: _____
KEITH BOGARDUS
Deputy District Attorney

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen years and not a party to the within entitled action; my business address is: 401 Civic Center Drive West, Santa Ana, CA 92701.

On November 7, 2013, I served the within the **NOTICE OF ERRATA TO PEOPLE'S PRE-TRIAL MOTION NO. 1, and PEOPLE'S COMBINED MEMORANDUM OF POINTS & AUTHORITIES IN OPPOSITION TO DEFENDANTS' PRE-TRIAL MOTIONS regarding People v. Ramos, and Cicinelli, Court Case Numbers 11CF2575** on interested parties in said action by placing a true copy thereof enclosed in a sealed envelope, postage thereon fully prepaid, in the United States mail at Santa Ana, CA 92701, addressed as follows:

JOHN D. BARNETT, ESQ
Law Office of Barnett & Barnett
One City Boulevard West, Suite 500
Orange, California 92868

MICHAEL SCHWARTZ
9701 W. Pico Blvd.,
Los Angeles, CA 90067

I certify (or declare) under penalty of perjury that the foregoing is true and correct.

Executed on November 7, 2013, at Santa Ana, California.

VanTuyen Tran
Information Processing Specialist