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**ENDORSED
FILED
ALAMEDA COUNTY**

JUN 07 2010

CLERK OF THE SUPERIOR COURT
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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 COUNTY OF ALAMEDA

10 THE PEOPLE OF THE STATE)
OF CALIFORNIA,)

No. 161210/AOC # 1009606-10

12 v.)

13 **PEOPLE'S MEMORANDUM OF POINTS
AND AUTHORITIES IN RESPONSE TO
DEFENDANT'S MOTION TO EXCLUDE
OFFICER PIRONE'S STATEMENTS**

15 JOHANNES MEHSERLE,)

16 Defendant.)

Dept: 104

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18 Based on *Evidence Code* §352, Defendant has moved to exclude Officer Anthony Pirone's
19 racial epithets made while standing next to Defendant and moments before Mr. Oscar Grant was
20 shot by Defendant. The People oppose this motion. Under *Evidence Code* §356, these statements
21 should be included as part of the complete picture of the scene on the BART platform when Mr.
22 Grant was killed. Furthermore, Officer Pirone's statements are highly probative on the issues of
23 Defendant's intent, his state of mind, as well as Officer Pirone's credibility. Contrary to
24 Defendant's contention, there is no undue prejudice to Defendant in admitting Officer Pirone's
25 statements.

26 **I. STATEMENT OF FACTS**

27 The People intend on presenting evidence that prior to the shooting, Defendant and Officer
28 Anthony Pirone acted together in applying undue and excessive force on the person of Mr. Grant.

1 The evidence will show that their actions were coordinated which is not uncommon in police work.
2 In fact, these two officers were working together in restraining Mr. Grant when the shooting
3 occurred. When Mr. Grant was on his knees he placed his hands behind his back to be handcuffed.
4 At that time, Officer Pirone bent over at the waist, leaned forward and shouted, "Bitch-ass nigger,
5 right, bitch-ass nigger right" into the face of Mr. Grant. The People intend to prove that not only did
6 Defendant hear those words, but he reacted to them. He reacted by pushing Mr. Grant face-first
7 onto the train platform. After he did so, Officer Pirone then responded to the Defendant's action by
8 shouting, "Yeah." Approximately thirty seconds later, Defendant pulled his gun from his holster
9 and fired a shot into the back of Mr. Grant.

10 II. ARGUMENT

11 A. Under Evidence Code Section 356, Officer Pirone's Statements Are Admissible.

12 The *California Evidence Code* §356 provides that "[w]here part of an act, declaration,
13 conversation, or writing is given in evidence by one party, the whole on the same subject may be
14 inquired into by an adverse party; when a letter is read, the answer may be given; and when a
15 detached act, declaration, conversation, or writing is given in evidence, any other act, declaration,
16 conversation, or writing which is necessary to make it understood may also be given in evidence."¹
17 "The purpose of this section is to prevent the use of selected aspects of a conversation, act,
18 declaration, or writing, so as to create a misleading impression on the subjects addressed." *People v.*
19 *Arias* (1996) 13 Cal.4th 92, 156.

20 The effect of Defendant's motion would be to include all of the portions of the video and
21 audio of the incident that the Defendant likes and exclude the portion of audio, Officer Pirone's
22 statements, that he does not like. To do so would give an incomplete picture of what occurred on
23 the platform in the early morning hours of January 1, 2009. In its simplest terms, the events on that
24 platform, including Officer Pirone's statements, happened the way they happened. The jury, in its
25 search for the truth, is entitled to the whole, complete picture of the incident that were memorialized
26 in the many videos from that night, including the highly relevant statements made by Officer Pirone.

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28 ¹ Under *California Evidence Code* §250, a "writing" includes a video recording. See *People v. Mayfield*
(1997) 14 Cal.4th 668, 747.

1 B. Evidence Code Section 352.

2 Defendant claims that Officer Pirone's statements have no relevance to any disputed issue
3 and that admitting the statements would prejudice Defendant. However, Officer Pirone's statements
4 are relevant to issues that are central to this case, where the charge is murder and the Defendant is
5 claiming accident. Officer Pirone's statements are probative on the issue of the Defendant's intent
6 and state of mind at the time he pulled the trigger. The statement is further probative on the issue of
7 Officer Pirone's credibility. The probative value of Officer Pirone's statements are in no way
8 substantially outweighed by the potential for undue prejudice.

9 The *California Evidence Code* section 352 provides that "[t]he court in its discretion may
10 exclude evidence if its probative value is *substantially* outweighed by the probability that its
11 admission will a) necessitate undue consumption of time or b) create substantial danger of undue
12 prejudice, of confusing the issues, or misleading the jury." "Prejudice' is not synonymous with
13 'damaging.'" *People v. Branch* (2001) 91 Cal.App.4th 274, 286. Evidence which is unduly
14 prejudicial under section 352 is not prejudicial merely because it is inconvenient for the party
15 against whom it is offered. *See id.* The prejudice section 352 "is designed to avoid is not the
16 prejudice or damage to a defense that naturally flows from relevant, highly probative evidence." *Id.*
17 "Undue prejudice" as referred to in Section 352 means "evidence which uniquely tends to evoke an
18 emotional bias against [a party]... and which has very little effect on the issues" in the case. *People*
19 *v. Yu* (1983) 143 Cal. App. 3d 358, 377. This prejudice must substantially outweigh the probative
20 value.

21 C. Officer Pirone's Statements Moments Before The Shooting Are Highly Probative To The
22 Issues At Trial.

23 1. Defendant's Intent and State of Mind

24 It is the People's position that the Defendant committed murder on the BART platform on
25 January 1, 2009 by intentionally firing his gun one time into the back of Mr. Grant. This killing was
26 the result of an intentional act fueled by emotion and aggression. The Defendant's conduct was
27 influenced by events that led up to the shooting. Those events included the racial slurs yelled by
28 Officer Pirone just seconds before Defendant decided to reach for his gun. The influence of these

1 statements on the Defendant's state of mind and intent cannot be ignored. Especially in a murder
2 case, where the defense is accident, the Defendant's state of mind and intent are central issues to the
3 case.

4 Any statements or actions of others that affect Defendant's state of mind and intent are highly
5 relevant and the Defendant has said so himself. Defendant has repeatedly put forth the defense, in
6 court proceedings and in moving papers, that his use of a firearm in this case was an accident and
7 that he meant to use a TASER. To support this contention, Defendant has continually made what he
8 characterizes as the hectic, near-riotous atmosphere on the BART platform an important part of his
9 defense. According to Defendant, the hostile conduct of the detainees on the BART platform, the
10 loud and hostile words of those on the BART platform and the threatening conduct of those on the
11 platform, affected Defendant's ability to make split-second decisions and ultimately caused him to
12 mistake his firearm for his TASER. In essence, Defendant plans to use the atmosphere on the
13 platform to show that it affected his state of mind and his intent at the time of the fatal shooting. *See*
14 *Attached Appendix A, (Defendant Mehserle's Motions In Limine, (24, ln. 27-28), (25, ln. 1-3), (33,*
15 *ln. 15-27); Defendant Mehserle's Trial Brief On Instructional Issues Related to Homicide, 580B,*
16 *(1), (2)).* The atmosphere on that BART platform, made up of statements and conduct, is clearly
17 relevant to Defendant's case.

18 Despite this defense, the Defendant claims that Officer Pirone's statements are not relevant
19 to any issues in this case. The Defendant cannot have it both ways. Officer Pirone, just like the
20 detainees or the other BART passengers, was one of the persons contributing to the atmosphere
21 moments before the shooting. In fact, Officer Pirone likely contributed more to Defendant's
22 immediate surroundings because Officer Pirone was standing right next to the Defendant, shouting,
23 "Bitch-ass nigger, right." Therefore, Officer Pirone's conduct and statements are just as probative,
24 if not more probative, on the issues of Defendant's state of mind and intent as the BART
25 passengers' conduct and statements. Given Defendant's defense, he cannot now say that Officer
26 Pirone's statements are not probative.

1 2. Officer Pirone's Credibility

2 The use of these statements is also probative on the issue of Officer Pirone's credibility. It is
3 expected that Officer Pirone will testify, as he has been served with a subpoena. Officer Pirone
4 never mentioned the racial slurs in any of the four statements he gave prior to the preliminary
5 hearing. Then when asked at the preliminary hearing about making any racial slurs towards Mr.
6 Grant he said, "I don't remember, but it very well may have happened." *See Preliminary Hearing*,
7 Vol.5 p. 779, lines 14-17. After the preliminary hearing, Officer Pirone was interviewed as part of
8 the internal investigation by the law firm of Myers Nave. When asked, "Do you remember Oscar
9 Grant saying that you were a bitch ass nigger?" Officer Pirone responded by saying, "No." Later in
10 the interview, he is asked again about the racial slurs and he said that he remembered Oscar Grant
11 "telling me about his four-year old daughter and how he respected the police, and then, 'Why are
12 you giving us a bad time?' And then things – that's when he said, 'Well you're a bitch ass nigger.'
13 And I said, 'You're calling me a bitch-ass nigger?' You know, that type of thing. And he said,
14 'Yeah.' And then I say, 'Bitch-ass, nigger, huh?' And I think that's when Mehserle comes over and
15 pushes him down." *See Myers Nave Interview* taken on July 10, 2009.

16 The People contend that Officer Pirone's initial refusal to mention the racial slurs followed
17 by his feeble attempt to explain them, especially when viewed in light of the videos, is relevant to
18 his credibility. These statements are highly probative of Officer Pirone's credibility and whether he
19 was being truthful about the incident or whether he was covering something up. Officer Pirone is
20 among the closest eyewitnesses to the shooting as he was standing directly above Mr. Grant and
21 directly across from the Defendant when the gunshot was fired. Officer Pirone's credibility will be
22 an issue in this case.

23 D. There Is No Undue Prejudice To Defendant By Admitting Officer Pirone's Statements.

24 1. Substantial Danger Of Undue Prejudice

25 Defendant argues that Officer Pirone's statements are unduly prejudicial because they invoke
26 an emotional response from the jury without providing any probative value. As discussed above,
27 Officer Pirone's statements are highly probative to many important issues in this murder trial.
28 Moreover, the courts have not held that racial epithets are inadmissible because they are offensive.

1 The contrary is true. The relevant inquiry is whether the statements are probative to issues at trial
2 and whether the probative value is substantially outweighed by the potential for undue prejudice.
3 The California Supreme Court addressed this issue in *People v. Quartermain* (1997) 16 Cal.4th 600.
4 In *Quartermain*, a murder case, the defendant was interviewed by the police and on three occasions
5 used racial epithets when referring to the murder victim, who was African-American and to other
6 African-Americans. The defense in *Quartermain* moved to exclude the statement based on
7 Evidence Code section 352. The California Supreme Court held that the trial court did not abuse its
8 discretion in admitting the racial epithets as evidence of defendant's prior attitude towards the
9 victim, a relevant factor in deciding whether the murder was deliberate and premeditated. *See id.* at
10 628. In holding so the Court stated the following:

11 In addition, the racial epithets were not so inflammatory that their probative value
12 was substantially outweighed by their potential for undue prejudice. (Evid.Code, §
13 352.) The unfortunate reality is that odious, racist language continues to be used
14 by some persons at all levels of our society. While offensive, the use of such
15 language by a defendant is regrettably not so unusual as to inevitably bias the jury
16 against the defendant.

17 *Id.*

18 *Quartmain* provides guidance regarding the prejudice in this case. In *Quartermain*, a
19 defendant's own racial epithets were admitted over a 352 objection because they were relevant to
20 issues at trial. Here, the prejudice to the Defendant is even less than *Quartermain* because here, the
21 Defendant did not make the racial slurs. The evidence will show that Officer Pirone made the
22 statements, a fact the defense can highlight during cross-examination and through the videos.

23 Further, even assuming that Officer Pirone's statements are as inflammatory as Defendant
24 contends, this fact only adds to the probative value of the statement. It is the inflammatory nature of
25 such slurs that makes them so probative. Words less inflammatory may not influence another's
26 conduct. These racial slurs, the People contend, did influence defendant's conduct and the videos
27 prove this point. One of the main issues in this case is the affect of these words and others on the
28 Defendant while he was on the platform. By their very nature, these statements are probative
because they are relevant to Defendant's conduct and his intent. Therefore, the prejudice cannot
outweigh the probative value under these circumstances.

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APPENDIX A

- 1 6. Mr. Meyer is familiar with various civil actions that have ensued as a result of those
2 prior matters and where available has read judicial opinions relating to those cases;
3 7. Based upon Mr. Meyer's review of the evidence in this case, including statements of
4 witnesses describing Mehserle's reaction to the shooting, and evidence that Mehserle
5 stated his intention to tase Mr. Grant just prior to firing the fatal round, it is Mr. Meyer's
6 expert opinion that the fatal shooting of Oscar Grant by defendant Johannes Mehserle
7 was an accident resulting from Mehserle's attempt to use a TASER and his mistaken
8 use of his firearm instead;
- 9 8. Mr. Meyer will testify that defendant's decision and attempt to use the TASER was
10 objectively reasonable and proper according under the circumstances, the relevant law,
11 BART policy, and the training the defendant had received prior to January 1, 2009
12 concerning deployment of the TASER;
- 13 9. Mr. Meyer will also testify concerning numerous instances in which the TASER has
14 been deployed by police officers in an attempt to avoid the use of lethal force against
15 police officers by suspects—i.e., instances in which officers might have resorted to the
16 use of firearms but, instead, chose to deploy TASERS in the face of the threat of the use
17 of lethal force against them.

18 Mr. Meyer will also provide testimony as follows:

- 19 10. It was objectively reasonable under the law, their training, and the circumstances for
20 BART officers to detain subjects they reasonably believed were involved in the fight on
21 the train;
- 22 11. It was objectively reasonable under the law, their training, and the circumstances for the
23 officers to handcuff those subjects;
- 24 12. Grant unlawfully physically resisted detention in violation of Penal Code § 148a;
- 25 13. Grant's resistance caused the officers' efforts to bring him under control to be
26 prolonged;
- 27 14. Various factors, including the increase in noise on the BART platform, the large
28 number of bystanders compared to police officers, and the justifiable conclusions of the

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- officers that the crowd could become aggressive, escalated tensions and stresses in the incident and are circumstances relevant to the question whether Mehserle acted in an objectively reasonable manner during the Grant detention;
15. Police may use force to make an arrest, overcome resistance, or prevent escape and to defend themselves or others from bodily harm;
16. Under the circumstances, training, and law, the force used to attempt to subdue and handcuff Grant prior to the shooting was an objectively reasonable use of force to overcome Grant's unlawful resistance;
17. Grant physically resisted the lawful control efforts of the officers by secreting his right arm under his body and resisting the efforts of Officer Mehserle to pull it out;
18. Officer Mehserle engaged in prolonged physical efforts to gain control of Grants right arm with the apparent intent to handcuff Grant;
19. Grant repeatedly contorted his body by twisting and turning and bucking against the officer's attempts to control him and handcuff him;
20. Various facts apparent from the physical evidence as well as his training, it is apparent that Officer Mehserle determined to deploy the TASER to attempt to control Grant;
21. Under the law, his training, and the circumstances, the decision to deploy the TASER was an objectively reasonable decision, after conventional soft empty-handed tactics failed to control Grant;
22. The TASER is typically far less injurious than hard-hands tactics or blunt force instruments, which were the next level of force above what the officers were using on Grant;
23. If Officer Mehserle observed or perceived that Grant's hand was entering his waistband or pants pocket area, it was likely that Officer Mehserle's level of fear would escalate, and in that case, under the law, the circumstances and his training, it was objectively reasonable for Officer Mehserle to deploy a TASER to stop Grant's actions;
24. Officer Mehserle loudly announced that he was going to use the TASER on Grant;

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2. Argument for Admissibility

Dr. Lewinski is unquestionably qualified to offer analysis and opinion on the subject of psychological and physiological factors surrounding the use of force by police officers. This witness is an international leader in this field, having been regularly qualified in courts around the country on these very issues, often on behalf of prosecutors. He is the director of an organization that is solely dedicated to research in this area.

Like expert Meyer, Dr. Lewinski's testimony is admissible on the key defense claim: that Mehserle intended to use his TASER, but rather used his gun. Again, the jurors will fairly be asking themselves, how is it a trained officer makes this sort of mistake? They require and defendant is entitled to offer the jurors assistance in answering this question.

To recap, Meyers will testify regarding the justifiability of the intended use of force, will explain how Mehserle's lack of adequate or effective training made an accident more likely, and will show how Mehserle's conduct on January 1, 2009, was entirely consistent with an intent to use his TASER and entirely inconsistent with an intent to use his gun.

Dr. Lewinski will explain how the inadequate and ineffective training, the fact that he had not carried or used the TASER with any regularity, and the various circumstances present on January 1, 2009—including, but not limited to, Grant's position on the platform, the fact that Grant refused to give up his arms for cuffing, the noise, the number of people on the platform, the perceived threat level, and the fact that Mehserle was aware that guns had been retrieved from BART riders that evening—led Mehserle to make the tragic mistake that officers in several other cases made before him.

Jurors can certainly imagine the circumstances on the BART platform—they can understand the noise, the chaos, and perhaps can even imagine that the officers felt outmanned and under siege. But, as per *People v. Harvey* (1991) 233 Cal.App.3d 1206, 1227, while they may understand these facts, they are in no position, without assistance from an expert like Dr. Lewinski, to grasp how those factors and the others described above might have resulted in the sort of confusion, and mistaken physiologic response, that led to the accidental shooting.

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Defendant's Proposed Instruction 580B

In deciding whether Mehserle's conduct itself was reckless and whether his actions so departed from the actions of a reasonable police officer in the same situation that his actions amounted to a disregard for human life or indifference to the consequences of his conduct, you may consider the following factors:

- (1) the atmosphere in which the shooting occurred;
- (2) you may consider whether Oscar Grant or any other persons present at the scene of the shooting posed a threat to the defendant or his fellow officers, whether Oscar Grant or any other persons at scene comply with police commands, and whether Oscar Grant or any other persons at scene resisted arrest;
- (3) you may consider whether there are any circumstances relating to the defendant's handling of the firearm was reckless;
- (4) you may consider whether the defendant's conduct violated BART police policies regarding the use of the taser;
- (5) you may consider whether the defendant's conduct complied with his training regarding the use of the taser;
- (6) you may consider whether the defendant was given adequate training provided to prevent such incidents;
- (7) if you find that he was provided such training, you may consider whether the officer failed to act in accordance with that training;
- (8) you may consider whether following that training have alerted the defendant that he was holding a handgun;
- (9) you may consider whether Oscar Grant's conduct prior to the shooting, or the conduct of any other person at the scene of the shooting, heightened the defendant's sense of danger; and
- (10) you may consider whether Oscar Grant's conduct prior to the shooting, or the conduct of any other person at the scene of the shooting caused the defendant to act with undue haste and inconsistently with his training.

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- GIVEN
- REFUSED
- WITHDRAWN