STATE OF ILLINOIS)
) SS.
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT – CRIMINAL DIVISION

PEOPLE OF THE STATE OF ILLINOIS,	**)**	
Plaintiff,	**)**	
	)	
	)	
	)	
	)	**No. 09CR-2972**
v.	**)**	**Hon. William Hooks,**
	)	**Judge Presiding**
	)	
	)	
	)	
ERNEST LITTLETON,	**)**	
Defendant.	**)**	

MOTION FOR RECONSIDERATION OF COURT'S RULING ON PEOPLE'S MOTIONS TO ADMIT/ MOTION TO WITHDRAW MOTIONS TO ADMIT THE PRIOR STATEMENTS OF MARY MOORE, LUCILLE ZAY AND ROSELLA DEFENBAUGH AS THEY ARE NOT HEARSAY

Now come the PEOPLE OF THE STATE OF ILLINOIS, by their attorney, ANITA ALVAREZ, State's Attorney of Cook County, Illinois, by her Assistant, Sherie L. DeDore, and respectfully request this Court to reconsider its ruling on People's Motions to Admit and reverse its order barring the prior statements of Audrey Schenck, Mary Moore, Lucille Zay and Rosella Defenbaugh. Further, the People request that this Court allow the People to withdraw their Motions to Admit Pursuant to 115-10.4 as to Mary Moore, Lucille Zay, and Rosella Defenbaugh as they are not hearsay and not subject to the requirements of 725 ILCS 5/115-10.4. In support of their motion, the People state as follows:

1. On December 22, 2010, the People filed four Motions to Admit Pursuant to 115-10.4 seeking to introduce prior statements of Audrey Schenck, Mary Moore, Lucille Zay, and Rosella Defenbaugh. On January 12, 2011, defendant filed a single Response to People's Motions to Admit Pursuant to 115-10.4. On January 12, 2011, the People filed People's Reply to Defendant's Response to People's Motion to Admit.
2. On February 16, 2011, this Court heard argument on People's Motions to Admit Pursuant to 115-10.4. On March 16, 2011, this Court entered its ruling denying each of the four separate People's Motions to Admit, barring the People from presenting the prior statements of Audrey Schenck, Mary Moore, Lucille Zay, and Rosella Defenbaugh. The preliminary hearing testimony of Mary Moore, Lucille Zay, and Rosella Defenbaugh would be used as proof of the other crimes evidence allowed by this Court. Audrey Schenck testified previously against defendant Ernest Littleton in a trial as proof of other crimes and is the person against whom defendant is alleged to have committed the offenses of Robbery and Theft from Person in this case.
3. The People unnecessarily sought to admit the preliminary hearing testimony of Mary Moore, Lucille Zay, and Rosella Defenbaugh pursuant to 725 ILCS 5/110.4 as the statements are being used as proof of other crimes and not as substantive evidence. Those prior statements would not be admitted for the truth of the matter asserted, but rather would be used to establish defendant's modus operandi, intent, identity or that the crime charged was part of a common scheme, design or plan, or any other relevant other crimes basis. Therefore, they would not constitute hearsay. The Illinois Supreme Court addressed a similar issue in People v. Moss, 205 Ill. 2d 139 (2001) when it concluded that it did not need to "resolve" whether the minor's outcry statements were properly admitted under Section 115-10, because those statements were not "hearsay." 205 Ill. 2d at 159. The Court explained:

> "When an out-of-court statement is offered for some purpose other than to establish the truth of the matter asserted, the statement is not hearsay and is admissible. *** As stated, the State's theory was that defendant ordered members of his family to murder the victims to prevent them from

> testifying at his upcoming sexual assault trial. Both Danita Best and Orvette Davis testified that defendant called them to collect while he was incarcerated and either asked or told them to 'get rid of' Diandra and Renee so they could not testify. As such, Diandra's out-of-court statements concerning the alleged sexual assault were not offered to prove that the sexual assault actually occurred; they were offered to prove defendant's motive. Accordingly, since Diandra's out-of-court statements were not offered to prove the truth of the matter asserted, defendant's argument that the statements were improperly admitted as hearsay must be rejected." (Internal citation omitted.) 205 Ill. 2d 159-60.

4. This Court was in error when it barred the preliminary hearing testimony of Mary Moore, Lucille Zay, and Rosella Defenbaugh citing defendant's 6th Amendment right to confrontation under Crawford v. Washington, 541 U.S 36 (2001). The Illinois Supreme Court has held that the admission of out-of-court statements at trial for other-crime purposes does not implicate a defendant's 6th Amendment right to confrontation under Crawford. People v. Lovejoy, 235 Ill. 2d 97, 138-9 (2009). Crawford in fact explicitly states that the confrontation clause does not bar the admission of statements that are admitted for purposes other than proving the truth of the matter asserted. Crawford, 541 U.S. at 59 n.9. The Illinois Supreme Court consequently held that the confrontation clause was not implicated by the admission of out-of-court statements relating to a prior offense where those statements were admitted to establish the defendant's motive in committing the charged offense. Lovejoy, 235 Ill. 2d at 138-9, quoting Commonwealth v. Pelletier, 879 N.E.2d 125, 129 n. 5 (2008) ("'We note that all of the Federal Circuit Courts of Appeals (except the District of Columbia Circuit, which has not dealt with the question) and the majority of State courts have indicated *** that statements, even if testimonial, when not offered for their truth do not implicate the confrontation clause.'"). As the prior statements of Mary Moore, Lucille Zay, and Rosella Defenbaugh are being offered as other crimes evidence and not the truth of the matter asserted, defendant's 6th Amendment right to confrontation does not bar their admission.

5. This Court erred in its analysis of the admissibility of prior testimony when it based its order denying People's Motions to Admit by stating the following:

"Although defense counsel was not precluded from cross-examining the witnesses in each case, the cross-examination of the witnesses in each instance was brief in nature and inadequate." (This Court's order dated March 16, 2011, p.12) The United States Supreme Court has explained that the "Confrontation Clause guarantees only 'an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.'" United States v. Owens, 484 U.S. 554 at 559, 108 S. Ct. 838 at 842 (1987); see also People v. Redd, 135 Ill. 2d 252 at 310-11, 553 N.E.2d 316 at 342 (1990); People v. Lewis, 223 Ill. 2d 393, 402-5, 860 N.E.2d 299, 305-6 (2006). The common law only required an "opportunity" for cross-examination. See People v. Tennant**,** 65 Ill. 2d 401, 409 (1976) quoting 2 Jones, Evidence, sec. 6:41 (6th ed. 1972) ("the testimony of the witness given on the previous occasion is admissible against the accused, as there had been a prior opportunity for confrontation.") The recently adopted Illinois Rules of Evidence similarly only require only an "opportunity" for cross-examination. See Illinois Rules of Evidence 804(b)(1), effective January 1, 2011. See also People v. Chism, 65 Ill. App. 3d 33, 382 N.E.2d 377 (1st District 1978), People v. Behm**,** 49 Ill. App. 3d 574 (1st District 1977). The prior testimony of Audrey Schenck (as well as the preliminary hearing testimonies of the three other crimes witnesses) all included a prior opportunity for cross-examination by defendant Ernest Littleton.

6. Additionally, this Court erred in its review of the cross-examinations of the prior testimony when it stated in its order, p. 12: "Objections were quickly sustained without any articulation by either the objecting party or the court." This Court, in its order, referred specifically to one objection to one question in an otherwise lengthy cross-examination. For the same reasons, this court did not apply the proper analysis when it stated in its order, p. 12: "A review of the transcripts reveals that defense counsel did not conduct a meaningful cross-examination of the witnesses. Therefore, in light of the unavailability of the deceased witnesses and the limited nature of the cross-examination that

was conducted during the preliminary hearings, the prior preliminary hearing testimony of Ms. Defenbaugh, Ms. Zay, and Ms. Moore will not be allowed." The test that the Illinois Supreme Court prescribed for making determinations of whether there was an adequate opportunity for cross-examination centered on whether the motive and focus was the same or similar. People v. Tennant, 65 Ill.2d 401 at 409. See People v. Rice, 166 Ill.2d 35, 31 (1995) (setting forth "motive and focus" test); People v. Sutherland, 223 Ill.2d 187, 273 (2006) (same). This is the standard used in the federal courts and is the same standard set forth by the Illinois Supreme Court in the new Illinois Rules of Evidence. See Fed. R. Evid. 804 (b) (1); Illinois Rules of Evidence 804(b)(1). This Court's review of prior testimony was inconsistent with this standard. Had this Court examined the motive and focus of the cross–examination of Audrey Schnenck in her trial testimony in case number 09CR-2972, it would have to have found it be the same or similar to the motive and focus of cross-examination at a trial in this cause. (The cross-examination during the preliminary hearings involving Mary Moore, Lucille Zay, and Rosella Defenbaugh likewise would meet the standard.)

7. In addressing specifically the previous trial testimony of Audrey Schenck in its order, p. 12, this Court is in error when it refers to it as other crimes evidence. In fact, Audrey Schenck, while her testimony in case number 09CR-2973 was for purposes of introducing other crimes evidence in that case, she is the "victim" in this case and the person against whom defendant Ernest Littleton is alleged to have committed the offenses of Robbery and Theft. The court's analysis of the cross-examination of Audrey Schenck was faulty, specifically that it found that because the questions asked were brief and limited in nature, the testimony would not be allowed. (Order dated March 16, 2011, p. 13) The proper analysis would have been opportunity to cross-examine and the motive and focus of that cross-examination as expressed by the Illinois Rules of Evidence 804(b)(1) and as set forth by People v. Rice, 166 Ill.2d 35, 41 (1995) and People v. Sutherland, 223 Ill.2d 187, 273 (2006).

8. The court's reasoning that because Ms. Schenck was unable to identify defendant as her assailant, her testimony lacks probative value is in error. (Order dated March 16, 2011, p.13) This court's analysis fails to properly consider the requirements of 725 ILCS 5/115-10.4. 5/115-10.4. "Admissibility of prior statements when witness is deceased. (a) A statement not specifically covered by any other hearsay exception but having equivalent circumstantial guarantees of trustworthiness is not excluded by the hearsay rule if the declarant is deceased and if the court determines that: (1) the statement is offered as evidence of a material fact; and (2) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (3) the general purposes of this Section and the interests of justice will best be served by admission of the statement into evidence. As the "victim" in this case, Audrey Schenck's testimony is material evidence to prove the elements of the offenses charged and the circumstances of their occurrence. Audrey Schenck's previous trial testimony is more probative than any other evidence regarding the circumstances of the taking of her purse than any other witness that the People could procure. In light of Audrey Schenck's death three months after her testimony, the other facts presented to this court, as well as the cases relied on by the People in the numerous other filings in this case and in this motion, it is clear that the general purposes of Section 115-10.4 and the interests of justice would best be served by admission of Audrey Schenck's prior trial testimony into evidence.

WHEREFORE, the People of the State of Illinois respectfully request that this Honorable Court reverse its prior order on each of People's four Motions to Admit Pursuant to 115-10.4. Further, the People request that this Court allow the People to withdraw their Motions to Admit with respect to the prior statements of Mary Moore, and Lucille Zay, and Rosella Defenbaugh and allow the People to introduce these prior

statements at trial as they are not hearsay. Additionally, the People request that this Court reverse its ruling regarding Audrey Schneck's previous trial testimony and allow the People to use it as substantive evidence pursuant to 725 ILCS 5/115-10.4.

Respectfully submitted,

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