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**ENDORSED
FILED**
ALAMEDA COUNTY

JUN 07 2010

CLERK OF THE SUPERIOR COURT
BY:  Deputy

7 SUPERIOR COURT OF THE STATE OF CALIFORNIA
8 COUNTY OF ALAMEDA
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10 THE PEOPLE OF THE STATE)
OF CALIFORNIA,)
11)
12 v.)
13)
14)
15 JOHANNES MEHSERLE,)
16 Defendant.)

No. 161210/AOC # 1009606-10

**PEOPLE'S MEMORANDUM OF POINTS
AND AUTHORITIES IN RESPONSE TO
DEFENDANT'S MOTION REGARDING
THE TESTIMONY OF SOPHINA MESA**

Dept: 104

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18 The People plan to call Ms. Sophina Mesa as a witness in this trial. Ms. Mesa was Mr.
19 Oscar Grant's girlfriend and is the mother of his child. Ms. Mesa was not only with Mr. Grant on
20 the night he was killed, she spoke to him by cell phone just minutes before the shooting. Despite
21 Ms. Mesa's highly relevant testimony, the Defendant now moves to exclude her testimony and, in
22 the alternative, moves to cross-examine Ms. Mesa regarding Mr. Grant's probation and parole
23 status. The People oppose these motions. Ms. Mesa's testimony is highly probative on numerous
24 issues in this case, including Mr. Grant's state of mind and his fear of TASERS on January 1, 2009.
25 Furthermore, allowing the Defendant to cross-examine Ms. Mesa on Oscar Grant's probation and
26 parole status has no relevance to the issues in this trial and should again be excluded on *Evidence*
27 *Code* §352 grounds.
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1 **I. STATEMENT OF FACTS¹**

2 On January 1, 2009, Ms. Sophina Mesa road a BART train headed towards Hayward with
3 victim, Mr. Grant, and several other friends. As the train pulled into the Fruitvale station, Mr. Grant
4 became involved in a fight. When the BART train was stopped at the Fruitvale station, Ms. Mesa,
5 Mr. Grant and several of their friends got off the train. Ms. Mesa left the station platform and went
6 downstairs. Mr. Grant got back on the train.

7 Ms. Mesa waited downstairs at the BART station for Mr. Grant. She had been separated
8 from him for about five minutes when she decided to call him on his cell phone. At the time, Mr.
9 Grant was seated on the platform, having been detained by Defendant and other BART officers.
10 When Mr. Grant answered his cell phone, Ms. Mesa stated that he sounded “nervous” and “scared.”
11 Mr. Grant then stated the following to Ms. Mesa, “Baby, they’re beating me for no reason,” or
12 “They’re beating us for no reason.” Mr. Grant then said, “I gotta go.” Minutes later, on the station
13 platform, Defendant shot and killed Mr. Grant.

14 Sometime before January 1, 2009, Ms. Mesa recalls speaking to Mr. Grant about an incident
15 in which he was shot by police officers with a TASER. After that incident, Mr. Grant told Ms.
16 Mesa that he never wanted to be tased again and that he had a fear of TASERS.

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18 **II. ARGUMENT**

19 A. Ms. Sophina Mesa’s Testimony Is Relevant To Several Important Issues In This Case And Is
20 Not Cumulative.

21 Defendant argues that Ms. Mesa’s testimony regarding her cell phone conversation with Mr.
22 Grant just minutes before the shooting should be excluded because it is cumulative. According to
23 Defendant, Mr. Jack Bryson and Mr. Tommy Cross also heard Mr. Grant make the same statements
24 on the BART platform and therefore, there is no reason for Ms. Mesa to testify to the same
25 evidence. Defendant will undoubtedly attempt to attack the credibility of Mr. Bryson and Mr Cross
26 on various parts of their testimony. Ms. Mesa’s testimony in this regard serves to corroborate the

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California

¹ This Statement of Facts is based on the civil deposition of Ms. Sophina Mesa taken on July 8, 2009.

1 testimony of Mr. Bryson and Mr. Cross. Therefore, Ms. Mesa's testimony reinforces the fact that,
2 before he was shot, Mr. Grant made statements that the police were beating him for no reason.

3 Additionally, Ms. Mesa's testimony will provide insight into these statements where Mr.
4 Bryson and Mr. Cross cannot. Ms. Mesa was Mr. Grant's girlfriend at the time and they were
5 raising their daughter together. She knew Mr. Grant intimately and therefore her testimony is
6 particularly relevant when she offers testimony that Mr. Grant sounded "nervous" and "scared" on
7 the cell phone when making these statements. The statements are relevant to Mr. Grant's state of
8 mind and the way in which he made them is even more probative of his state of mind at that time. If
9 Mr. Grant was "nervous" and "scared" after just being beaten by the police for no reason, it was less
10 likely that he would resist arrest minutes later when he was shot by Defendant.

11 Ms. Mesa's testimony regarding her call to Mr. Grant also lessens any speculation about the
12 cell phone call, what was said during the call and who was on the other end of the line. On several
13 videos of the incident, Mr. Grant is clearly seen using a cell phone while being detained by the
14 Defendant. Ms. Mesa's testimony will answer questions the jury will inevitably have regarding Mr.
15 Grant's last cell phone conversation right before he was shot.

16 Finally, Ms. Mesa will offer testimony regarding Mr. Grant's stated fear of TASERS and, as
17 will be discussed in the next section, this fear is highly relevant to explain Mr. Grant's state of mind
18 and his conduct. This testimony is probative on the issue of whether Mr. Grant resisted on the
19 morning in question.

20 For all of these reasons, Ms. Mesa's testimony is not cumulative, but highly relevant on
21 many important issues and should be admitted.

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1 B. Mr. Grant's Statements To Ms. Sophina Mesa Regarding His Fear Of Tasers Are Probative
2 On The Issue Of The Nature And Quality Of Mr. Grant's Resistance And Are Admissible
3 Under Evidence Code Section 1250.

4 *California Evidence Code* §1250 states:

5 (a) Subject to Section 1252, evidence of a statement of the declarant's then existing
6 state of mind, emotion, or physical sensation (including a statement of intent, plan,
7 motive, design, mental feeling, pain, or bodily health) is not made inadmissible by
8 the hearsay rule when:

9 (1) The evidence is offered to prove the declarant's state of mind, emotion, or
10 physical sensation at that time or at any other time when it is itself an issue in the
11 action; or

12 (2) The evidence is offered to prove or explain acts or conduct of the declarant.

13 (b) This section does not make admissible evidence of a statement of memory or
14 belief to prove the fact remembered or believed.

15 "A prerequisite to this exception to the hearsay rule is that the declarant's mental state or conduct be
16 factually relevant. [Citation] A murder victim's fear of the alleged killer may be in issue when the
17 victim's state of mind is directly relevant to an element of an offense. [Citation] That fear may also
18 be in issue when, according to the defendant, the victim has behaved in a manner inconsistent with
19 that fear. [Citation]" *People v. Hernandez* (2003) 30 Cal.4th 835, 872-73.

20 In *People v. Sakarias* (2000) 22 Cal.4th 596, the defendant was charged with special
21 circumstances murder during commission of robbery and burglary. Before her death, the murder
22 victim made statements to an FBI agent that the defendant requested to retrieve items from her
23 house, that she refused the request, that she was concerned or frightened by the call because the
24 defendant knew her husband wasn't home, and that she would call 911 if the defendant came to her
25 house. *See id.* at 628. The *Sakarias* court held that these statements were properly admitted under
26 *Evidence Code* §1250(a)(1) to show the murder victim's then existing state of mind - that the
27 murder victim's fear of the defendant was admissible to show that she would not have voluntarily
28 given him any of her personal property and thus it could be inferred that the defendant obtained the
property through force, ie. a robbery. *See Sakarias*, 22 Cal.4th at 628-29

In *People v. Conrad* (1973) 31 Cal.App.3d 308, the relevant charges were murder and
robbery with the intent to inflict great bodily injury. Before the murder, the murder victim told her

1 husband that if she was robbed, she would be afraid and she would give the robber her money.
2 These statements were found to be admissible under *Evidence Code* §1250(a)(2) to prove acts or
3 conduct of the decedent. *See id.* at 325. The hearsay statements supported the inference that while
4 the murder victim would not resist a robbery, she would resist a robbery with sexual advances. *See*
5 *id.* at 324-25. This was particularly relevant due to the great bodily injury clause alleged with the
6 robbery. *See id.* at 325; *see also People v. Cox* (2003) 30 Cal.4th 916, 957-59 (victim's stated fear
7 of defendant admissible under section 1250 to rebut defense claim that victim fabricated defendant's
8 confession and another victim's fear of defendant supported inference that she would not voluntarily
9 get into his car).

10 Here, prior to the shooting, Mr. Grant does not tell Ms. Mesa that he has a fear of the
11 Defendant, but he does tell her that he has a fear of TASERS. According to Mr. Mesa, this fear was
12 based on a prior incident in which he was tased. Mr. Grant's statements to Ms. Mesa regarding his
13 fear of TASERS are relevant to one of the most important issues in this case - the nature and quality
14 of Mr. Grant's resistance. The nature and quality of Mr. Grant's resistance on January 1, 2009 has
15 been established by both parties as a disputed issue in this case. *See Attached Appendix A,*
16 *(Reporter's Transcript of Motions In Limine, 61, ln. 2-18).* Indeed, Mr. Grant's alleged resistance is
17 central to Defendant's defense. According to Defendant, Mr. Grant was violently resisting arrest,
18 and Defendant was justified in using his TASER to effectuate that arrest. *See Attached Appendix B,*
19 *(Defendant's Motions In Limine, 6, ln. 1-7).* The People dispute this assertion and believe the
20 evidence will show that Mr. Grant was not resisting at all and that the use of any force by Defendant
21 was unwarranted.

22 Like the statements in *Sakarias* and *Conrad*, the statements by Mr. Grant regarding his fear
23 of TASERS are admissible under *Evidence Code* §1250 because they show Mr. Grant's state of
24 mind on January 1, 2009 and also assist in explaining his actions and conduct on the BART
25 platform. Mr. Grant knew that the Defendant possessed a TASER because minutes before he was
26 shot, he was seated on the platform in front of Defendant and Defendant was pointing his yellow
27 TASER at him. At this time, Mr. Grant even took a cell phone picture of Defendant pointing his
28 TASER directly at him. Therefore, Mr. Grant's previously stated fear of TASERS helps to explain

1 | why he did not resist at any time while on the BART platform, including the moments before and at
2 | the time he was shot in the back by Defendant. These statements to Ms. Mesa give insight into Mr.
3 | Grant's state of mind and his conduct on the morning in question. As stated in *Hernandez*, the
4 | statements are particularly relevant when Defendant is claiming that Mr. Grant behaved in a manner
5 | inconsistent with his fear of TASERS. The People respectfully request that this highly probative
6 | evidence be admitted.

7 | C. Cross-Examination Of Ms. Sophina Mesa's Regarding Mr. Grant's Probation And Parole
8 | Status Should Not Be Permitted Because It is Irrelevant And Highly Prejudicial.

9 | This Court has already ruled that evidence regarding Oscar Grant's probation and parole
10 | status are not admissible on relevancy grounds and because the prejudice to the People substantially
11 | outweighs the probative value. Defendant now attempts to circumvent this previous ruling by
12 | claiming that in order to cross-examine Ms. Mesa fully, he should be permitted to question on this
13 | subject. However, cross-examination is still subject to *Evidence Code* §350, which states, "[n]o
14 | evidence is admissible except relevant evidence." Besides his desire to question in this area,
15 | Defendant has not put forward any true relevance to cross-examining Ms. Mesa on Mr. Grant's
16 | probation or parole status. The Defendant has not explained how asking Ms. Mesa *why* she told Mr.
17 | Grant to get back on the BART is probative on any issue or helpful to the jury. Questioning in this
18 | area does not affect Ms. Mesa's credibility, her bias or her interest while testifying. Cross-
19 | examination of Ms. Mesa in this area should be denied on relevance grounds.

20 | Cross-examining Ms. Mesa on Mr. Grant's probation and parole status should also be denied
21 | on *Evidence Code* §352 grounds. This Court previously ruled this evidence is unduly prejudicial to
22 | the People's case with no probative value. Admitting evidence in the context proposed by
23 | Defendant would be just as damaging to the People with little probative value. The analysis under
24 | *Evidence Code* §352 should not change.


25 | The People respectfully request that Ms. Mesa be permitted to testify regarding her cell
26 | phone conversation with Mr. Grant while he was on the BART platform and regarding his
27 | statements to her regarding his fear of TASERS. The People see no reason for the court to change
28 | its previous ruling regarding Mr. Grant's probation and parole status.

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DATED: June 7, 2010

Respectfully Submitted,

NANCY E. O'MALLEY
District Attorney

By: 
David R. Stein
Deputy District Attorney

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APPENDIX A

1 they're going to take issue with it.

2 THE COURT: All right. Regarding the incident, the
3 shooting incident, do you contend that Grant was resisting?

4 MR. Stein: No, I do not contend that. I dispute
5 that.

6 THE COURT: Okay. So the nature and quality of
7 Grant's resistance is an issue in this case; is that
8 correct?

9 MR. Stein: It is.

10 THE COURT: Do you agree, Mr. Rains?

11 MR. RAINS: I've been after the people to identify
12 when they have concluded Mr. Grant was shot and what he was
13 doing since the outset of this case. I have yet to receive
14 an answer.

15 THE COURT: Well, I asked you a different question.
16 My question is, you believe the nature and quality of
17 grant's resistance is at issue in this case?

18 MR. RAINS: Oh, absolutely, yes.

19 THE COURT: All right. So it is your position that
20 any force that Mesherle was authorized to use on Grant did
21 not include tasing Grant; that is your position?

22 MR. Stein: It is.

23 THE COURT: Okay. So that to me means we've got to
24 get into this area of use of force, and I think -- and
25 apparently from the pleadings both sides agree that
26 expressions of what -- or witnesses to testify as to what
27 kind of training the defendant received at the police
28 academy, and also after the police academy as a B.A.R.T.

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1 officer will be relevant not only as to firearms training,
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APPENDIX B

1 That, of course, is precisely the situation here. Mehserle's position is that Grant behaved in
2 such a way—vigorously resisting arrest—so as to justify the officer's decision to employ a
3 TASER. Similarly, as the Court will learn, the defense position is that because Grant would not
4 give up his arms, and appeared to be moving one arm toward the waistband of his pants, Mehserle
5 believed Grant might be going for a gun. It was that belief that caused Mehserle to decide to use
6 a TASER, just as the officer did when the armed Grant refused to comply with police orders in
7 October 2006.

8 Under Evidence Code §1103(a) Mehserle is entitled use evidence of Grant's character in
9 support of his defense. Defendant is entitled to place before the jurors circumstantial evidence—
10 in the form of specific prior bad acts—that Grant is the *sort of person* or had the *sort of character*
11 that would lead him to behave during the relevant events in the manner asserted by the defense—
12 resisting arrest, possibly due to his probationary status, refusing to give up his arms during an
13 attempted arrest, and vigorously resisting arrest.

14 Longstanding California law supports the admission of the evidence precisely as described.
15 Indeed, California courts have held that the right of a defendant to offer the evidence of the
16 alleged victim's character for violence—which, of course, is precisely the type of evidence at
17 issue here—rises to a due process right under the federal constitution. *People v. Mizchele* (1983)
18 142 Cal.App.3d 686, 691, citing *Chambers v. Mississippi* (1973) 410 U.S. 284, 302.

19 In *Mizchele*, the defendant was accused of killing his wife. He claimed at trial that during
20 an argument he picked up his wife's coat in an effort to remove a gun he knew was inside the
21 jacket to avoid her using it—the gun went off accidentally. The trial court excluded evidence
22 that the wife had been violent in the past, including on occasions with others than the defendant.
23 The court of appeal reversed, holding that the evidence was admissible on Mizchele's defense that
24 the shooting had been an unintentional accident. 142 Cal.App.3d at 691.

25 Most important to this Court's analysis is the fact that the evidence in *Mizchele* of the
26 victim's character was deemed admissible on *two distinct bases*. First, the evidence was
27 admissible to prove the defendant's state of mind at the time of the offense. So, for example,
28 where a defendant asserts self-defense, and is aware that the victim has acted violently in the past,