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STATE OF COLUMBIA

WARREN COUNTY SUPERIOR COURT

Criminal Division

CASE NO. 2014-2341

STATE OF COLUMBIA

V

CHRISTOPHER DANIEL

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

1. Motion to suppress the evidence of all or part of all testimony of non-verbal statements allegedly made by Gloria Daniel (GD) to the police during an interview conducted on August 12-13, 2014

a. Inadmissible Hearsay

Conclusion:

As supported by the facts and case law described below, the testimony offered by Officer James (OJ) in relation to his interview with GD should be suppressed on the grounds that the responses given by GD to OJ on the night in question amount to inadmissible hearsay which do not fall within the "excited utterance"

exception.

Analysis:

i. Failure to establish grounds for the "excited utterance" exception

In **People v Jackson (2009)** the Supreme Court considered the admissibility of statements admitted under the excited utterance exception to hearsay. In its reasoning, the Court applied the Columbia Rule of Evidence 803(2) which sets out the 3 elements required for this hearsay exception to apply: (i) an event or condition startling enough to cause nervous excitement, (ii) the statement relates to the startling event, and (iii) the statement must be made while the declarant is under the stress of the excitement caused by the event before there is time to contrive or misrepresent.

Considering how these elements apply in relation to the present case, it is clear that GD's statement did not amount to an excited utterance.

OJ testified in the preliminary hearing that on the night in question he stopped the paramedics from taking GD to the hospital so that he could ask her some questions about the incident. He has confirmed that GD was unable to speak, due to substantial head trauma. However, OJ persisted to ask GD some questions about the incident during which GD nodded yes when asked if the Defendant committed the crime.

While it is fair to say that the events which took place on August 12-13 are demonstrative of an event startling enough to lead to an excited utterance. The present case must be distinguished from *People*. In that case, the key question observed by the court was in determining whether such statements are classed as "a spontaneous reaction" or "the result of reflective thought".

The victim in that case had offered a statement after a six-day delay between getting run over by a truck and speaking to a police officer. This time delay was held to be sufficient to fall within the excited utterance exception, due to the fact that during the six day period the victim was either semi conscious or unconscious and unable to speak due to her physical condition.

This case is different. The statement offered by GD was made shortly after the startling event, and in circumstances where she was suffering from profound head trauma.

As confirmed in the Affidavit of Dr. Nancy Donahue filed in support of this motion, when a person suffers brain injury, they demonstrate erratic movements. Such movements are not necessarily indicative of an affirmative response to a question.

Dr. Donahue has confirmed in her evidence that there are patients who may nod their heads up and down but do not really intend the "yes" response.

Dr. Donahue has suggested that in order to determine if a person with a brain injury is capable of responding to questioning, it would be necessary to first ask a series of questions in order to establish if the person was oriented to person, place or time.

Based on the testimony provided by OJ, no such evaluation took place on the night in question prior to OJ's questioning of the victim.

It is therefore not possible to ascertain whether GD was of capable and sound mind to answer OJ's questions in any reliable manner. Her phyiscal "nodding" may have simply been, as Dr Donahue suggests, the involuntary symptoms exhibited by people with brain injury.

Following an interview of GD conducted by this firm on February 11, GD confirmed that she was unable to recall who attacked her. She had no recollection of her interview with OJ.

ii. "Lapse in time" factor

Should the Court determine that OJ's testimony is admissible, the Defendant would request that the notes of the interview of GD by this firm on February 11 should also be admitted.

This follows the rationale adopted by *People*, where the court ruled that statements made after the victim has recovered from a condition of semi-consciousness may be considered as an "excited utterance" within the hearsay exception.

In this case, the interview took place 1 month after the incident. However, GD confirmed that she was unable to speak for one month following the attack.

b. Violation of Defendant's constitutional right to confront witnesses

As is demonstrated in well established case law (cf. *Crawford v Washington 2004),* the Confrontation Clause places no constraints at all on the use of prior testimonial statements as long as the declarant is present at trial to defend or explain it.

GD has unfortuntely passed away and will therefore not be available to testify in the present case. In circumstances where the Defendant will now have no opportunity to cross examine GD in relation to her responses to OJ's questions during that interview, it would be highly prejudicial to the Defendant if OJ's testimony in relation to his interview with GD were to be admitted.

The Court in *Melendez-Diaz* emphasised that the purpose of the right to confrontation is that it is designed to "weed out" not only fraudulent witnesses, but incompetent ones as well. Here, the question of GD's competence is key to determining whether her actions were indicative of reliable testimony. Without the opportunity to cross-examine GD to determine whether she was of sound mind when questioned by OJ, the Defendant's Sixth amendment rights shall be violated.

Conclusion:

For the reasons stated above, the Defendant submits that the testimonial evidence of OJ in relation to his interview with GD should be suppressed on the grounds that it is (i) inadmissible hearsay, or in the alternative (ii) a violation of the Defendant's Sixth Amendment rights.

2. Motion to suppress the evidence of all or part of all transcripts or testimony by recording concerning the 911 call allegedly made by Peter Daniel on August 12-13, 2014

a. Inadmissible Hearsay

b. Violation of Defendant's constitutional right to confront witnesses

Conclusion:

All or part of all transcripts or testimony by recording concerning the 911 call allegedly made by Peter Daniel on August 12-13, 2014 should be supressed as inadmissible on the grounds that it is not testimonial evidence and thus is hearsay not within any exception.

Analysis:

In **Crawford v Washington (2004)** the Supreme Court considered the effect of the Sixth Amendment on the admissibility of testimonial evidence. The Court concluded that where testimonial evidence is at issue, the Sixth Amendment demands unavailability and a prior opportunity for cross-examination.

Here, Mr Daniel (PD) has deceased and is unavailable to testify at the trial. There is therefore no opportunity for the Defendant to cross examine PD in relation to his call to 911 on the night in question.

Accordingly, if PD is not available, and he cannot be cross-examined during or prior to the trial, the 911 transcript of his testimony should not be admitted on the grounds that it would violate the Defendant's Sixth Amendment rights.

In light of the above, the central issue is therefore whether PD's call to the emergency services on the night in question amounts to "testimony". If it is not testimonial, then there is no Sixth Amendment right to Confrontation.

Was the 911 call "testimonial"?

In **Davis v Washington (2006)** the Supreme Court applied the rationale adopted in *Crawford* and went on to consider the meaning of the word "testimonial". In particular, the Court considered whether statements made to law enforcement personnel during a 911 call or at a crime scene are considered to be "testimonial".

That case concerned a domestic disturbance, and the victim did not appear to testify. Davis objected to admission of the 911 call of the victim based on his sixth amendment rights.

The Court determined that it is the testimonial character of the statement that

separates it from other hearsay that is not subject to the Confrontation Clause.

The court defined "non-testimonial" as follows: "statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency".

By contrast, the court defined "testimonial" statements as follows: "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution".

In determining whether the emergency is ongoing, timing of the call is key. The Court must consider whether it was a plea for help during an ongoing emergency, versus a narrative report of a crime absent any imminent danger.

In addition, the court must consider whether the elicited statements were necessary to resolve the present emergency, rather than to simply learn what had happened n the past.

The court will also consider the level of formality. Namely, was the caller responding calmly, at the station house, to a series of questions, or were the answers frantically delivered on the telephone in an environment that was not tranquil? In the latter case, the caller is not acting as a witness and was not testifying.

It is clear that PD's 911 call falls squarely within the non-

If there is a period of quiet on the call, and then the operator poses further questions once the caller has calmed down, this could be classed as testimonial.

Applying the above case law findings to the present case, there is a strong argument to suggest that PD's 911 call would be classed as "non testimonial". It was made

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