In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>**Plaintiff and Respondent,**<br>**v.**<br>**BAILEY JACKSON,**<br>**Defendant and Appellant.** | **CAPITAL CASE**<br>Case No. S139103 |

Riverside County Superior Court Case No. RIF97839
The Honorable Patrick F. Magers, Judge

# RESPONDENT'S BRIEF



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## TABLE OF CONTENTS

## TABLE OF CONTENTS
## (continued)

**Page**

## TABLE OF CONTENTS
## (continued)

Page

## TABLE OF CONTENTS
## (continued)

Page

## TABLE OF CONTENTS
## (continued)

Page

## TABLE OF AUTHORITIES

**Page**

**CASES**

**STATUTES**

**CONSTITUTIONAL PROVISIONS**

**OTHER AUTHORITIES**

## STATEMENT OF THE CASE

The amended information charged Appellant Bailey Jackson, in count 1, with the premeditated and deliberate murder of Geraldine Myers, in violation of Penal Code section [1]187, subdivision (a). As to count 1, the information alleged the special circumstances of burglary and robbery, in violation of section 190.2, subdivision (a), subsections (17)(A) and (G). The information also charged Jackson, in counts 2 and 3, with burglary and robbery against Geraldine Myers, in violation of sections 459 and 212.5, subdivision (a).

The information charged Jackson, in count 4, with the attempted murder of Myrna Mason, in violation of section 664/187, subdivision (a). As to count 4, it was alleged that Jackson personally inflicted great bodily injury on a person 70 years of age or older, within the meaning of sections 12022.7, subdivision (c), and 1192.7, subdivision (c)(8). The information charged Jackson, in count 5, with burglary, in violation of section 459, and in count 6, with robbery of Myrna Mason, in violation of section 212.5, subdivision (a). The information further charged Jackson, in count 7, with the torture of Myrna Mason, in violation of section 206, and alleged that Jackson personally inflicted great bodily injury on a person 70 years of age or older, within the meaning of sections 12022.7, subdivision (c), and 1192.7, subdivision (c)(8) while committing that crime. The information charged Jackson, in count 8, with the rape of Myrna Mason, in violation of section 261, subdivision (a)(2), and in count 9, with forcible oral copulation, in violation of section 288a, subdivision (c)(2). The information also charged Jackson, in count 10, with sexual penetration with a foreign object on an unconscious person, against Myrna Mason.

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[1] Further statutory references are to the Penal Code unless otherwise indicated

As to counts 8, 9, and 10, the information alleged that Jackson inflicted aggravated mayhem or torture on Myrna Mason, within the meaning of section 667.61, subdivision (d)(3); and that Jackson entered Myrna Mason's house with the intent to commit a violent sex offense as specified in section 667.61, subdivision (c), within the meaning of section 667.61, subdivision (d)(4).

The information also alleged Jackson committed a prior prison offense, within the meaning of section 667.5, subdivision (b); a prior prison offense, within the meaning of section 667.5, subdivision (a); two serious prior offenses, within the meaning of section 667, subdivision (a); and two special prior offenses within the meaning of sections 667, subdivisions (c), (d)(2), (e)(2)(A), and section 1170.12, subdivision (c)(2)(A). (3 CT 713-718.)

On December 9, 2004, a jury convicted Jackson of all counts and found the special circumstance and enhancements allegations to be true. (15 CT 4246-4266.) The same jury subsequently found all of the alleged prior offense allegations to be true. (16 CT 4429-4435.)

On December 15, 2004, the court found that the jury was unable to reach a penalty verdict and declared a mistrial. (27 RT 4689-4690.)

The penalty retrial began in September of 2005. On October 11, 2005, the jury found death to be the appropriate penalty for the murder of Geraldine Myers. (45 RT 7407.) On November 8, 2005, the court denied Jackson's automatic motion to modify the judgment and sentenced Jackson to death for count 1, and imposed a sentence of 212 years to life on the remaining counts. (46 RT 7427; 24 CT 6896-6897.) This appeal is automatic. (§ 1239, subd. (b).)

## STATEMENT OF FACTS

In the spring of 2001, Myrna Mason and Geraldine Myers, two petite elderly women in their eighties, who lived alone in the same neighborhood were violently attacked inside their homes by appellant Bailey Jackson. Each woman had briefly gone outside of her home late at night before being attacked. Property was taken from both of their homes. Police were led to Jackson shortly after he had beaten and brutally sexually assaulted Myrna Mason, and then left her for dead. A highly trained bloodhound followed Jackson's scent from a footprint left in Ms. Mason's yard to Jackson's residence which was located a short distance away. In addition to confessing to the attack on Ms. Mason, Jackson also described stabbing Geraldine Meyers, who had disappeared a few weeks earlier from the same neighborhood, stealing her car and disposing of her body. Ms. Myers' body was never recovered. Ms. Meyers' kept cash in her home in an envelope. The same bloodhound that traced the scent from Jackson's footprint in Ms. Mason's yard, traced the scent left on a crumpled envelope recovered from Ms. Meyers' bedroom to Jackson. Shoeprints left inside Ms. Meyers' home were consistent with shoes worn by Jackson. On the night that Meyers' disappeared, and again on the night that Mason was attacked, Jackson requested to borrow money from a neighbor and was turned down. The facts and circumstances surrounding Jackson's crimes are detailed below.

### A. May 2001 Disappearance of Geraldine Myers

Geraldine Myers, a petite 82 year-old grandmother lived alone at 3756 San Simeon in Riverside, a duplex with a detached garage. (7 RT 1761; 9 RT 1765; see Exh. No. 108. The last day anyone saw Geraldine Myers was on May 13, 2001 – Mother's Day.

That day, Ms. Meyers' son, Douglas, and daughter-in-law, Monique attended church with her at the Arlington Christian Church, where Geraldine had been a member for over 55 years. (8 RT 1874-1876, 1941-1942.) Later that evening, another of her sons, William Myers, took her to dinner to celebrate Mother's Day. (8 RT 1925.) They returned to Ms. Meyers' home between 7:00 and 7:30 that evening, where William stayed with his mother for a little while longer, looking at photographs. William left his mother's home about 8:45 p.m. (8 RT 1926-1927, 1933.)

Ms. Meyers cared for a cat that lived outside her home, feeding it every evening outside her back door around 8:30. She would remain outside on her porch until the cat finished eating. (8 RT 1898, 1933.) Ms. Myers had not yet fed her cat by the time William left on Mother's Day night. (8 RT 1926-1927, 1933.) Geraldine's son Richard tried to call her about 10:00 p.m. that night, but there was no answer. (8 RT 1912.) No one ever heard from or saw Ms. Myers again. (8 RT 1908.)

Ms. Myers' daughter-in-law Monique was very close to her. Monique called Ms. Myers' home the next morning, afternoon, and evening, but there was no answer. Monique went to Ms. Myers' house about 9:00 p.m. that night. Ms. Myers did not answer the door, so Monique obtained a spare key from Ms. Myers' property manager, John Mazzola. (8 RT 1877-1878, 1884.) Monique entered Ms. Myers' house through the back door. (8 RT 1887.) She did not walk into the bedrooms and only remained in the house for about 10 minutes. The front door was still latched and locked, and she did not touch anything inside the home. (8 RT 1890-1892.) Because she did not "really see anything," Monique returned the key to Mazzola, and went home. (8 RT 1887, 1892-1893.)

Monique called Ms. Myers' home again the next morning, May 15, and there was still no answer. (8 RT 1887, 1892-1893.) She then called her daughter, Robin, and instructed her to go to Ms. Myers' home. Robin

and her sister, Deanna, went to their grandmother's home together. Mazzola let the women into the house through the porch door. Robin immediately noticed the window curtains were down and lying across the utility sink near the back door, and a large number of cleaning products were lying on the floor. This was very out of the ordinary. (8 RT 1929-1930, 1949-1950.) There was a large bleach stain in the hallway that was not there on Mother's Day. It looked like someone had "thrown bleach all over the place." (8 RT 1931, 1947, 2026.) Robin called the police. (8 RT 2030.)

**B. Investigation of Ms. Meyers' Home**

Riverside Police Sergeant Victor Williams assisted in the investigation of Ms. Myers' home on May 15. He found newspapers for Monday and Tuesday (May 14th and 15th) in the front yard. (9 RT 2084.) The bleach stain in the hallway "stood out" to him. It looked as if bleach had been "poured" in the hallway. (9 RT 2085.) The bleach stain did not appear to be moist. (9 RT 1767.)

A manila envelope in which Ms. Myers kept her money was ripped open and sitting empty on her bed. (8 RT 2025.) She kept her money in manila and white envelopes in her purse, sometimes as much as $3,000 or $4,000 at a time. (8 RT 1887, 1894-1895, 1899-1900, 1917, 2020.) No fingerprints were found on the envelope. (7 RT 1776.)

Jewelry boxes on the dresser were open, and some of Ms. Myers' jewelry was missing. (8 RT 1970-1971.) Detectives were unable to lift any fingerprints from the area of the jewelry boxes. (7 RT 1777.) The dress and pantyhose Ms. Myers had worn on Mother's Day were sprawled on the bedroom floor of the guest room. (8 RT 1984-1985, 2026, 2063.) Ms. Myers never would have left her clothes on the floor. (9 RT 2064.) She was very tidy and never left anything lying around. (9 RT 2066.) Ms. Myers' purse was found in her home, but it contained no money. (7 RT

1783-1787.) A file cabinet was open and paperwork appeared to be pulled out. (7 RT 1777.) Investigators discovered cash and bags of coins in Ms. Myers' closet. (9 RT 2094-2096.)

Two empty glass beer bottles and an empty water bottle were in the garbage can in the laundry room. There was nothing else in the garbage can. (9 RT 1788-1789, 2087-2088.) Neither William nor Ms. Myers drank any beer or alcohol that evening. (8 RT 1927-1928.) Investigators did not find any finger prints or DNA on the bottles in the garbage can. (9 RT 1789-1790.)

Investigators found a drop of Ms. Myers' blood found on the heater vent in her hallway. (12 RT 2566, 2570, 2618.) There was also a strike mark on the door leading from the living room into the hallway, about three feet from the floor. It appeared to have been caused by the impact of a hard object. There were white marks around the door, indicating that it had been recently cleaned or wiped down. (9 RT 2089-2092.) The door from the hallway leading to the utility room also appeared to have been wiped down recently. (9 RT 2093-2094.)

Senior Evidence Technician Tim Ellis assisted detectives in the investigation. (7 RT 1718.) Ellis collected the manila envelope from Ms. Myers' bed. (7 RT 1769.) Senior Criminalist Mark Traughber used a scent pad to collect the scent from the envelope. He placed a gauze scent pad into the manila envelope, leaving it there for about 15 minutes to collect any scent from the envelope. Traughber then placed the scent pad into a ziplock bag. (9 RT 1775-1776.) This manila envelope was collected and processed for fingerprints using ninhydrin. It was then put in a sealed envelope called a K-pack. (15 RT 2922-2927.)

On May 31, 2001, investigators cut out a piece of the bleach stained carpet from the hallway, and the carpet pad underneath. (9 RT 1778.) The carpet pad and wood under the pad appeared to be bleached also. A

crumpled bleach bottle containing a small amount of bleach was located right inside the hallway bathroom on the floor. Detectives were not able to retrieve any fingerprints from the bleach bottle. (7 RT 1777-1779; 8 RT 1847.)

Seven shoe impressions were taken from Ms. Myers' house. (11 RT 2397; 8 RT 1841-1842.) Impressions taken from the kitchen and bathroom floor were made by a Vans shoe. (11 RT 2398-2399, 2403.) Dana Guidice, vice president of product development and manufacturing for Vans, testified that the specific shoe impression was the waffle cup sole made by the company in 1996, and used only on two models of shoes, "Blake" and "Gravel." Approximately 20,000 to 30,000 pair of shoes had this particular sole. They were sold all over the country, but primarily in southern California. The sole pattern was not used again. (16 RT 2995-3000.) Criminalist Traughber examined items obtained from Jackson, including a pair of Jackson's unwashed jeans. The jeans had soil stains in the cuff areas, and a blood stain near the coin pocket. (11 RT 2484- 2488.) Traughber also found discolorations on the pant leg that he believed were caused by bleach. (11 RT 2489-2490.) Jackson's shirt had several holes in it that were ringed by lighter-color discoloration from chemical oxidation. (11 RT 2491-2492.) The holes were consistent with being splashed with bleach, followed by a washing. (11 RT 2492.)

**C. Recovery of Ms. Meyers' Car**

Ms. Myers' car was located five days later, on May 18, 2001, in Las Vegas during a routine traffic stop. (10 RT 2165-2166.) Fifteen year-old Donald Rogers was driving. (10 RT 2167.) Upon discovering the car was stolen, Officer Steven Perry arrested Rogers and conducted an inventory search. A Macy's shopping bag with blood on it was found in the trunk. (10 RT 2169-2170, 2186.) There were no bloody fingerprint impressions,

and no fingerprints on the bag matched anyone connected to the case. (11 RT 2357-2358.)

Rogers originally told Detective Barnes that he had taken the vehicle on May 16 from a Food 4 Less parking lot in North Las Vegas. (10 RT 2320.) He noticed that the keys were in the ignition so he jumped in and drove it away. (19 RT 2216-2218, 2232, 2252, 2309.) He stated that he drove the car to his friend Jose Davila's house, and then drove the car around with his friends, and tried to buy marijuana a couple of times. (10 RT 2320-2321.) Rogers told investigators that he saw the plastic bag in the trunk with women's clothes, and thought it had blood on it. He thought the blood was probably menstrual blood and did not think anything about it. (10 RT 2322.) He seemed shocked to find out that the car had been involved in a murder. (10 RT 2323.)

In a subsequent interview, Rogers admitted to police that he had actually taken the car from the Food 4 Less parking lot on May 14, and said that he had lied about the day in earlier questioning because he did not want to get his girlfriend, Stephanie Lopez, involved. (10 RT 2324.) Rogers insisted that the actual date he stole the car was May 14 because it was one day before his one year anniversary with Lopez. (10 RT 2324.)

### D. June 2001 Attack on Elderly Woman Three Blocks from Ms. Meyers' Home

Ms. Mason, a small 84 year-old woman, also lived alone at 6616 Lassen Court in the city of Riverside, just three blocks from Ms. Myers' home - and four doors down from Jackson's residence. (6 RT 1584-1585; 7 RT 1761, 1683, Exh. No. 25; 16 RT 1913.) Ms. Mason spent most of the afternoon of June 22, 2001, doing yard work. (6 RT 1584-1585; 7 RT 1683.) She then went inside her home, took a bath and ate dinner. (13 CT 3678-3679.) After dinner she read the paper and watched television before falling asleep. She awoke around 1:30 a.m., and realized she had forgotten

to turn off the water outside. (13 CT 3680-3683.) Ms. Mason went outside and turned the water off, and then walked back inside her home, locking the security door behind her. She took one or two steps toward the hallway bathroom when Jackson knocked her down, put both of his hands around her neck and choked her. (13 CT 3683-3688.) Jackson instructed Ms. Mason not to resist or he would kill her. Jackson picked Ms. Mason up and shoved her into the bedroom. He told her that he was going to rape her vaginally, rectally and orally.[2] Ms. Mason told Jackson that he probably would not enjoy it because she had undergone a complete hysterectomy. (13 CT 3689-3692.) Jackson told her that he wanted money, and wanted to know where her purse was. (13 CT 3718.)

Jackson rammed Ms. Mason's head down violently and forced her orally copulate him. (13 CT 3692-3693.) Jackson complained that she was going too slowly and repeatedly hit her on the head. (13 CT 3696-3698.) Jackson then rubbed his penis on her vagina and rectum. (13 CT 3704.) Jackson once again choked Ms. Mason using both of his hands, until she lost consciousness. (13 CT 3696-3698.) Jackson then shoved a garden rake into Ms. Mason's vagina. (13 CT 3701.) When she awoke she managed to pull the rake out of her vagina. She was bleeding and her sheets and bedding were covered in blood. (6 RT 1588; 13 CT 3702.) Ms. Mason tried to wipe her body with a wash cloth in the bath tub and then called 911. (13 CT 3707, 3709.)

Ms. Mason suffered bruising on her hip and thigh, and petechial consistent with being choked, on her face and her eyes. She had significant bleeding from both ears, hearing loss, bruising to her neck, jaw and throat.

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[2] Ms. Mason died prior to trial. Accordingly, her preliminary hearing testimony was read to the jury. (16 RT 3041.)

(6 RT 1617-1620.) She also suffered bruising to her wrists, hands, and forearms. (6 RT 1622-1623.) She suffered bruising to her tongue and lacerations to her external genitalia and vaginal vault. (6 RT 1627, 1642.) Ms. Mason was in a tremendous amount of pain and required general anesthesia in order to undergo a pelvic examination. (6 RT 1630-1631.)[3]

**E. Jackson's Arrest**

Riverside Deputy Sheriff Coby Webb, a canine officer, responded to Ms. Mason's home. (18 RT 3481-3482.) Deputy Webb worked with Maggie, an extensively trained bloodhound trained in trailing. (18 RT 3485-3486.) Deputy Webb collected scent from shoe prints found at Mason's home using a scent transfer unit. (19 RT 3540-3541.) Deputy Webb then presented the scent pad to Maggie. Maggie immediately trailed from Ms. Mason's home, crossed the street, and went to a trash can located in between 6663 and 6651 Lassen Court. Maggie circled the trash can. Deputy Webb opened the trash can and found Ms. Mason's black purse was inside. (7 RT 1677, 1698-1699; 19 RT 3542.) Maggie then continued down the street and to Jackson's neighbor's (the Shraders) front porch, and to the yard of the home where Jackson lived with his girlfriend, Angie Fortson. (19 RT 3546-3547; 20 RT 3757.)

Riverside Police Sergeant Kevin Stanton found tread marks of footprints found at Jackson's residence that matched footprints found at Ms. Mason's house. (14 RT 2739.) Ms. Mason's stolen television was found inside Jackson's residence in the room he shared with Fortson. (7 RT 1693.) Mason's checkbook was found in Fortson's purse inside the

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[3] Riverside Police Department Sergeant Jeffrey Joseph interviewed Ms. Mason at the hospital and the audio tape of that interview was played for the jury. (6 RT 1596; 7 RT 1754; 13 CT 3675-3719.)

residence. (7 RT 1697-1698.) Ms. Mason's blood was found on a pair of Jackson's pants. (11 RT 2465-2466, 2476-2478.)

Later that morning, at approximately 10:30 a.m., Deputy Webb was asked to take Maggie to the Spruce Street Police Station. Deputy Webb presented Maggie with a scent pad from the shoe impression found at Ms. Mason's again. Maggie trailed to Jackson and stopped. (19 RT 3546-3553.)

**F. Jackson's Confession**

Detectives Bill Barnes and Jeff Joseph interviewed Jackson regarding the attack on Ms. Mason the same day (June 23rd) that she was attacked. The videotaped interview was played for the jury. (15 RT 2905.) Jackson told the detectives that his "homeboys" gave him Ms. Mason's TV and a gun through the bedroom window. Jackson denied knowing where they got the TV from. Jackson provided names of his homeboys to the detectives – Mark Johnson, "Psycho Bullet" and "Tom Dog." (14 CT 3821-3823, 3825.) Jackson later admitted that this was a lie. (14 CT 3886.) He admitted he knew the TV was stolen, but denied knowing anything about the circumstances surrounding the theft itself. (14 CT 3838.) Jackson initially denied leaving the room he shared with Fortson on the night Ms. Mason was raped. (14 CT 3834.) He then admitted to going into Ms. Mason's residence and taking her television, but he claimed to not remember anything in between. (14 CT 3875-3877.) Jackson denied any memory of raping Ms. Mason. (14 CT 3918.)

Jackson began describing to detectives how he went into the house, ate a sandwich, and drank some water from the sink. He did not think anyone was home. As he was running through the house "she" "came out of nowhere" and "startled him." Jackson described the woman as "older"

and having red hair.[4] He said he "just flipped." Jackson thought he punched the woman in the face and that she scratched him somewhere. (14 CT 3881-3884.) While detectives were initially questioning Jackson about the attack on Mason, it became clear to the detectives at this point that Jackson was describing the murder of Ms. Myers.[5]

Jackson described Ms. Myers as bleeding "bad" after he hit her. (14 CT 3887.) He recalled that she startled him in the hallway and that he was trying to get out of the house, but could not get out of any of the doors. (14 CT 3884.) Jackson stated that he remembered stabbing Ms. Myers in the back in the hallway. (14 CT 3924.) Jackson said that he asked Myers to let him out of the house but that she refused. He thought Myers had the type of door locks that require a key to open from the inside. He stated that he left through a window. Jackson said that he took her TV and checkbook prior to leaving. (14 CT 3884-3885.)

Jackson said Ms. Myers did not look like an "old woman" because she had red hair. Her hair color was clear to him, but everything else was "blurry." (14 CT 3888.) Jackson denied raping Myers, and said that after punching her, he carried her to her car "like a baby" and put her in the car. (14 CT 3907.) Jackson said he remembered driving with Ms. Myers in the car, and pushing or throwing her out of the car while driving on freeway. (14 CT 3891.) Jackson said that Myers was in the passenger side of the car and he was holding her by her hair, and he just threw her out the window on the freeway. (14 CT 3891.) Jackson thought he drove past a Jack in the

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[4] Ms. Meyers went to the beauty parlor every week to have her hair colored red. (8 RT 1911; 9 RT 2025; People's Exh. 5.)

[5] Neither Riverside Police Department nor the Riverside District Attorney's Office was aware of anyone or any case at that time matching the description of the crime Jackson confessed to other than Geraldine Myers. (20 RT 3747-3749.)

Box and then drove on the freeway towards San Bernardino and Barstow. He thought he threw Myers out of the car before reaching Victorville. (14 CT 3896, 3899.) Jackson believed Ms. Myers was still alive when he pushed her out of the car. (14 CT 3908.) Jackson said the next thing he knew he woke up in his own bed. He thought it was all a dream until the police arrived. (14 CT 3893.) Jackson agreed to drive towards Victorville and show the detectives where he had shoved Ms. Myers out of the car. (14 CT 3928-3929.)

**G. Subsequent Investigation**

Detectives interviewed Angie Fortson about the details surrounding the dates of the attacks on Ms. Myers and Ms. Mason. Fortson told investigators that Jackson had been staying with Fortson since about May 1, 2001. (14 RT 2740, 2790.) Jackson and Fortson were living with Billie Harris, Fortson's mother, in a converted garage at 6651 Lassen Court. (20 RT 3838-3839.) The Fortson home was just five blocks from Ms. Myers' home, and four doors down from Ms. Mason's home. (7 RT 1761, 1683; 20 RT 3848.) Jackson had lived there full time at the time of his arrest, and kept his clothes and shoes there, including a pair of light and dark blue Vans that he kept on the porch and wore when he mowed the grass. (14 RT 2748, 2752, 2776.) Fortson identified a picture of the "Blake" shoe that matched the shoe impressions taken from the kitchen and bathroom floor of Ms. Meyer's home as being the same as a pair of Vans Jackson owned and that he wore when he mowed the lawn. (16 RT 2995-3000, 3034-3035.) Jackson would sometimes go outside in the backyard at night and drink and smoke, or lift weights. (14 RT 2756.) Sometimes he would leave the backyard and would be gone for hours. (14 RT 2756.)

Fortson said Jackson gave her Ms. Mason's television, and said that he got it from a friend. Fortson originally lied to investigators, telling them that she bought the television from a friend so that she would not get Jackson in trouble. (14 RT 2744-2745.) Forston testified that she did not know how Ms. Mason's checkbook got into her purse. (14 RT 2746.) Fortson also had Nevada Bell prepaid phone cards in her purse in the room she shared with Jackson. She said she either got them from an old boyfriend or from Jackson's dad. She told investigators that Jackson's father drove a Greyhound bus back and forth from Riverside to Las Vegas, and that they could get on the bus and ride for free. (20 RT 3825-3828.) According to Greyhound's employment records, Jackson's father, Bailey Albert Jackson's last day of employment with Greyhound was June 24, 2001. (20 RT 3885, 3887.)

Fortson said that on Mother's Day night of 2001, Jackson said he was going outside to lift weights. Fortson heard him lifting weights for about 25 to 30 minutes. When she no longer heard him she looked for him and realized he had left the property. He was gone for over two hours before returning around 11:00 p.m. (14 RT 2756-2757, 2761.) Jackson smelled like he had been drinking "a little." He told Fortson that he was with her next-door neighbor, Richard Shrader, having beers at a bar. (14 RT 2758-2759.) Jackson looked "pumped" and was "sweating" as if he had been running. (14 RT 2759, 2859-3860.) Fortson was angry with Jackson so she went to sleep. When she awoke the next morning around 9:00 a.m., Jackson was gone. (14 RT 2761.) He did not return until around 10:00 p.m. that night. He told Fortson that he had been at work with a friend named Joe. (14 RT 2762.)

Sheena Fortson, Angie Fortson's young adult daughter, also lived at 6651 Lassen Court with her grandmother, who raised her. (16 RT 3004, 3012.) Sheena Fortson told investigators that her mother was "gone for like

two or three days" "right after Mother's Day or after that night," and that Jackson was gone with her. (16 RT 3011, 3037.) Sheena Fortson did not know where her mother went, stating that "she never tells me where she goes." (16 RT 3012.) When Angie Fortson and Jackson returned to the house, they were together. (16 RT 3013.)

Detectives interviewed Jackson's friend, Joe Taufaao. (16 RT 2972-2973.) Taufaao recalled going to a restaurant called China Star with his mom on Mother's Day. Around that time Jackson and Angie Fortson told Taufaao that they had just gotten back from Las Vegas. Taufaao could not recall exactly when they told him they were in Las Vegas but he thought it was May, the month prior to the interview. (14 CT 3939-3941, 3945.)

Richard and Deborah Shrader lived next door to Jackson and Fortson. (8 RT 1999.) Jackson asked Richard Shrader to borrow money on two occasions. The first time was around 8:00 p.m. on June 21, 2001. Jackson asked to borrow $40. Shrader only had $15 in cash, and he gave it to Jackson. (8 RT 2004-2005.) The second time was the night of Mother's Day. When the Shraders pulled into their driveway, Jackson asked to borrow $40 again. Shrader did not give money to Jackson at that time, but did not clearly tell him "no." Later that night, around 9:30 p.m., Jackson tapped on the Shraders' window and asked to borrow money again. Shrader told appellant he could not give him any more money. (8 RT 2006-2007.) Richard Shrader did not lift weights nor go to a bar with Jackson that night. Deborah Shrader had never known her husband to lift weights with Jackson. (16 RT 2969-2970.)

Investigators searched the home of Jackson's parents, Albert and Cleona Jackson, on June 26, 2001. Albert Jackson testified that Jackson lived with he and his wife about four days a week, and spent the remaining time at Fortson's house. (13 RT 2724-2725.) Investigators seized paperwork from a locked cabinet in the bedroom occupied by Jackson. The

papers included an article about the disappearance of Ms. Myers, and the $50,000 reward for information about her. (13 RT 2727-2729.) Albert Jackson also testified that Jackson had lived with them in Las Vegas in 1991 and 1992. (13 RT 2724.)

Luejean Price was Ms. Meyers' neighbor. On Mother's Day, around 11:00 p.m., Price heard what sounded like Ms. Meyers hammering a nail on the wall. She did not hear anything else after that. (17 RT 3162-3163.) Price testified that two or three times a week Ms. Meyers would take her trash to the dumpster in the alleyway between 10:30 and 11:00 p.m. (17 RT 3164-3165.)

On June 25, 2001, investigators conducted a third canine trail to determine whether Jackson's scent was on the ripped manila envelope found on Ms. Myers' bed. The trail took place at the Orange Street Police Department because Jackson had never been there before. Detectives Barnes and Johnson took Jackson to the basement of the Department, taking two or three turns on the way, and not letting Deputy Webb know where Jackson would be placed. (17 RT 3172-3175.) The detectives sat Jackson on a bench, closed the door, and then remained in the room. Deputy Webb presented Maggie with the manila envelope and she began to trail. 10 to 15 minutes later Maggie entered the room, walked past both of the detectives, and approached Jackson and got onto his lap. (17 RT 3175-3177, 3210-3211.) Deputy Webb was confident that Maggie identified Jackson as the person whose scent was on the manila envelope. (19 RT 3613.)

**H. Defense**

The defense called Dr. Lawrence Myers to attempt to discredit the prosecution's canine experts. (19 3635-3674.) The defense also called Jeanne Brandon who had interviewed Daniel Rogers, the person arrested in possession of Ms. Meyers' car, to testify as to inconsistencies in his

statements to investigators. (19 RT 3618-3628.) The defense presented evidence of the prosecution's inability to recover Ms. Myers Myers' body, despite Jackson giving them multiple locations where she might be found. (20 RT 3762-3768.)

The defense also called Angie Fortson to testify that she and Jackson spent Mother's Day and night together, and that Jackson never left the house that night. (20 RT 3778-3779.) Detective Shumway was called to testify that Sheena Fortson did not specifically tell him that her mother had gone to Las Vegas with Jackson while the couple was living at Billie Harris's house. (20 RT 3799-3801.)

Jackson's father testified that he drove the Greyhound route to Las Vegas prior to retirement, but that his last day with Greyhound was March 30, 2001. (20 RT 3874, 3870.) This date was refuted by Greyhound employment records. (20 RT 3886-3887.) Jackson Sr. also denied giving Jackson or Fortson prepaid Nevada calling cards, and denied that the newspaper clipping about Ms. Myers' disappearance belonged to Jackson. (20 RT 3873, 3876.)

## PENALTY PHASE

### A. Evidence in Aggravation

Since the penalty phase was retried, the prosecution presented the facts and circumstances surrounding Jackson's crimes. In addition to the evidence adduced in the guilt phase, in the penalty phase retrial, the prosecution presented evidence of additional canine trails conducted between the two penalty phase trials. Jackson was not positively identified in either trail. (37 RT 6515-6518.)

Detective Barnes testified to a conversation with Jackson on the day he was arrested and questioned, while they were driving to the supposed scene where Ms. Myers Myers' body may have been dumped. (33 RT

5776-5778.) During the drive Barnes asked Jackson what would do if he were involved in a homicide, and he answered that the first thing he would do would be to get rid of the body, clean up the scene, and if there was blood, throw down some bleach. (33 RT 5779.)

Geraldine Meyers' sons Douglas and William Meyers, and her granddaughter Deana Meyers testified about their loss. Deana Myers was very close to her grandmother. She would see her several times a week. (31 RT 5616-5618.) It has been painful and frustrating not knowing where Ms. Meyers is and exactly what happened to her. (31 RT 5606.) Her death tore the family apart, and family members rarely even talk to each other anymore. (31 RT 5579-5580, 5616-5618.)

### B. Evidence in Mitigation

The defense called the same expert it had relied upon in the guilt phase in an attempt to impeach the expert testimony by Dr. Harvey as to the reliability of the bloodhound's identification of Jackson. Several witnesses testified to Jackson's good and peaceful character. The defense also presented evidence of abuse suffered by Jackson as a child. (42 RT 7165-7247.)

## ARGUMENT

### I. THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION IN DENYING JACKSON'S MOTION TO SEVER THE COUNTS RELATING TO MS. MYERS FROM THE COUNTS RELATING TO MS. MASON BECAUSE THE EVIDENCE WAS CROSS-ADMISSIBLE

Jackson contends that the trial court abused its discretion when it denied his motion to sever the counts relating to the murder of Ms. Myers Myers from the counts relating to the attack on Ms. Mason. (AOB 125-152.) Jackson argues that trying all of the counts together denied him due process of law, and cast doubt on the reliability of the jury's capital murder

verdict. (AOB 125.) Because the evidence relating to the crimes against both women was cross-admissible, the counts were properly joined.

The amended information charged Jackson with the murder, robbery and burglary of Ms. Myers (counts 1 through 3). (3 CT 713-714.) Jackson was also charged with attempted murder, burglary, robbery, torture, rape, forced oral copulation, and sexual penetration with a foreign object on an unconscious person, against Ms. Mason. (3 CT 714-716.)

Prior to trial Jackson asked the court to sever the murder count relating to Ms. Myers from the counts relating to the attack on Ms. Mason, arguing that trying all of the counts together would violate his rights to a fair trial, due process of law, equal protection and heightened evidentiary reliability as guaranteed by the United States and California constitutions. (3 CT 776-777.)

The prosecutor opposed Jackson's motion. He argued that because evidence that Jackson had robbed and sexually assaulted Ms. Mason was cross-admissible under Evidence Code section 1101, subdivision (b), to show identity, common design or plan, motive, and intent, trying all the charges together was appropriate. (3 CT 799.) The prosecutor pointed out that the evidence showed both victims were of similar age, similar petite stature, who lived alone, and were attacked inside of their own home after going outside briefly late at night, and personal property was stolen from each victim. Additionally, each victim lived nearby each other, as well as within close proximity to where Jackson was living at the time. Further, both crimes occurred within a short period of time of each other. Finally, Jackson attempted to borrow money from a neighbor shortly before each attack. (3 CT 799.)

The prosecutor argued that the cross-admissibility of the evidence, the dog tracking evidence at both crime scenes, and Jackson's incriminating statements implicating himself in Ms. Myers' murder while being

interrogated for the assault on Ms. Mason, all weighed in favor of joinder and against Jackson's motion to sever. (3 CT 799-800.)

After hearing argument from both parties, the court explained that Jackson's confession was "so bound up and intertwined with everything" and that "regardless of which count was being tried, the whole [confession] would come in. That's the key here. It's not only cross admissibility of evidence, it's the pivotal evidence which anchors both counts." (3 RT 1316-1317.) The court noted that the Ms. Myers' case was inflammatory in nature also, evidenced by Jackson's own admission of being in her house eating a sandwich, when Ms. Myers "surprised" him. Jackson claimed that he stabbed her with a large knife in the back with such force that the blade came out through her chest. Jackson then described putting Myers in her car, grabbing her by the hair, driving her to a remote location and dumping her body. (3 RT 1317-1318.)

The court denied Jackson's motion to sever, ruling that these crimes were not "completely unrelated events" and that Jackson's admission "anchor[s] both counts." It stated that while the evidence was prejudicial, it was probative and highly relevant and would be admissible whether the counts were tried jointly or separately. (3 RT 1319-1320.)

Pursuant to Penal Code section 954, an accusatory pleading may charge two or more different offenses so long as at least one of two conditions is met: The offenses are (1) "connected together in their commission," or (2) "of the same class." (*People v. Soper* (2009) 45 Cal.4th 759, 771.) Article I, section 30, subdivision (a) of the California Constitution provides: "This Constitution shall not be construed by the courts to prohibit the joining of criminal cases as prescribed by the Legislature . . . ." Joint trial has long been prescribed, and broadly allowed, by the Legislature's enactment of section 954. (*People v. Soper, supra*,45 Cal.4th at p. 772; *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1218.)

Thus, "[T]he law prefers consolidation of charges." (*People v. Manriquez* (2005) 37 Cal.4th 547, 574, quoting *People v. Ochoa* (1998) 19 Cal.4th 353, 409.) Where the offenses charged are of the same class, joinder is proper under Penal Code section 954. (*People v. Kraft* (2000) 23 Cal.4th 978, 1030; *People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

Consolidated charges are beneficial to the state, namely, conservation of judicial resources and public funds. These considerations often weigh strongly against severance of properly joined charges. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774; *People v. Bean* (1988) 46 Cal.3d 919, 939-940.) Because "consolidation or joinder of offenses ordinarily promotes efficiency, that is the course of action preferred by the law." (*Alcala v. Superior Court, supra*, 43 Cal.4th at p. 1220.) Whether severance is appropriate is dependent upon the particular circumstances of each individual case, and this Court has developed criteria to provide guidance in ruling upon and reviewing a motion to sever trial. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774; *Frank v. Superior Court* (1989) 48 Cal.3d 632, 639.)

The first thing to be considered is cross-admissibility of the evidence in separate trials. (*People v. Alcala*, *supra*, 43 Cal.4th at p. 1220.) That the evidence underlying the offenses in question would be cross-admissible in separate trials of other charges is sufficient, standing alone, to justify a trial court's refusal to sever the charged offenses. (*Alcala v. Superior Court*, *supra*, 43 Cal. 4th 1205, 1221.) However, complete cross-admissibility is not required. (*Ibid.*)

If the evidence underlying the charges in question would not be cross-admissible, the reviewing court considers "whether the benefits of joinder were sufficiently substantial to outweigh the possible 'spill-over effect of the 'other-crimes' evidence on the jury in its consideration of the evidence of defendant's guilt of each set of offenses." (*People v. Soper,supra,*45 Cal.4th at p. 775, quoting *People v. Bean*, *supra*, 46 Cal.3d 919, 938.) In

making this evaluation a reviewing court considers whether some of the charges are unusually likely to inflame the jury against the defendant; whether a weak case has been joined with a strong case, or with another weak case, so that the spillover effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and whether any one of the charges is a capital crime, or joinder of them turns the matter into a capital case. (*People v. Soper*, *supra*, 45 Cal.4th at p. 775; *People v. Arias* (1996) 13 Cal.4th 92, 127; see also *Alcala v. Superior Court*, *supra*, 43 Cal.4th at pp. 1220-1221.) Joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1244-1246.) Joinder is proper when there are capital charges as long as evidence of each charge is strong enough that consolidation is unlikely to affect the verdict. (*People v. Arias*, *supra*, 13 Cal.4th at p. 130, fn. 11; *People v. Lucky* (1988) 45 Cal.3d 259, 277-278; *People v. Ochoa* (2001) 26 Cal.4th 398, 423.)

A trial court's denial of a severance motion for abuse of discretion is based on the facts as they appeared at the time the court ruled on the motion. (*People v. Avila* (2006) 38 Cal.4th 491, 575; *People v. Hardy* (1992) 2 Cal.4th 86, 167.) If the court's joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder "resulted in 'gross unfairness' amounting to a denial of due process." (*People v. Mendoza* (2000) 24 Cal.4th 130, 162.) To establish error in a trial court's ruling declining to sever properly joined charges, a defendant must make a clear showing of prejudice to establish that the trial court abused its discretion. (*People v. Soper*, *supra*, 45 Cal.4th at p. 774; *Alcala v. Superiour Court*, *supra*, Cal.4th at p. 1220.) Even if the court abused its discretion in refusing to sever, reversal is unwarranted unless, to a reasonable probability, defendant would have received a more

favorable result in a separate trial. (*People v. Avila*, *supra*, 38 Cal.4th at p. 575; *People v. Coffman* (2004) 34 Cal.4th 1, 41.) In the context of properly joined offenses, a party seeking severance must make a stronger showing of potential prejudice than would be necessary to exclude other-crimes evidence in a severed trial. (*Soper*, at p. 774; *Alcala, supra*, 43 Cal.4th at p. 1222, fn. 11; *People v. Arias*, *supra*, 13 Cal.4th at p. 127.)

Jackson argues that while there was "limited cross-admissibility of some of the crimes against Ms. Mason, there was no cross-admissibility of the sex crimes against her; and that the coupling of the weak capital case with the strong and inflammatory non-capital case violated his rights to due process. (AOB 141-142.)

Jackson acknowledges that some aspects of the crimes against Ms. Mason were cross-admissible, for the limited purpose of explaining Jackson's comments to the police during their interrogation, namely that

> he had committed a home-invasion burglary and robbery at Mason's residence; that he took a fair bit of her property, much of which was soon traced to his residence; that he was quickly arrested and following his arrest was interrogated; and that in the course of that interrogation certain of his statements – that the victim had red hair, was stabbed or killed, and transported away and disappeared – did not seem to relate to the Mason incident for which he was arrested but rather, possibly to Myers."

(AOB 142.)

But, argues Jackson, the question is whether "applying the *Soper* analysis and assuming some degree of cross-admissibility, there must nevertheless be severance because a very weak murder case had been 'joined with a stronger non-murder case." (AOB 138.) The answer is no.

First, because murder and rape are '"offenses of the same class of crimes' within the meaning of section 954" they were properly joined. (*People v. Ramirez* (2006) 39 Cal.4th 398, 439, internal citations omitted.) Because the statutory requirements for joinder were met, Jackson can

establish error only on a clear showing of prejudice. *(Ibid.)* In making such a determination, a reviewing court examines the record before the trial court at the time it made its ruling. "If the evidence underlying the charges in question would be cross-admissible, that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." (*People v. Soper* (2009) 45 Cal.4th 759, 780.)

To evaluate the cross-admissibility of the evidence at hypothetical separate trials a court looks at the degree of similarity, depending on the purpose for which the introduction of evidence is sought. (*People v. Soper*, *supra*, 45 Cal.4th 776, citing *People v. Ewoldt* (1994) 7 Cal.4th 389 at P. 402.) The least degree of similarity is required in order to prove intent, in which the evidence must be "sufficiently similar to support the inference that the defendant probably harbored the same intent in each instance." (*Ibid*, internal citations omitted.) "By contrast, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity. (*Ibid.*)

Here, intent, common plan or design, and identity were all at issue, and evidence regarding the crimes against Ms. Mason was cross-admissible as to all three. As the prosecutor pointed out, and the evidence ultimately showed, the evidence in both cases was shockingly similar and easily met the standard for cross-admissibility. Both Ms. Mason and Ms. Myers were in their eighties living alone in a single family home and each of these elderly petite women had briefly gone outside of their home late at night before being attacked inside of their homes. Additionally, the crimes occurred within a short period of time of each other and both victims' homes were nearby each other as well as being within close proximity to where Jackson lived at the time. Jackson took personal property from both

of his victims and earlier in the evening before each attack he had attempted to borrow money from a neighbor. (3 CT 799.)

In addition, the prosecutor argued that Jackson left trace evidence in the form of his scent, at both crime scenes, which was detected and identified by a trained bloodhound. The accuracy and reliability of the identification at the Myers' crime scene was corroborated by the undisputed identification at the Mason crime scene, combined with the other direct and circumstantial evidence gathered in the Mason case. (3 CT 799-800.) Accordingly, the evidence of the crimes against both victims was cross-admissible and the court properly denied Jackson's motion to sever.

Moreover, as the trial court pointed out, the prosecution had a right to introduce Jackson's entire recorded interview where he admitted killing Ms. Myers for impeachment purposes, because Jackson made false and misleading statements. The trial court ruled that there was no way to sanitize the confession to omit the details of the rape of Ms. Mason from Jackson's interview. (3 RT 1317-1318.)

Even if, as Jackson argues, the evidence of the sex crimes against Ms. Mason was not cross-admissible, joinder was nevertheless proper. Lack of cross-admissibility alone is "insufficient to establish that a trial court abused its discretion in failing to sever those charges." (*People v. Soper*, *supra,* 45 Cal.4th at p. 780.) Absent cross-admissibility, the benefits of joinder to the state are weighed against the likelihood of the evidence to unduly inflame the jury; whether the cases were joined to bolster a weak case with a strong one; and whether joinder converted the charges into a capital offense. (*People v. Soper*, *supra*, 45 Cal.4th at p. 779.) The benefits of joinder outweigh these factors here.

The evidence of the attack on Ms. Mason was highly probative and relevant, and by its nature prejudicial, but not unduly so. As the prosecutor noted "it's gruesome, disgusting evidence, but that's what this case is

about." (3 RT 1319.) The court agreed, explaining that the Ms. Myers' case was inflammatory in nature also, evidenced by Jackson's own admission of eating a sandwich in Myers' house when she "surprised" him – and his claim that he then stabbed her with a large knife in the back with such force that the blade came out through her chest. Jackson then described putting Ms. Myers in her car, grabbing her by the hair, and throwing her out of the car in a remote location. (3 RT 1317-1318; 14 RT 3888-3927.)

Jackson contends that severance was nevertheless required because the prosecution joined a weak capital case with a strong non-capital offense. (AOB 138.) While the evidence supporting the crimes against Ms. Mason was overwhelming, the evidence that Jackson murdered Ms. Myers and dumped her body was also very strong. Jackson admitted to doing so, a newspaper clipping about Ms. Myers' disappearance was found in his room at his parents' house, he had an unexplained absence at the time Ms. Myers disappeared, and his scent was found on Myers' property inside of her home. (19 RT 3613.) As the court in *Soper* acknowledged, "as between any two charges, it is always possible to point to individual aspects of one case and argue that one is stronger than the other. A mere imbalance in the evidence, however, will not indicate a risk of prejudicial "spillover effect," militating against the benefits of joinder and warranting severance of properly joined charges." (*People v. Soper*, *supra,* 45 Cal.4th at p. 781, quoting *People v. Ruiz*, *supra*, 44 Cal.3d 589, 606, 607.) Moreover, severance is not required simply because properly joined charges made it more difficult for a defendant to avoid conviction. (*Ibid.*).

Finally, the murder of Ms. Myers is a capital offense, regardless of whether the charges against Jackson were tried together or separately. Hence, the trial court properly denied Jackson's severance motion because the evidence was cross-admissible, and because the legitimate goal of the

conservation of judicial resources and public funds far outweighed severance. "[J]oinder, with its attendant efficiencies provided by section 954 is integral to the operation of our public court system. Manifestly, severance of properly joined charges denie[s] the state the substantial benefits and conservation of resources otherwise afforded by section 954." (*Soper, supra*, 45 Cal.4th at p. 782.)

## II. THE COURT PROPERLY ADMITTED THE DOG SCENT EVIDENCE

Jackson contends the court erred in admitting some of the dog-scent identification evidence without first holding a *Kelly*[7] or an Evidence Code section 402 hearing to preliminarily assess its validity. (AOB 153-236.) Because the use of trained human scent trailing[8] dogs is not a "new scientific technique," a *Kelly* hearing was not required.

The prosecution used dogs in this case on four occasions, twice on June 22, 2001, once on June 25, 2001, and once on February 5, 2005. Jackson does not challenge the searches or the evidence arising from the dog trailing on June 22, 2001. (AOB 153.) He contends that the June 25, 2001 dog trailing evidence was improperly admitted because the court did not conduct a *Kelly* hearing prior to its admission. He also argues that the court improperly admitted the February 5, 2005 dog trailing evidence. (AOB 162-208.) The February 5, 2005, dog trailing was conducted prior to

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[7] *People v. Kelly* (1976) 17 Cal.3d 24

[8] The case law often uses the terms "tracking" and "trailing" interchangeably. However, experts who work in human scent discrimination distinguish between "tracking" and "trailing." "Tracking" involves following ground disturbances such as crushed vegetation, created by footsteps on a path, along with some human scent component. "Trailing," on the other hand, is where a dog follows the scent of an individual. Maggie is a trailing dog. (16 RT 3241; 18 RT 3502.)

the second penalty phase trial. Jackson's objections to this evidence will be addressed in the portion of Respondent's Brief addressing Jackson's claims of error during the penalty phase. (Penalty Phase Argument IV, infra.) As set forth below, the court properly admitted the evidence arising from the dog trailing on June 25, 2001.

### A. Proceedings Below Regarding Admissibility of Dog Trailing Evidence

On June 22, 2001, Deputy Webb responded to Myra Mason's home to assist in the investigation. Deputy Webb collected scent onto a scent pad from fresh set of distinctive footprints from alongside Ms. Mason's house using a scent transfer unit or "STU." (19 RT 3539-3541.) A scent transfer unit is a vacuum-like device that "sucks up scent onto a gauze pad." (19 RT 3539-3541.) Deputy Webb presented the scent pad to her dog Maggie, and Maggie immediately began to trail from Ms. Mason's home, across the street, and to a trash can. Deputy Webb opened the trash can and discovered Mason's purse inside of it. Maggie then went up one of two side-by-side driveways and onto the Schraders' porch, before turning and going next door to Jackson's residence. (19 RT 3542-3543.)

Later that same morning investigators asked Deputy Webb to conduct a follow up trailing at the Riverside Police Department Spruce Street Station, where Jackson was in custody. Investigators wanted to confirm or eliminate Jackson as a suspect. (19 RT 3546-3547.) Deputy Webb did not know Jackson's location in the station, she only knew that the trailing starting point was a place he had been. She presented Maggie with the same scent pad she had used earlier that morning and Maggie began to trail. Maggie briefly entered into an interview room containing a couch and stuffed animals, and then entered the interview room where Jackson and a police officer were sitting. Maggie went up to Jackson, smelled him, and stopped. She did not trail further. (19 RT 3549-3552.)

On June 25, 2001, Deputy Webb and Maggie assisted in the investigation for a third time, this time at the Orange Street Station. (19 RT 3554.) Deputy Webb described in detail the process by which she conducted the "station identification," to ensure there was no cross-contamination and that the proper procedures were followed. For example, Jackson had been placed in the basement, a location he had never been before. Deputy Webb instructed investigators that the air conditioner should be turned off, and that the trail Jackson took from start to finish should have at least three turns as opposed to a straight route to "make sure Maggie [wa]s committed to trailing." In addition, Deputy Webb had no knowledge of where Jackson was located, she knew only where the Jackson entered the building. (15 RT 2935-2936, 2935; 17 RT 2170-3171;18 RT 3507-3508.)

Deputy Webb entered the building through the loading dock door and harnessed Maggie. She then presented the manila envelope to Maggie by using the K-pack in which it had been placed, and pushing the manila envelope up from inside the bag and putting it to Maggie's nose to tell her to smell it. Deputy Webb unleashed Maggie and she immediately began to trail. (18 RT 3510-3511.) She followed the path Jackson had taken through the police department, trailing directly to Jackson and jumped on him. (17 RT 3177-3179, 3205-3206; 18 RT 3515.) Maggie passed right by the detectives without even looking at them. (18 RT 3515-3516.)

Prior to the introduction of this evidence, Jackson argued that Maggie's identification of him on June 25, 2001 at the Orange Street station was subject to a *Kelly* hearing to determine its admissibility. Jackson argued that the identification was a "hybrid" of trailing, which has long been admissible in court, and a "scent lineup", which requires a *Kelly* hearing prior to its admission. Jackson argued that Maggie's identification began as a traditional trailing, but became a scent lineup when Maggie

entered the room where people other than Jackson were standing. (1 RT 956.) Jackson also asked the court to conduct a contested Evidence Code section 402 hearing to determine whether the prosecution had met its foundational burden for canine tracking evidence as set forth in *People v. Malgren* (1983) 139 Cal.App.3d 234.[9] (1 RT 965-966.)

The prosecutor responded that Jackson was attempting to confuse the facts. As he pointed out, Maggie followed the exact trail that Jackson had just taken, through a "highly utilized and highly trafficked" area of the Riverside Police Department, in the basement where the dispatch center and the locker rooms are located. In following Jackson's trail through doors and around corners, Maggie went into a locker room, passed other individuals, and alerted on Jackson. (1 RT 956-957.) The prosecutor noted that "the fact that the dog followed a trail is significant in that the dog was scented off that item and it picked up that trail. And if we look at the cases and what they define as a trailing or a tracking, it's exactly the same thing." (1 RT 956-957.)

The court agreed with the prosecutor and denied Jackson's request for a *Kelly* hearing. It noted that no scientific mechanism, such as an STU, was utilized here, and characterized this case as one of "tracking." The court found it irrelevant that the trailing was conducted in a controlled context, noting that Jackson "went on a fairly complex path through the police department and into the basement, and this dog tracked that path and ultimately alerted on [Jackson]." The court found the fact that the officers knew the actual path Jackson took – combined with the fact that Maggie followed that path exactly, to be strong circumstantial evidence that Maggie was on to the proper scent. (1 RT 963-965.)

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[9] *People v. Malgren* (1983)139 Cal. App. 3d 234, 238, sets forth foundational requirements for the admission of canine trailing evidence.

The court further denied Jackson's request for a contested Evidence Code section 402 hearing, ruling that the prosecution had met its foundational requirement under *People v. Malgren* to admit the evidence, and that Jackson's argument that the scent on the envelope was old or had been contaminated went to the weight of the evidence, not its admissibility. (2 RT 981.)

### B. The Court Properly Determined a *Kelly* Hearing Was Unnecessary Prior to Admission of the Dog Trailing Evidence

California courts have long upheld the admission of evidence of human scent discrimination by dogs in the form of "dog trailing." (See, e.g., *People v. Gonzales* (1990) 218 Cal.App.3d 403, 414; *People v. Malgren, supra*, at p. 238; *People v. Craig* (1978) 86 Cal.App.3d 905, 915-916.) Trailing cases are distinguishable from cases involving "scent identification lineups." In scent identification lineups, different scents are transferred to multiple scent pads. Dogs are presented with a scent pad, and are asked to pick the pad containing the scent with which it was presented. (*People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*).) Such lineups can involve the STU, which has been found to be a novel device subject to a hearing under *Kelly*. (*People v. Mitchell, supra*, at pp. 787-789; accord, *People v. Willis* (2004) 115 Cal.App.4th 379, 385; cf. *People v. Malgren, supra*, 139 Cal.App.3d 234 [dog tracking evidence need not be subjected to a *Kelly/Frye*[10] hearing, but a foundation must be laid to establish the dog's ability and reliability].)

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[10] The federal standard enunciated in *Frye v. United States* (D.C. Cir. 1023) 293 Fed. 1013 is the same as the standard for admissibility of scientific evidence set forth in this Court's decision in *Kelly*. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 587 [113 S.Ct. 2786, 125 L.Ed.2d 469] the United States Supreme Court held that the Federal Rules of Evidence has superceded *Frye*. California chose to continue to

(continued...)

For tracking evidence to be admissible, a proper foundation must be laid that (1) the handler is trained and experienced, (2) the dog is adequately trained, (3) the dog has been found to be reliable in human scent discrimination, (3) the dog was placed on a track where circumstances indicated the suspect to have been, and (4) the trail had not become stale or contaminated. (*People v. Malgren, supra*, 139 Cal.App.3d at p. 238.)

Under the *Kelly* test, evidence obtained through a "new scientific technique" is only admissible where the technique's reliability is established by the following three prong-test: (1) general acceptance of the technique in the relevant scientific community; (2) testimony from a properly qualified expert regarding the general acceptance of the technique; and (3) proof that the generally-accepted procedures were correctly followed in the particular case. (*People v. Bolden* (2002) 29 Cal.4th 515, 544-545, citation omitted.) "[P]roof of a technique's general acceptance in the relevant scientific community would no longer be necessary once a published appellate decision had affirmed a trial court ruling admitting evidence obtained by that scientific technique, at least until new evidence is presented reflecting a change in the attitude of the scientific community." (*Id.* at p. 545, internal quotation marks and citation omitted].)

The *Kelly* test "only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is new to science and, even more so, the law." (*People v. Leahy* (1994) 8 Cal.4th 587, 605, internal quotation marks and citation omitted].) Thus, the analysis is limited to situations where the expert testimony will "forestall the jury's uncritical acceptance of scientific evidence or technology that is

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(...continued)
use the more conservative rules of *Kelly*, and the test is now most commonly referred to as the *Kelly* rule. (*People v. Leahy* (1984) 8 Cal.4th 587, 591, 595-596, 604.)

so foreign to everyday experience as to be unusually difficult for laypersons to evaluate." (*People v. Venegas* (1998) 18 Cal.4th 47, 80.)

> This Court has explained the purpose of the rule as follows:
>
> When a witness gives his personal opinion on the stand - even if he qualifies as an expert - the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently "scientific" mechanism, instrument, or procedure.

(*People v. McDonald* (1984) 37 Cal.3d 351, 372, italics added, internal quotation marks and citation omitted], overruled on other grounds in *People v. Mendoza* (2000) 23 Cal.4th 896, 914.)

> [C]ourts have invoked the *Kelly-Frye* rule primarily in cases involving novel devices or processes such as lie detectors, 'truth serum,' Nalline testing, experimental systems of blood typing, 'voiceprints,' identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis, and, most recently, proof of guilt by 'rape trauma syndrome.'

(*People v. McDonald*, *supra*, 37 Cal.3d at p. 373, italics added and citation omitted].) "The conclusion that a certain legal principle, like the *Kelly-Frye* rule, is applicable or not in a certain factual situation is examined independently." (*People v. Rowland* (1992) 4 Cal.4th 238, 266.)

Human scent discrimination does not constitute a newly developed scientific technique. For three decades, California law has recognized the admissibility of sufficiently reliable scent discrimination evidence within the context of dog trailing cases. (*People v. Gonzales*, *supra*, 218 Cal.App.3d at p. 414; *People v. Malgren*, *supra*, 139 Cal.App.3d at p. 238; *People v. Craig*, *supra*, 86 Cal.App.3d at pp. 915-916.)

In *People v. Craig, supra*, 86 Cal.App.3d 905, three men in a white Nova robbed a gas station. Station employees pursued the men to an apartment complex, where the men stopped and ran inside. When police officers arrived at the complex, they saw three men who matched the descriptions of the suspects and ultimately detained them. (*Id.* at pp. 909-910.) The robbery victim was brought to the scene, where he identified the defendant. When the Nova was searched, incriminating evidence from a separate robbery which had occurred earlier that evening was found inside. An officer and his "trained police dog" "were ordered to track from the interior of the vehicle. After being allowed to smell inside the Nova, the dog followed the path of the suspects from that point to the point where the detention occurred." (*Id.* at pp. 910-911.)

The court specifically held in *Craig* that this dog-trailing evidence was admissible and not subject to *Kelly*. The decision in *Craig* described trailing as a "subjective, innate capability" rather than an "inanimate scientific technique." (*Id.* at p. 916.) The court reasoned that, because every dog's abilities are different, the reliability of dog-trailing evidence depended on the abilities of the particular dog and was not something subject to the general proof of *Kelly*. (*Id.* at p. 915.) This "basic distinction in the . . . subject matter" removed the case from *Kelly* analysis. (*Ibid.*) The court in *Craig* instead chose "to require each particular dog's ability and reliability be shown on a case-by-case basis." (*Ibid.*)

> In the area of new scientific techniques, especially dealing with electronic gadgetry, one piece of testing apparatus is essentially the same as another of similar design, make and purpose. [¶] When dealing with animate objects, however, we must assume each and every unit is an individual and is different from all others. Within one breed of dog, or even with two dogs of the same parentage, it cannot be said each dog will have the same exact characteristics and abilities. Therefore, while the reliability of a machine can be duplicated and passed down the assembly line with relative ease, the abilities and reliability of

> each dog desired to be used in court must be shown on an individual basis before evidence of that dog's efforts is admissible. We simply cannot say all dogs can trail a human, or even that all dogs of specific breeds can do so.

(*Ibid.*)

Thus, in *Craig* the court held:

> [R]ather than attempt to identify certain specific criteria as being indicative of the ability of dogs, in general, to trail a human, we choose to require each particular dog's ability and reliability be shown on a case-by-case basis. We are not merely assuming a well-trained dog can trail a human; we say that this ability is a fact which, like other facts, may be proven by expert testimony.

(*Ibid.*)

Later, in *People v. Malgren*, the court set forth five foundational requirements for such evidence: (1) the dog's handler was qualified by training and experience to use the dog; (2) the dog was adequately trained in tracking humans; (3) the dog has been found to be reliable in tracking humans; (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and (5) the trail had not become stale or contaminated. (*People v. Malgren*, *supra,* 139 Cal.App.3d at p. 238.) By ignoring the *Kelly* test in setting forth those criteria, the court in *Malgren* implicitly agreed with the court in *Craig* that *Kelly* did not apply.

The court in *Malgren* further held that in dog trailing cases, the trial court must give sua sponte instructions that: (1) when dog tracking evidence is used to prove the identity of the defendant, there must be some other evidence either direct or circumstantial which supports the accuracy of the identification evidence and (2) in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler together with all the circumstances surrounding the tracking in question. (*People v. Malgren*, *supra*, 139 Cal.App.3d at p. 242.)

Subsequently, in *People v. Gonzales* (1990) 218 Cal.App.3d 403, 408-414, the court discussed the nature of the evidence necessary to corroborate dog tracking evidence. The court held that a conviction may be had where dog tracking evidence is used and there is other corroborative evidence. The court did not find that the other corroborative evidence must independently link the accused to the crime, but only that it must support the accuracy of the tracking. (*Id.* at p. 414.)

The more recent cases of *People v. Willis* (2004) 115 Cal.App.4th 379 (*Willis*), and *People v. Mitchell* (2003) 110 Cal.App.4th 772, accept the law stated in the earlier cases and acknowledge that the *Kelly* rule applies to new scientific techniques, but not to traditional dog trailing evidence. (*Willis*, *supra*, 115 Cal.App.4th at pp. 385-386; *People v. Mitchell*, *supra*, 110 Cal.App.4th at pp. 784-786.)

In *People v. Mitchell*, *supra*, 110 Cal.App.4th 772, the court addressed the admissibility of the use of a scent transfer unit within the unique context of a scent discrimination lineup. At the scent discrimination lineup in the *Mitchell* case, Edward Hamm used a STU to collect scents from the murder shell casings, as well as from the victim's shirt. Scents were also collected from shirts the suspects had worn, and additional scents were collected from shirts worn by fellow gang members. Hamm also made three control pads with scents extracted from the chairs of three detectives who had not worked on the case. Reilly, a scent discrimination dog, was then given a pad to sniff that had scent extracted from the shell casings and matched it in a "lineup" of other scents to the pad that contained scent collected from Mitchell's shirt.

On appeal, the defendant challenged the admission of the scent discrimination evidence absent a *Kelly* hearing based on (1) the use of the STU specifically, and (2) the use of a scent discrimination lineup in general. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at pp. 787, 790.) The

Court first addressed the *Kelly* issue as to the STU, holding that it was a "novel device" and that it was error to admit the evidence absent a *Kelly* hearing. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at p. 789.)

The *Mitchell* court then expressed its concerns regarding scent identification lineups in general. (*People v. Mitchell*, *supra*, 110 Cal.App.4th at pp. 790-794.) Recognizing that "under well established law dog tracking or trailing evidence does not involve a scientific technique within the meaning of *Kelly*," the court held that the *Kelly* test should apply to dog discrimination lineups in future cases. It further held, in the alternative, that other foundational factors must be met for admissibility in those future cases, such as whether there are distinctions in abilities between breeds, the relevant certification requirements, whether scent can be transferred onto casings, and whether the scent is "damaged" by firing a bullet. (*Id.* at pp. 790-794.)

In *People v. Willis*, supra, a dog handler used a scent transfer unit to create scent pads from certain objects found "in the vicinity" of the crime scene. After being given a scent pad from one of the objects, a trained bloodhound named Scarlet "showed interest (i.e., was animated or excited)" in a vacant lot near a church and at several apartment houses where the defendant had lived or spent time. (*People v. Willis*, *supra*, 115 Cal.App.4th at p. 384.) On appeal, the court held that the scent transfer unit was a "novel device," which should have been subject to a *Kelly* hearing. It further found a foundational weakness in the "dog identification evidence." (*Id.* at p. 386.) As in *Mitchell*, the court first recognized that "'dog trailing is a lot different from dog scent recognition.'" It went on to add:

> A more difficult case is presented when the dog is not tracking a suspect but rather is given a scent from a gauze pad some length of time after an incident and is watched to see if the dog "shows interest" in various locales frequented by the defendant.

> Showing interest in locations is a far cry from tracking a suspect and giving an unambiguous alert that the person has been located.

(*Willis, supra*, 115 Cal.App.4th at p. 386.)

The court in *Willis* then concluded that in such situations,

> The prosecution cannot rely solely on anecdotes regarding the dog's capabilities. Instead, a foundation must be laid from academic or scientific sources regarding (a) how long scent remains on an object or at a location; (b) whether every person has a scent that is so unique that it provides an accurate basis for scent identification, such that it can be analogized to human DNA; (c) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (d) the adequacy of the certification procedures for scent identifications. [Citation.]

(*People v. Willis, supra,* 115 Cal.App.4th at p. 386.)

Jackson's entire argument is premised on his claim that the dog trailing identification at the Orange Street station was actually a "scent identification" such as the one conducted in *Mitchell*, and therefore the court erred in admitting the evidence without first holding a *Kelly* hearing. (AOB 173.) Because this was a trailing case, no *Kelly* hearing was required and Jackson's argument should be rejected.

Jackson attempts to distinguish this case from other trailing cases. He argues that because the scent Maggie trailed was not "fresh" because Maggie did not pick it up at the scene of the crime, and that the manila envelope had been treated with the chemical ninhydrin, the trailing was somehow transformed into a scent-identification lineup. (AOB 173.)

Jackson is wrong. These distinctions cannot possibly transform the nature of the trailing identification into one of a scent lineup. This was a traditional "dog trailing" situation. Deputy Webb presented Maggie with an envelope containing Jackson's scent, taken from the crime scene, and Maggie trailed his scent. She followed the same path Jackson took through

the police station, and unambiguously alerted on Jackson. (17 RT 3175-3177, 3210-3211; 18 RT 3508-3517.) This was strictly a trailing identification – no "scent identification lineup" as in *Mitchell* took place. The only distinction between this case and other published dog trailing cases was that this identification took place in a controlled environment. As the court noted, having the benefit of knowing what "complex" path Jackson took through the police station, and the fact that Maggie followed the same complex path before alerting on Jackson, makes this evidence particularly relevant and credible. (1 RT 963-965.)

This was not a scent lineup or a "hybrid" case. No scent was transferred to a scent pad, no scent transfer unit was utilized. Maggie was not asked to discriminate between multiple scent pads to determine which one contained Jackson's scent. She was asked to find the person whose scent was on the envelope by trailing and she did so. Whether the time lapse between Ms. Myers' murder, and/or the ninhydrin on the envelope affected Maggie's ability to trail Jackson, was a question of weight for the jury to determine. It did not transform the evidence into "a technique, process, or theory which is new to science" thus, requiring a *Kelly* test prior to its admission. (*People v. Leahy*, *supra*, 8 Cal.4th at p. 605.)

Instead, as the trial court properly determined, the appropriate test for admissibility is whether the evidence is sufficiently reliable so as to make it relevant. (*People v. Malgren*, *supra,* 139 Cal.App.3d at p. 238.) Here, because the dog scent investigation conducted at the police station was traditional dog trailing, the prosecution only had to establish the foundational requirements set forth in *Malgren*.

As set forth below, the trial court properly admitted the dog scent evidence. Deputy Webb testified extensively to the factors listed in *Malgren*, including (1) her own training and experience with Maggie; (2) Maggie's training in trailing human scent; (3) Maggie's reliability in

trailing humans; (4) Maggie's placement at the location where Jackson was located; and (5) and the process of the station identification, indicating that the trail had not become contaminated or stale.

### 1. Deputy Webb and Maggie's Qualifications

Deputy Webb is recognized as an expert in the training and handling of bloodhounds. At the time of trial she had served as a Sheriff's Deputy for 10 years, had been a canine officer for over four years, and had been training bloodhounds since 1998. (18 RT 3480, 3482.) Deputy Webb's training included approximately 2500 hours of training, including bloodhounds, patrol canines, and narcotics training. (18 RT 3491-3492.)

Deputy Webb was formally certified as a bloodhound trailing instructor by the Canine Training Academy in September 2001. (18 RT 3490.) She was also certified with the Law Enforcement Bloodhound Association, and the National Police Bloodhound Association, which also certified Maggie. (18 RT 3491.)

Deputy Webb had Maggie as a puppy in 1999. Maggie began training in 1999, when she was four months old. Maggie participated in 20 hours with the Southern California Bloodhound Coalition Seminar, and she attended the Canine Training Academy in Colorado in 2000. In April, 2001, Maggie had 40 hours of training in Maryland with the Law Enforcement Bloodhound Association, and then returned to Colorado in May 2001 for the Canine Training Academy. Maggie attended 72 hours of the FBI SWAT Training in July 2011, and then in December 2001, she attended 50 hours of the National Police Bloodhound Association training in South Carolina. Maggie then completed a search and rescue training in Anza Borrego, followed by another training stint at the Canine Training Academy in May 2002. In June 2002, Maggie completed 32 hours of training at the Idaho Working Canine Conference on Missing Persons, and in July of 2002, she completed 72 hours of FBI SWAT training with

fourteen SWAT teams. In December 2002, Maggie returned to South Carolina for further training with the National Police Bloodhound Association, and in May 2003, Maggie attended the National Police Bloodhound Association Seminar in New York. In 2003, Maggie spent 50 additional hours at the Canine Training Academy in Colorado, in addition to another 40 hours at the Law Enforcement Bloodhound Association seminar in Maryland. (18 RT 3482-3487.)

Deputy Webb and Maggie attended each of these seminars together and worked together. In addition to the seminars, Maggie also received 10 to 15 hours of weekly training provided by Deputy Webb. (18 RT 3486-3487.) That training consisted of continuous variation-type training where a deputy would "get lost and go lay a trail." Maggie's training would be changed up by the age, distance and surface of the trails, and variation of "anything that can happen in real life." (18 RT 3488.)

Maggie attended a seminar approximately every six months in order for her to be evaluated by people who did not know her and did not regularly train with her. (18 RT 3487.) She has been found to be accurate and reliable in following and discriminating between human scent both in training and in actual cases. She had successfully trailed complex cases on numerous occasions. (18 RT 3491-3498.) Expert witness, Dr. Lisa Harvey, testified that Deputy Webb is considered a very good handler and Maggie is regarded as a very competent dog. (18 RT 3355.) Maggie's ability to trail was unquestionably demonstrated by her ability to pick up Jackson's scent from his footprint in Ms. Mason Mason's yard and trail to the trash can where he dumped her purse, and ultimately to Jackson's home. Indeed, Jackson does not raise a challenge to that trail at all.

In addition, as set forth above, Deputy Webb described in detail the process by which the station identification at the Orange Street Station on June 22, 2001, was handled, to ensure there was no cross-contamination

and that the proper procedures were followed. There is nothing to indicate the trail at the police station had become stale or contaminated. Jackson's contention that the manila envelope was contaminated because it had been treated with ninydrin is a separate issue.[11] The trail itself, from starting point to where Maggie ultimately located Jackson, was not contaminated, and Jackson does not contend otherwise.

And while Jackson contends the ninhydrin must have contaminated the manila envelope, the evidence at trial showed it did not. Based on Maggie's ability to follow Jackson's path through the police station, and unambiguously alert on him, the ninhydrin did not affect Jackson's scent on the envelope. In addition, Dr. Harvey conducted six different test trails using three different dogs, to determine whether or not ninhydrin affected a human scent on paper. Each time the dogs were able to trail off of the scent on an envelope after it was sprayed with ninydrin. (18 RT 3349.) Dr. Harvey's test results indicate ninhydrin does not destroy the scent on an envelope. (17 RT 3146-3147, 3333-3338; 18 RT 3340-3348.) For all these reasons, the dog trailing evidence was properly admitted under *Malgren.* (See *People v. Malgren*, *supra*, 139 Cal.App.3d at p. 238.)

Even assuming the trial court was required to consider the additional factors set forth in *Mitchell* and *Willis,* the dog scent evidence was properly admitted. In *Mitchell* and *Willis*, in addition to being concerned about the "novelty" of the scent transfer unit (not at issue here), the courts raised other foundational questions. As discussed in detail above, in the context of those cases, the *Mitchell* and *Willis* courts required additional academic or scientific testimony regarding (1) how long scent remains on an object or at a location; (2) whether every person has a scent that is so unique that it

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[11] The envelope was sprayed with ninhydrin when it was processed for fingerprints. (15 RT 2927.)

provides an accurate basis for scent identification, such that it can be analogized to human DNA; (3) whether a particular breed of dog is characterized by acute powers of scent and discrimination; and (4) the adequacy of the certification procedures for scent identifications. (*People v. Willis, supra,* 115 Cal.App.4th at p. 386*; People v. Mitchell, supra*, 110 Cal.App.4th at pp. 790-794.)

Here, unlike in *Mitchell* or *Willis*, the trial court heard expert testimony on these subjects, not just anecdotal stories. Indeed, the trial court in the instant matter was not presented with a "lack of scientific evidence" or "left in the dark" with respect to its concerns, as occurred in *Mitchell.* (*People v. Mitchell, supra,* 110 Cal.App.4th at pp. 792-793.) As explained below, an adequate foundation for the dog scent evidence was therefore established.

**2. Expert testimony regarding evidence of scent identification**

First, the trial court heard extensive testimony regarding how long human scent can remain on items. Dr. Lisa Harvey, the prosecution's expert, specializes in the science of human scent and the use of bloodhounds. Dr. Harvey is a forensic pathology and physiology professor at Victor Valley College with bachelor's degrees in biology and chemistry, a master's degree in physiology, and a Ph.D in physiology. (17 RT 3318-3319.) She testified that bloodhounds do not seem to be affected by "contamination." She described two separate experiments where bloodhounds were able to trail to the correct person 48 hours after that person initially walked the trail, even though thousands of different people had crossed through the trail during that time period. (17 RT 3332-3333.)

Dr. Harvey testified that human scent can remain on objects for a significant amount of time. In one example, Dr. Harvey asked study participants to wear T-shirts for 24 hours. Afterwards the shirts were cut up

into squares and packaged into K-packs. Some were placed in freezers and some were stored at room temperature. Every six months for seven-and-a-half years the T-shirt material was presented to a bloodhound, and the dog was asked to find the person who wore the shirt. The dogs were able to find the person every time.[12] (17 RT 3333-3334.) Her studies also showed that paper will hold a scent very well compared to other substances. (17 RT 3331.)

Dr. Harvey also testified that an individual does not have to hold onto an item for a long period of time in order to leave a scent. She testified to real life situations where a dog was able to successfully trail an individual from a scent picked up from a victim's arm that the defendant had grabbed for no longer than one second. (17 RT 3331-3332.

Dr. Harvey conducted several experiments herself, and also described research conducted by other doctors that concluded that except for identical twins, humans each have a unique scent, and that individual scents are related to chromosome 6 of a person's DNA. (17 RT 3322-3324.) She described studies conducted both of humans, and of mice and rats, and all concluded that human scent is unique. (17 RT 3323-3324.)

As with the other factors, the trial court heard extensive testimony about the abilities of trained scent dogs. Dr. Harvey testified that bloodhounds have been used for centuries to trail human beings. Although not every possible breed has been tested, as far as the dogs have been tested, bloodhounds are the best at trailing. (17 RT 3329.) Moreover, there was extensive testimony regarding the abilities of Maggie. (18 RT 3355. 18 RT 3491-3498.)

Dr. Harvey's research on the reliability of bloodhounds to discriminate human scents has been published in the peer-reviewed Journal

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[12] The experiment was still ongoing at the time of trial.

of Forensic Science, and she had multiple research articles awaiting publication at the time of trial. Her research showed that bloodhounds were able to scent discriminate between humans reliably and accurately, and that the reliability and accuracy increased with the age and experience of the dog, finding that by the time dogs reached one year of age they were very reliable. (17 RT 3324-3328.)

Maryland State Police Officer Douglas Lowry worked as a bloodhound handler for 25 years. He has received extensive training over the years, and has worked as a trainer for other bloodhound handlers for 20 years. Lowry explained how bloodhounds are trained and certified. (17 RT 3226-3238.) As noted above, Maggie was certified by the National Police Bloodhound Association. Deputy Webb was certified as a bloodhound trailing instructor by the Canine Training Academy, by the Law Enforcement Bloodhound Association, and by the National Police Bloodhound Association. (18 RT 3490-3491.)

In sum, the trial court correctly concluded that Jackson's challenges to the dog trailing evidence went to the weight of such evidence, not the methodology accepted by the scientific community or its reliability. Substantial evidence supports the trial court's finding that the dog trailing evidence was reliable and Jackson's assertions to the contrary should be rejected.

### C. THE DOG TRAILING EVIDENCE WAS NOT TESTIMONIAL IN NATURE AND ITS ADMISSION DID NOT VIOLATE JACKSON'S SIXTH AMENDMENT RIGHTS

Next, Jackson argues that admission of the dog trailing evidence, specifically, Maggie's "alert" of him, violated the Confrontation Clause of the Sixth Amendment and the principles enunciated in *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed. 177] (AOB

208-212.) Because Deputy Webb was available for cross-examination as to the dog trailing evidence, Jackson's argument is entirely without merit.

The Confrontation Clause guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) Under the Confrontation Clause, out-of-court statements that are testimonial in nature are inadmissible unless the declarant is unavailable and the accused has had a prior opportunity to cross-examine the declarant. (*Crawford v. Washington*, *supra*, 541 U.S. at pp. 68-69.)

Maggie's alert was not testimonial in nature. "[T]o be testimonial the out-of-court statement must have been made with some degree of formality or solemnity." (*People v. Lopez* (2012) 55 Cal.4th 569, 581-582, citing cases, [*Crawford v. Washington*, *supra*, 541 U.S. at p. 51 ["An accuser who makes a formal statement to government officers bears testimony ... ."]; *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 310-311,[129 S.Ct. 2527, 174 L.Ed.2d 314] [stressing that each of the laboratory certificates determined to be testimonial was "a ' "solemn declaration or affirmation" ' "]; *Bullcoming v. New Mexico* (2011) 564 U.S. at p. ___ [131 S. Ct. 2705, 2717] [the laboratory certificate found to be testimonial was "'formalized' in a signed document ... referring to ... rules" that made the document admissible in court (citation omitted)]; see also *Davis v. Washington* (2006) 547 U.S. 813, 830, fn. 5 [165 L. Ed. 2d 224, 126 S. Ct. 2266] ["formality is indeed essential to testimonial utterance"].) Maggie's alert was not made with the requisite formality or solemnity so as to be considered testimonial in nature.

As Jackson acknowledges, Deputy Webb, Maggie's handler, was available for cross-examination. (AOB 209.) This fact takes Jackson's claim out of the Confrontation Clause context entirely. (AOB 209.) This is so because if Jackson's argument were correct it would leave no avenue by

which to admit the evidence at all since the prosecution could not put a dog on the stand. (See, Evid. Code § 700, et. seq. re competency of witnesses.) Jackson's position is nonsensical and should be rejected as such.

### D. The Court Correctly Ruled an Evidence Code Section 402 Hearing Was Unnecessary

Jackson next contends that even if a *Kelly* hearing was not required prior to the admission of the dog trailing evidence, the court should have alternatively held an Evidence Code section 402 hearing. (AOB 212-218.) Because the trial court properly ruled that the prosecution had met its foundational burden as to the dog trailing evidence and that a contested hearing was unnecessary, Jackson's argument is without merit.

Defense counsel sought to suppress the dog trailing evidence at trial pursuant to Evidence Code sections 402 and 403. He acknowledged that the prosecution had laid the proper foundation at the preliminary hearing, but nevertheless requested an Evidence Code section 402 hearing at trial, arguing that "additional matters" had come up that "call[ed] into question" that foundation. (2 RT 978; 5 CT 1153-1159.) Counsel argued that the defense had retained an expert witness to "disprove" the preliminary facts established by the prosecution. (2 RT 980; 5 CT 1158.)

The prosecution responded that the unsigned declaration of the defense expert in which he opined that some of the *Malgren* factors had not been satisfied, or that some of the evidence may have been tainted, went to the weight of the evidence, not to its admissibility. (2 RT 980.) The court agreed. It denied counsel's motion, ruling that "[b]ased on the People's offer of proof, the Court makes the specific finding that the foundation requirement is satisfied. And based upon the defendant's offer of proof, I do believe it does go to the weight that the jury should attach to this evidence, if any." (2 RT 981.)

Jackson argues that had the trial court held a section 402 hearing, it would have led to the exclusion of the dog trailing evidence because the fifth prong of the *Malgren* test was not met, specifically that "whether or not the trail – or here, the scent item – had become contaminated." (AOB 218.)

A trial court's decision to admit or not admit evidence is reviewed for abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167; *People v. Clair* (1992) 2 Cal. 4th 629, 676.) The court properly exercised its discretion in denying Jackson's request for an Evidence Code section 402 hearing. That section provides that "[w]hen the existence of a preliminary fact is disputed," the trial court "may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury . . . ." A trial court's ruling on admissibility implies whatever finding of fact is prerequisite thereto. (*People v. Williams* (1997) 16 Cal.4th 153, 196; Evid. Code, § 402, subd. (c).)

The court specifically found that the prosecution had laid the proper foundation for admission of the evidence, ruling that counsel's concerns were relevant to the weight of the evidence, not to its admissibility. Thus a separate or formal finding here was unnecessary. Further, the court had all the relevant evidence in front of it. There is no possibility that had the defense expert testified, instead of submitting a declaration, that the court would have found otherwise. There was no abuse of discretion.

### E. The Court Properly Denied Jackson's Request to Exclude the Manila Envelope, Ruling That the Effect of Ninhydrin, if Any, Was A Question for the Jury

Jackson contends that the trial court erred when it denied his request to exclude the manila envelope because it had been sprayed with ninhydrin, making any evidence gathered using it unreliable. (AOB 218-227.) The

court properly ruled that whether or not the ninhydrin affected the scent on the envelope was a question of weight, not admissibility.

During the investigation, Criminalist Ellis collected the manila envelope from Ms. Myers' bed and processed it for fingerprints using ninhydrin. He then put the manila envelope into a sealed envelope called a K-pack. (15 RT 2922-2927.)

At trial, defense counsel requested an evidentiary hearing to determine whether or not the envelope had been contaminated by the ninhydrin. (13 RT 2658- 2660.) The court denied counsel's request, ruling:

> The issue before the Court, as I see it, is whether or not the introduction of the ninhydrin chemical on the envelope has so compromised any scent on the envelope that, No. 1, either it's totally inadmissible because it's been so compromised it has no validity, or, No. 2, does it go to the weight of the evidence? And at this point in time I think it goes to the weight of the evidence.

(13 RT 2661.)

In order to show that the ninhydrin did not affect Jackson's scent on the envelope, the prosecution had its experts conduct dog trails using ninhydrin-treated envelopes. Officer Lowry conducted a trail with his bloodhound, Joey, to see if Joey could follow a scent trail from an envelope that had been treated with ninhydrin. (17 RT 3241.)

Officer Lowry had his mother, who lived in a different part of town, take a new envelope and put money in it, and place the envelope between the mattress and box springs of her bed. Later that day, Lowry sent his "decoy", Kristina Lopez, to retrieve the envelope. Lopez had never been to the residence before. Lopez removed the envelope from under the mattress, took the money and put it in her pocket, crumpled up the envelope and tossed it on the bed. After a couple of minutes Lopez put the envelope in a plastic bag, sealed it, and then put the bag into another plastic bag. The

bags were then put into a brown grocery bag and given to Officer Lowry. Officer Lowry took the envelope to the police station where a forensic technician treated it with ninhydrin spray as if he was looking for fingerprints, using the same type of ninhydrin spray that was used in this case. The technician allowed the envelope to dry for eight minutes and then put it in a K-pack, sealed it with evidence tape, and placed it back in the brown bag. Officer Lowry took the bag home and left it in his basement overnight. (17 RT 3243-3246.)

The next day Officer Lowry took the bag and his dog Joey, and traveled to a community park where he had Lopez hide. Officer Lowry chose this location because it was heavily traveled. He wanted as much "contamination" as possible for Joey, to make it as difficult as possible to trail. (17 RT 3246-3252.) Officer Lowry put Joey's harness on and presented the envelope to him. Joey followed Lopez's trail almost exactly, and was able to locate and alert on her demonstrating that the ninhydrin spray did not destroy Lopez's scent on the envelope. (17 RT 3256-3264.)

Dr. Harvey also conducted dog trails to determine whether ninhyrdrin spray had an effect on human scent. (17 RT 3334.) Dr. Harvey worked with the San Bernardino Police Department in conducting her study, in much the same way Officer Lowry had conducted his study. Dr. Harvey conducted multiple trails using three different dogs, at six different locations. (17 RT 3334-3338; 18 RT 3346.) All of the dogs were able to successfully trail each time. (18 RT 3349.)

Thus, the court heard argument from both counsel, and heard expert testimony that ninhydrin does not destroy scent. It also heard Deputy Coby Webb testify that if there was no scent on the envelope, Maggie would not have trailed, but instead would have just circled at the starting point. (18 RT 3500.) Moreover, the court heard the evidence that Maggie was presented with the envelope and that she then followed Jackson's complex

path through the police station and alerted on him. The court acted within its discretion in determining that the prosecution had laid the proper foundation, and that defense counsel's concerns went to the weight of the evidence, not its admissibility, and properly denied counsel's request to exclude the envelope.

Jackson argues, however, that the ninhydrin experiments were themselves inadmissible, and without them the prosecution would not have been able to show that the envelope had not been contaminated. (AOB 223-227.) As set forth above, the court's decision to admit evidence will not be disturbed unless the court abuses its discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1167.) The court acted well within its discretion in denying Jackson's motion to exclude the ninhydrin studies evidence..

Defense counsel moved to exclude the controlled studies conducted by Dr. Harvey and Officer Lowry, arguing that the experiments were not relevant, and were more prejudicial than probative, essentially because the conditions under which the studies were conducted were not identical to the facts of the case. (17 RT 3144-3145.)

The court overruled counsel's objection, ruling:

> From the Court's standpoint, as far as my ruling is concerned, the Court acknowledges the conditions as far as a study or experiment, the conditions need not be identical. The controlling factor is whether or not they are substantially similar to the point that where the results of the experiment or studies have some tendency to prove or disprove a disputed fact. In this particular case, it gets back to basically a relevancy evaluation. ... and it does appear to the Court that the study or experiment done by Dr. Harvey and Mr. Lowry is relevant in this case, because it does have some tendency to prove or disprove something in contention, and that is the narrow issue of whether or not ninhydrin has some effect on dissipating the human scent or destroying it. So with that said, the Court finds the People

have met their burden to establish the preliminary fact of relevancy.

(17 RT 3147-3148.)

As the court pointed out, a narrow but important issue at trial was whether ninhydrin had the effect of dissipating human scent left on an envelope. Thus, the ninhydrin studies conducted by Dr. Harvey and Officer Lowry were clearly relevant. Jackson argues that even so, the studies were "fundamentally unreliable," and had they been excluded he would have received a not guilty verdict. (AOB 227.) However, the evidence itself demonstrated the reliability of the prosecution's ninhydrin experiments.

The jury heard how Maggie sniffed the envelope and then trailed Jackson's exact path directly to him at the Orange Street Station. (18 RT 3510-3517.) The jury extensively heard how reliable of a scent trailing dog Maggie was. This was proven by the unquestionably reliable trailings Maggie performed at Ms. Mason's home and at the Spruce Street Station – evidence which Jackson does not challenge on appeal. Regardless of any testimony regarding the ninhydrin, the only logical conclusion was that Jackson's scent was on the manila envelope found on Ms. Myers' bed, despite whether it had been stored in a K-pack for 40 days, or that it had been sprayed with ninhydrin in an attempt to lift fingerprints. In looking at all of the dog trailing evidence, the court properly determined the ninhydrin studies were reliable and did not abuse its discretion in overruling counsel's section 352 objection to that evidence.

### F. Dr. Harvey's Expert Opinion Was Based on Information Reasonably Relied Upon by Experts in Her Field and Was Properly Admitted

Jackson argues that the court erred in overruling his objections to the use of an STU in dog-scent research relied upon by Dr. Harvey because the STU has not been generally accepted in the science community within the

meaning of *Kelly*. (AOB 228-231.) Because Dr. Harvey's opinion was premised on information reasonably relied upon by experts in her field in forming their opinions, Jackson's argument is without merit.

During cross-examination defense counsel questioned Dr. Harvey about research conducted with bloodhounds, her opinion that bloodhounds can differentiate between scents, and that they were efficient at trailing humans. Counsel asked Dr. Harvey how scents were collected for use in dog-scent research studies. (18 RT 3420.) Dr. Harvey answered that a scent transfer unit was used. A scent transfer unit, or STU, is an "instrument that has a type of vacuum device that collects the scent onto a gauze pad made out of paper pulp." (18 RT 3420.) Counsel then asked Dr. Harvey whether the STU "is a device that's been accepted in [her] scientific community," of "the area of [her] research." (18 RT 3422.) Dr. Harvey answered that "[a]s far as the people doing scent research are concerned, Florida International University uses the scent transfer unit to collect scent, Oak Ridge Laboratories uses [it], the FBI uses it, and, yes, we use it." (18 RT 3422-3423.) Counsel then asked Dr. Harvey whether the STU has been accepted by a California court in a published court opinion. (18 RT 3423.) The prosecutor objected to this question as irrelevant. (18 RT 3423.)

Outside the presence of the jury defense counsel argued that the use of an STU has been "rejected" by two published decisions in California (*Mitchell* and *Willis*), and that Dr. Harvey's knowledge of those cases is relevant and "something the jury should hear." (18 RT 3423-2424.) The court noted that the STU was used "as a research tool." There's no evidence here that that instrument was used in any part of the identification of Mr. Bailey Jackson." The court also noted that the published decisions to which counsel was referring found only insufficient foundation for admission of the STU, not that the device was unreliable. (18 RT 3424.) The court sustained the prosecutor's objection, ruling:

> As far as instructing the jury that the device has not been approved in a court of law, I'm not going to do that, because it's apples and oranges. This is a research device. Certainly they are free to use any research device they want. If we're talking about the actual admissibility of an item of evidence, that's something entirely different.

(18 RT 3425.)

Evidence obtained through a new scientific technique may be admitted only after its reliability has been established. This requires proof that the technique is generally accepted as reliable in the relevant scientific community (*People v. Bolden*, *supra*, 29 Cal.4th at p. 544; *People v. Kelly*, supra, 17 Cal.3d at p. 30.) However, the *Kelly* test is inapplicable here. No evidence gathered using an STU was at issue during trial, nor is any at issue on appeal. Jackson's argument is essentially that Dr. Harvey's opinion lacked foundation, and that argument is without merit.

Expert testimony may be premised on material that is not admitted into evidence so long as it is material of a type that is reasonably relied upon by experts in the particular field in forming their opinions. (Evid. Code, § 801, subd. (b); *People v. Gardeley* (1996) 14 Cal 4th 605, 618-619; *People v. Montiel* (1993) 5 Cal. 4th 877, 918-919.) "So long as this threshold requirement of reliability is satisfied, even matter that is ordinarily inadmissible can form the proper basis for an expert's opinion testimony." (*People v. Gardeley*, *supra,* 14 Cal 4th at pp. 618-619.) A trial court's ruling allowing expert testimony is reviewed for abuse of discretion. (*People v. Mayfield* (1997) 14 Cal.4th 668, 766.)

There was no abuse of discretion here. Counsel was cross-examining Dr. Harvey about her published article in a peer-reviewed journal, on the abilities of bloodhounds to scent discriminate and to trail humans. Dr. Harvey testified that experts in her field routinely use an STU. That is all that was required. The fact that an STU was used to collect scents to

conduct some of the studies reported in the article does nothing to invalidate Dr. Harvey's opinion that bloodhounds are reliable in these areas.

### G. Admission of the dog trailing evidence did not violate Jackson's constitutional rights

Jackson argues that because the dog trailing evidence was admitted without a *Kelly* or an Evidence Code section 402 hearing, and without the ability to cross-examine the bloodhound, Maggie, his state and federal constitutional rights were violated and reversal is required. (AOB 232-236.) As set forth above, the dog trailing evidence and attendant expert testimony were properly admitted. Even if it were not, any error was harmless.

The admission of evidence results in a due process violation only if it makes the trial fundamentally unfair. (*Estelle v. McGuire* (1991) 502 U.S. 62, 70 [116 L. Ed. 2d 385, 112 S. Ct. 475]; *People v. Falsetta* (1999) 21 Cal.4th 903, 913 ["The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair"].) Absent fundamental unfairness, state law error in admitting evidence is subject to the traditional Watson test: The reviewing court must ask whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. (*People v. Partida* (2005) 37 Cal.4th 428; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Here, Jackson characterizes the "remaining evidence against [him]" as "very weak." He contends that the Van's shoe print could have been made by 20,000-30,000 other pairs of shoes, that his confession to the police was "at most suggestive, and certainly not probative." The same goes, he argues, for the "suggestions" that he drove Ms. Myers' car to Las Vegas,

and that the bleach stains on his clothes were from the same bleach poured on Ms. Myers' carpet. (AOB 234.)

Jackson's self-serving version of the facts omits the most important details -- the extraordinary similar circumstances of the crimes. Two elderly women, both of whom lived alone, in the same neighborhood – Jackson's neighborhood – were attacked within weeks of each other. Both women were attacked late at night, and on both nights Jackson was unable to credibly account for his whereabouts. Jackson's neighbor and girlfriend reported that Jackson was out in the neighborhood on both of these occasions. Additionally, shortly before each woman was attacked and property taken, Jackson's request of a neighbor to borrow money had been refused.

Moreover, notwithstanding that no one in Jackson's family knew Ms. Myers, a newspaper clipping about her disappearance was found in the bedroom Jackson maintained in his parents' home. (13 RT 2727-2729.) Additionally, Jackson "disappeared" for a couple of days following Ms. Myers' disappearance. Ms. Myers' car was found in Las Vegas, a city Jackson had lived in and was familiar with, and a place his friend, Taufaao, reported that he had gone around that same time. (14 CT 3939-3941, 3945.) Jackson's father drove a Greyhound bus back and forth from Riverside to Las Vegas, and Jackson was able to ride the bus for free. Jackson's girlfriend had Nevada Bell prepaid phone cards in her purse, and said she may have gotten them from Jackson's dad. (20 RT 3825-3828.)

In addition to all of these incredibly incriminating facts and circumstances, Jackson admitted killing Ms. Myers to the police. While Jackson considers his confession "at most suggestive," it is far more than that. He provides specific details of how he killed Ms. Myers in her home, dragged her into her car, and then dumped her body in an unknown location. No other person matching any part of Jackson's story, other than

Ms. Myers, was reported missing anywhere near the time of her disappearance.

So perhaps if one looked at each fact and circumstance individually, each one might be "at most suggestive" of Jackson's guilt. However, in looking at the evidence as a whole, even without the dog trailing identification at the Orange Street Station, every piece of evidence presented leads to the same, singular conclusion – that Jackson was responsible for Ms. Myers' murder. Accordingly, the admission of the dog trailing evidence certainly did not render Jackson's trial fundamentally unfair, and there is no reasonable probability he would have received a more favorable verdict had it been excluded.

## III. THE TRIAL COURT PROPERLY OVERRULED COUNSEL'S OBJECTION TO THE ADMISSION OF PICTURES OF THE BLOODHOUND THAT TRAILED JACKSON'S SCENT AND DENIED JACKSON'S NEW TRIAL MOTION REGARDING JUROR DISCUSSIONS WITH THE PROSECUTION'S EXPERT ABOUT A DIFFERENT DOG

Jackson argues that the court erred in allowing the prosecution to bring pictures of Maggie, the bloodhound, into court over his objection. (AOB 237-239.) The pictures were relevant, and were not unduly prejudicial. Jackson also complains the trial court erred in denying his motion for mistrial because jurors asked the prosecution expert's questions about her dog. The trial court properly denied the motion based on the absence of any prejudice from the discussion.

### A. The Photograph of the Bloodhound That Trailed Jackson's Scent Was Relevant and Properly Admitted to Support Deputy Webb's Testimony

Defense counsel moved to exclude the prosecution from bringing Maggie, or pictures of Maggie, into the courtroom, arguing that such evidence was not relevant, and that it should be excluded under Evidence Code section 352. (4 RT 1348; 18 RT 3476.) The prosecutor argued that

either bringing the dog into court, or allowing a photograph of the dog in court was relevant to help illustrate the testimony of Deputy Webb when she testified about Maggie's behavior and how trailing works. (4 RT 1352.) The court ruled that the prosecution could bring a picture of Maggie into the courtroom, but that it was unnecessary to bring the dog herself, noting that it may "engender some sympathetic responses from the jury, especially from pet lovers." (4 RT 1353.)

During trial, the prosecutor sought to introduce an exhibit board containing nine photographs: a photograph of Maggie by herself with her badge; one of Maggie and Deputy Coby Webb; one showing Maggie being harnessed, which is the start of the working procedure with the dog; three photographs showing Maggie trailing over various different types of terrain; and three photographs showing various forms of Maggie's alert on a find. (18 RT 3477.)

Defense counsel renewed his motion to exclude the photographs. The prosecutor argued that the photographs were relevant to complement Deputy Webb's testimony, and to illustrate and explain her testimony regarding how the dog works and the ability and nature of the bloodhound and Maggie's capability. The court denied counsel's request to exclude the photographs again, ruling that the "photographs do illustrate the dog working, in general terms, and I think it would probably be helpful for the jury to see the photographs so they can better understand the working conditions of the dog." (18 RT 3477.)

The trial court has broad discretion in determining the admissibility of evidence. (*People v. Scheid* (1997) 16 Cal.4th 1, 13.) The trial court's exercise of discretion in determining relevance and the admissibility of photographs will not be disturbed on appeal unless their probative value clearly is outweighed by their prejudicial effect. (*People v. Hughes* (2002)

27 Cal.4th 287, 336, citing *People v. Crittenden* (1994) 9 Cal. 4th 83, 133-135.)

Jackson contends that the court erred in allowing pictures of Maggie into the courtroom because the pictures were not relevant and "would inevitably invoke positive emotional responses in some jurors." (AOB 237-238.) The court properly determined that the pictures of Maggie were admissible to assist in putting Deputy Webb's testimony regarding Maggie's abilities and identification of Jackson into context. The court's ruling did not amount to an abuse of discretion.

Even if the court erred in allowing pictures of Maggie in the courtroom, any error was harmless. "Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded." (*People v. Heard* (2003) 31 Cal.4th 946, 978; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

Here, pictures of a dog, totally unrelated to either victim, were in the courtroom as a witness was testifying. Even if the pictures were unnecessary, is not reasonably probable the pictures affected the jury's verdict. This was not a situation where gruesome pictures of the victim may have impermissibly inflamed the jury's passions. This is a picture of a working dog whose work was relevant to issues in the case. The evidence against Jackson was overwhelming and viewing pictures of Maggie did not contribute to the jury's verdict.

### B. The Court Properly Denied Counsel's Request for a Mistrial

Next, Jackson contends that the court erred in denying his motion for a mistrial following an improper discussion between jurors and Dr. Harvey about her dog. (AOB 239-252.) Because the court's finding that no

prejudice occurred was supported by substantial evidence, Jackson's argument is without merit.

Following Dr. Harvey's testimony (and prior to Deputy Webb's testimony and introduction of the photographs of Maggie), while the parties were in chambers, some of the jurors asked Dr. Harvey questions about her dog. According to courtroom deputy Kevin Bacor, the questions had to do with the dog's size and were unrelated to the case. (18 RT 3439-3442.) The court spoke with the parties and then questioned each juror individually.

According to all of the jurors, a "few" jurors were interested in bloodhounds and the size of Dr. Harvey's dog. One juror asked Dr. Harvey how big her dog "Tank" was. Dr. Harvey spelled out 1-3-5 with her fingers. Dr. Harvey also said that when the dog stood up he was about five feet eight inches tall. (18 RT 3442-3473.) Each juror individually indicated that the exchange with Dr. Harvey would not affect them at all with regard to the case. (18 RT 3474.)

Defense counsel requested to dismiss jurors, or alternatively, for a mistrial, citing the improper contact between jurors and Dr. Harvey. The court denied counsel's request, ruling as follows:

> It does appear to the Court that no specific questions were asked about this case. I'm not trying to minimize what happened. I'm just trying to put it in proper context. The questions were general in nature regarding her dog or dogs. The jurors have represented to the Court that what transpired would not affect how they evaluate her credibility based upon the kinds of questions asked and her answers. It seems reasonably apparent that they wouldn't. The Court will be admonishing the jurors collectively when we bring them in.

(18 RT 3476.)

> When the jury was seated, the Court admonished it as follows:
>
> The record will reflect the jury is again seated. We will be starting up in just a moment. However, I would like to talk to

you as a group and talk about the admonishments that we have informed you about previously. It is very, very, very important that you have no contact with any witness in this case, period. And what happened this morning is unfortunate. It shouldn't have happened. And I'm admonishing all the jurors that anything that transpired during that session while the Court was with counsel going over the evidentiary issues, anything that transpired during that session, any questions asked or statements made by anybody involved in the conversations cannot be used at all in evaluating the evidence in this case or evaluating the credibility of a witness, and in particular evaluating the testimony of Dr. Harvey. Anything that you heard or anything that was said has to be put aside and this case evaluated on what is done in open court in front of the Court's view and in front of the attorneys, and that's the way it has to be.

If anybody cannot follow that admonition, I want to know now. Can you all follow that admonition? Can all of you put aside what you heard this morning and evaluate the testimony of Dr. Harvey based upon what you saw and heard in open court with the Court present?

The jury collectively responded "Yes."

(18 RT 3479.)

Jackson contends that the court abused its discretion when it determined that an admonishment was appropriate and denied his motion for a mistrial. (AOB 248-252.)

As a general rule, juror misconduct "raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted." (*In re Hitchings* (1993) 6 Cal.4th 97, 118-119, citing *People v. Cooper* (1991) 53 Cal.3d 771, 835; *People v. Holloway* (1990) 50 Cal.3d 1098, 1108.) Reversal is required when the court finds a substantial likelihood that the vote of one or more jurors was influenced by exposure to prejudicial matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. (*Ibid*, internal citations omitted.) "The ultimate issue of influence on the juror is resolved by

reference to the substantial likelihood test, an objective standard. In effect, the court must examine the extrajudicial material and then judge whether it is inherently likely to have influenced the juror." (*Ibid.*)

"This presumption of prejudice may be rebutted by an affirmative evidentiary showing that prejudice does not exist or by a reviewing court's examination of the entire record to determine whether there is a reasonable probability of actual harm to the complaining party resulting from the misconduct." (*In re Hitchings*, *supra*, 6 Cal. 4th at p. 119.) The presumption of prejudice may be dispelled by an admonition to disregard the improper information, and reviewing courts generally presume that jurors observe such instructions. (*People v. Zapien* (1993) 4 Cal.4th 929, 996.)

"A juror's unauthorized contact with a witness is improper. However, contact between a juror and a witness or between a juror and the defendant's family may be nonprejudicial if the contact was de minimis or if there is no showing that the contact related to the trial." (*People v. Cowan* (2010)50 Cal.4th 401, 507, internal quotation marks & citations omitted.)

In reviewing the trial court's ruling regarding a claim of juror misconduct, a reviewing court accepts the trial court's findings of historical fact if supported by substantial evidence, but reviews the question of whether prejudice arose from juror misconduct de novo. (*People v. Thomas* (2012) 53 Cal.4th 771, 819.)

Here, the jurors exchange with Dr. Harvey did not result in prejudice to Jackson. The questions the jurors asked were entirely innocuous and unrelated to the case. The information the jury received was simply the height and weight of Dr. Harvey's dog.

The court spoke to each juror, both individually, and as a group, and all jurors indicated that the exchange with Dr. Harvey would have no effect

on their duties as jurors. The trial court's finding that the exchange would not affect the how the jurors evaluated Dr. Harvey's credibility was supported by substantial evidence. Any presumption of prejudice was rebutted, and there was no reasonable probability of actual harm to the Jackson resulting from the misconduct. The court did not abuse its discretion in denying counsel's motion for a mistrial.

### C. The Court Properly Allowed Deputy Webb to Testify That Dogs are Colorblind

Next, Jackson contends that the court erred in overruling his objection to Deputy Webb's opinion about whether dogs are colorblind. (AOB 253-255.) Deputy Webb's opinion was proper and Jackson's argument fails.

During rebuttal the prosecutor recalled Deputy Webb to refute the defense testimony that the Orange Street station identification of Jackson was somehow tainted, including his claim that Maggie had alerted on Jackson because he was the only person wearing an orange jumpsuit. The prosecutor sought to show that Deputy Webb does not "cue [Maggie] in on" people in custody while doing station identifications, that dogs are colorblind, and that Maggie has eliminated suspects during prior station identifications. (20 RT 3913-3915.)

The prosecutor asked Deputy Webb if dogs are colorblind. She responded "yes," and counsel objected as to the foundation for Deputy Webb's opinion. The court overruled the objection. (20 RT 3916.)

"A person is qualified to testify as an expert if he has special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates." (Evid. Code, § 720, subd. (a).) "The qualification of expert witnesses, including foundational requirements, rests in the sound discretion of the trial court. That discretion is necessarily broad: "The competency of an expert is in every case a relative one, i.e. relative to the topic about which the person is

asked to make his statement. Absent a manifest abuse, the court's determination will not be disturbed on appeal." (*People v. Ramos* (1997) 15 Cal.4th 1133, 1175, internal citations omitted.)

Deputy Webb testified to the thousands of specialized hours she spent training dogs. She made her living training and working with highly trained dogs in law enforcement. The court's determination that she was qualified to testify as to whether dogs are colorblind was not a manifest abuse of discretion.

In any event, as Jackson acknowledges, this was "perhaps a small matter." (AOB 254.) He is correct. Had the court required the prosecutor to lay additional foundation for Deputy Webb's opinion, she no doubt could have done so, and her opinion that dogs are colorblind would have been admitted nonetheless. Moreover, Maggie followed Jackson's trail through the police station and located him before she ever saw his orange jumpsuit. There is simply no evidentiary support for Jackson's argument that Maggie only alerted on him because of the color of the clothing he was wearing. There is no reasonable probability that Jackson would have received a more favorable result had counsel's objection been sustained. (*People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Accordingly, his argument should be rejected.

### D. CALJIC No. 2.16 Was Sufficient to Instruct the Jury with Regard to the Dog Trailing Evidence

Jackson maintains CALJIC No. 2.16 was insufficient to warn the jury that dog trailing evidence requires significant corroboration, failed to advise the jury to view such evidence with caution, and impermissibly lightened the prosecution's burden of proof. (AOB 255-258.) Jackson specifically approved this instruction at trial and thus has waived his claim. In any event, the instruction is proper.

The court instructed the jury with CALJIC No. 2.16 as follows:

> Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes charged in Counts One, Two, and Three of the Amended Information, to wit: Murder, Burglary, and Robbery. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of these crimes. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of these crimes.
>
> The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.
>
> In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question.

(15 CT 4101.)

Defense counsel specifically approved the instruction as given. (21 RT 3937.) Jackson still argues that the trial court had a sua sponte duty to advise the jury to view the dog scent evidence with caution, and that it was of slight probative value. This argument was rejected by the Court of Appeal in *People v. Craig, supra*, 86 Cal.App.3d at p.917. (AOB 258.)

The instruction Jackson claims he was entitled would have advised the jury that dog trailing evidence:

> must be viewed with the utmost of caution and is of slight probative value. Such evidence must be considered, if found reliable, not separately, but in conjunction with all other testimony in the case, and in the absence of some other direct evidence of guilt, dog trailing evidence would not warrant conviction.

(*People v. Craig, supra*, 86 Cal.App.3d at p. 917.)

It is true, that even in the absence of a request, the trial court must instruct on general principles of law closely and openly related to the

evidence before the jury, which are essential to the jury's understanding of the case. (*People v. Najera* (2008) 43 Cal.4th 1132, 1136.) However, CALJIC No. 2.16 was sufficient to instruct the jury here, and no further instruction was necessary.

"A trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal...." (*People v. Lee* (2011) 51 Cal.4th 620, 638.) CALJIC No. 2.16 accurately stated the law. If Jackson believed the instruction required elaboration or clarification, he was obliged to request such elaboration or clarification in the trial court. (*People v. Lee*, *supra*, at p. 638.) Accordingly, Jackson has forfeited this claim.

In any event, Jackson's claim lacks merit. The court in *Craig* addressed the propriety of the jury instruction given there, to which Jackson contends he was entitled. The court rejected the defendant's argument that the jury should have also been instructed that the evidence of was slight probative value, noting that the instruction as given "treat[ed] the dog trailing evidence the same as any other evidence by allowing the weight given to it to be left to the discretion of the finder of fact. (Evid. Code, § 312.)" (*People v. Craig*, *supra*, 86 Cal.App.3d at at p. 918.)

In *People v. Malgren*, *supra*, 139 Cal.App.3d at pages 240-242, the court of appeal specifically held that there is no sua sponte duty to instruct a jury to view dog-scent evidence with caution so long as the instruction conveys that this form of evidence cannot alone form the basis for conviction and must be supported by other evidence at least as to its reliability.

The defendant in *Malgren* complained that the trial court erred in failing to instruct, sua sponte, with the language in *Craig*, "that such evidence should be viewed with caution, and is not alone sufficient to

warrant conviction." (*People v. Malgren*, *supra*, 139 Cal.App.3d 234.) The *Malgren* court agreed with the defendant that "[t]he principle that dog trailing evidence alone is not sufficient to warrant conviction was unquestionably a principle openly and closely connected with the facts before the court." The court disagreed, however,

> that the court was obligated to instruct that dog trailing evidence is of little probative value. Unlike accomplice testimony, dog tracking evidence is not inherently suspect because of a self-interested source. [Citation.] The notion that such evidence must be viewed with caution stems at least in part from a fear that a jury will be in awe of the animal's apparent powers and will give the evidence too much weight. [Citation.] In light of the stringent foundational requirements which must be met before such evidence is admissible at all, however, we see no reason to categorize that evidence thereafter as inferior or untrustworthy, and instruct that it be given less weight than other evidence. The *Craig* court itself suggested that what the law in this state actually requires is not that dog trailing evidence be viewed with caution, but that it be treated as any other evidence, with its weight left to the trier of fact.
>
> We hold, then, that the trial court should have instructed sua sponte that (1) when dog tracking evidence is used to prove the identity of a defendant, there must be some other evidence, either direct or circumstantial, which supports the accuracy of that identification evidence; and (2) in determining what weight to give such evidence, the jury should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the trailing in question.

*(Id.* at pp. 241-242.)

While this Court has not addressed the propriety of CALJIC No. 2.16, the First Appellate District, Division Three rejected Jackson's argument in *Malgren*, supra, 139 Cal.App.3d 234, and its reasoning is sound. This Court should adopt the reasoning of *Malgren* and hold that Jackson's jury was properly instructed that it could not convict on the dog-scent evidence alone, and nothing more was required.

Finally, in *People v. Gonzales* (1990) 218 Cal.App.3d 403, 407, the defendant complained that although the trial court instructed the jury with the factors as set forth in *Malgren* to guide the jury in determining the weight to assign to the dog-tracking evidence, it did not instruct that dog-tracking evidence required corroboration. The Fifth Appellate District agreed, holding that a jury must be required to find other evidence supporting the accuracy of the dog-tracking evidence. (*Id.* at p. 408.) It clarified, however, that "the corroborating evidence needed to support dog-tracking evidence need not be evidence which independently links the defendant to the crime; it suffices if the evidence merely supports the accuracy of the dog tracking." (*Ibid.*)

Against this backdrop, it is clear that CALJIC No. 2.16 incorporates all of the concerns expressed in *Craig*, *Malgren*, and *Gonzales* and thus properly guides jurors as to how to consider dog-scent evidence.

Jackson also complains that the language in CALJIC No. 2.16 "can be understood as permissive rather than cautionary," and as lightening the prosecution's burden of proof, comparing it to instructions on accomplice testimony. (AOB 259-264.) However, dog-scent evidence is in no way akin accomplice testimony, which jurors are instructed to view with caution:

> 'The rationale for requiring corroboration of an accomplice is that the hope of immunity or clemency in return for testimony which would help to convict another makes the accomplice's testimony suspect, or the accomplice might have many other self-serving motives that could influence his credibility.' [Citation.] For these reasons, 'the evidence of an accomplice should be viewed with care, caution and suspicion. . . .' [Citation.]

(*People v. Gonzales*, *supra*, 218 Cal.App.3d at pp. 410-411, quoting *People v. Belton* (1979) 23 Cal.3d 516, 525.) There is no such concern with a dog.

(*People v. Gonzales, supra*, 218 Cal.App.3d at p. 411; *People v. Malgren supra*, 139 Cal.App.3d at p. 241.)

Dog scent-evidence is more akin to evidence of possession of recently stolen property. CALJIC No. 2.15 addresses the inferences a jury may draw from a defendant's possession of recently stolen property. This instruction also requires corroboration, but does not state that a jury should view such evidence with caution. Dogs and property do not lie, unlike accomplices and informants. Rather, the concern with dogs and property is that there may be an innocent explanation for the dog's behavior just as there may be an innocent explanation for the defendant's possession of stolen property. This concern, however, is alleviated by the jury instructions for both dog-scent and recently-stolen-property evidence, which require corroboration. (See *People v. Najera* (2008) 43 Cal.4th 1132, 1138[13] [uncorroborated evidence of possession of recently stolen

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[13] This Court in *Najera* determined that there is no sua sponte duty to instruct pursuant to CALJIC No. 2.15 that a jury cannot convict based solely on the defendant's possession of recently stolen property. *(People v. Najera, supra,* 43 Cal.4th 1132, 1136.) Significantly, this Court compared the lack of a sua sponte instructional requirement with regard to possession of recently stolen property to situations in which sua sponte instructions have been required, including the *Malgren* court's requirement for sua sponte instruction on dog-scent citing to *Malgren.* (*Id.* at p. 1137, n. 2.) This Court noted "[t]he theory underlying the sua sponte duty . . . mirrors that discussed in the text above — i.e., not that the jury needs assistance in performing its assigned role of evaluating the sufficiency of the evidence under the legal rules provided elsewhere in the instructions, but that an extrinsic legal rule renders insufficient what would otherwise be evidence sufficient to sustain a verdict of guilt." (*Ibid.*, citing *People v. Gonzales, supra,* 218 Cal.App.3d at pp. 412-413 [requiring corroboration for dog-scent evidence due to concerns over reliability and inability to cross-examine].)

property is insufficient on its own to establish guilt as there may be an innocent explanation].)

Jackson next argues that CALJIC No. 2.16 lightens the prosecution's burden of proof. (AOB 261-264.) CALJIC No. 2.16 does not even address the burden of proof. There is no language in the instruction whatsoever to support Jackson's argument that is lowers the prosecution's burden to prove every element beyond a reasonable doubt.

The problems Jackson notes with dog-scent evidence throughout his brief speak to whether this evidence is trustworthy and reliable. These issues are resolved by the trial court prior to admitting dog-scent evidence in determining as to each particular dog in each particular case whether the foundational requirements for trustworthiness have been met. (*People v. Gonzales*, *supra,* 218 Cal.App.3d at p. 413.) Once the foundation has been satisfied, the jury is not instructed in any manner that the evidence is inherently reliable. To the contrary, the first sentence of the instruction informs the jury that dog-scent evidence is insufficient to warrant a guilty verdict. The instruction goes on to inform the jury that it must find other corroborating evidence that supports the accuracy of the dog-scent evidence. In light of these admonitions, CALJIC No. 2.16 properly instructed the jury and no further instruction was necessary.

Moreover, even if the jury had been instructed to view the dog-scent evidence as Jackson suggests, he would have been found guilty nonetheless. This was not a case dependent on dog-scent evidence. (Compare *People v. Gonzales*, *supra*, 218 Cal.App.3d at pp. 405-407 [dog smelled pillowcase found in path where man had been seen running from a burglarized home; dog led officers to defendant lying prone in tall grass a short distance away; instructional error prejudicial under *Watson* standard].) The defense exposed the limits and credibility of the dog-scent testimony such that the jury had plenty to consider when assigning weight

to this testimony. (19 RT 3642-3674.) The dog trailing identification was one factor among many pointing to Jackson's guilt, and it was not the most compelling. In light of Jackson's admission to the police, and the extraordinary similarities of the crimes against Myers and Mason, there is no probability, much less a reasonable one, that had the jury been instructed to view the dog-scent evidence with additional caution, Jackson would have achieved a more favorable outcome.

Finally, Jackson contends that any combined prejudice from the alleged errors related to the dog trailing evidence warrants reversal of his convictions related to Ms. Myers. (AOB 266.) As set forth above, no error occurred, and even if error is assumed, Jackson has failed to show prejudice. (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1316; *People v. Abilez* (2007) 41 Cal.4th 472. 523.)

## IV. THE COURT PROPERLY DENIED JACKSON'S MOTION TO SUPPRESS HIS STATEMENTS TO POLICE

Jackson argues that the trial court erred in denying his motion to exclude his statements to police because these statements were obtained in violation of his *Miranda* rights.[14] (AOB 267-279.) The trial court's finding that Jackson initiated further conversation after invoking his right to counsel is supported by substantial evidence, and therefore Jackson's argument fails.

It is well established that questioning must cease when a suspect invokes his or her right to remain silent "unless the accused himself initiates further communication, exchanges, or conversations with the police." (*Edwards v. Arizona* (1981) 451 U.S. 477, 485 [101 S.Ct. 1880, 68 L.Ed.2d 378]; *Miranda v. Arizona*, *supra*, 384 U.S. at pp. 473-474.) A

[14] (*Miranda v. Arizona* (1966) 384 U.S. 436, [86 S.Ct. 1602, 16 L.Ed.2d 694].)

defendant initiates such communication by actions that can "be fairly said to represent a desire on the part of an accused to open up a more generalized discussion relating directly or indirectly to the investigation." (*Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045 [103 S.Ct. 2830, 77 L.Ed.2d 405].)

A trial court's denial of a motion to suppress a defendant's in-custody statements is reviewed de novo. (*People v. Waidla* (2000) 22 Cal.4th 690, 730) However, "[t]he finding of 'initiation' in and of itself is 'reviewed for substantial evidence' as the resolution of a 'mixed question' of law and fact that is 'predominantly factual.'" (*Id.* at p. 731; see also *People v. San Nicholas* (2004) 34 Cal.4th 614, 642.)

The factual basis for Jackson's motion to suppress his in-custody statements was the DVD and transcript of the interrogation. (1 RT 11-17.) Jackson asserts he invoked his right to silence and did not reinitiate conversation with the police.[15] (1 RT 12.)

Jackson was interviewed by the police the morning following his attack of Ms. Mason. The officers read Jackson his *Miranda* rights prior to starting the interview, after which Jackson confirmed he wanted to speak with the investigators. (14 CT 3821.) During the interview, when it appeared that Jackson realized the police did not believe his story, he said "[m]an just take me to jail man. I don't wanna talk no more." (14 CT 3878.) Four minutes and 30 seconds later a different officer, Officer Sutton, asked Jackson if he was thirsty, and offered him some cold water. (14 CT 3878-3879.) The conversation continued:

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[15] Jackson also argued that the *Miranda* warnings were insufficient, and that the interview was coercive. Those additional grounds are not raised in this appeal. (AOB 271.)

JACKSON: No man what are you gonna do with me man?

SUTTON: I don't know, I mean, I'm on the outside. Don't know what's going on.

JACKSON: I need to speak to somebody right now man 'cause I need ...

SUTTON: Do you want them to come in and talk to you some more? Is that what it is?

JACKSON: No I need to find out what are they, what are they gonna do man, what is ..... .

SUTTON: Well I don't know, did you want them to come back in and talk to you some more is that it? If that's all, I'll go tell 'em.

JACKSON: Is my girl still here?

SUTTON: I, I'm manning a desk up front so I don't know.

JACKSON: How long am I gonna be here man?

SUTTON: Again, I'm sorry

JACKSON: If they don't let me out man I will fuck up this room right now man.

SUTTON: Well what you just need to do is just kinda take a deep breath and ...

JACKSON: Take a deep breath, what are you talking about man? I don't even have ...

SUTTON: Just kinda relax.

JACKSON: My medicine right now man.

SUTTON: What medication are you...

JACKSON: Uh I...

SUTTON: Supposed to have.

JACKSON: I'm supposed to have my you, can you get me some Haldol and cogentin.

SUTTON: ..... it's unlawful for me to dispense medication.

JACKSON: Well they, they need to come on and do what they need to do man.

SUTTON: Okay so you wanna talk to 'em again ..... I'll get then here and then you can talk to 'em some more and tell 'em everything you need to tell 'em okay, okay? Is that a yes or a no? Okay.

SUTTON: I just talked to ----. I'm sorry just chewing on sunflower seeds again, I just talked to Barnes and Joseph, they'll be in, in just a minute to talk to you okay?

JACKSON: I mean where I go from here man ..... .

SUTTON: They're the men to talk to about that, I, all I can say to you is I don't know, okay, they should be here in a minute or two, alright?

JOSEPH: I understand you wanted to talk to us still?

BARNES: Did you say you want to talk to us again Bailey, at your request?

JACKSON: Yes sir.

BARNES: Okay what's up.

JACKSON: I'm just, I'm sorry man, I, I just wanna ..... whatever, whatever you wanna write in there just write down in there uh you just, you know, put down there 'cause I know, I know I, you know what I'm say in', I know I did it.

BARNES: You know you did it

JACKSON: Yeah I know I did it okay?

BARNES: O kay what did you do.

JACKSON: Huh? Jackson then proceeded to describe how he killed Ms. Myers and dumped her body.

(14 CT 3879-3928.)

Officer Sutton testified at the hearing on Jackson's motion to suppress that the detectives had only asked him to watch Jackson while they were gone from the room. He stated that no one asked him to try to get Jackson to reinitiate the questioning. (3 RT 1285-1286.) After Jackson asked Officer Sutton to tell Detectives Barnes and Joseph he wanted to talk to them again, he did so, but did not tell the detectives why Jackson wanted to do so, or what Jackson wanted to talk to them about. (3RT 1287.)

Jackson moved to exclude his statements to the detectives at trial. The court heard testimony from the officers and watched a videotape of Jackson's interview. (3 RT 1303.) The court denied Jackson's motion to suppress his statements, ruling:

> First of all, on the issue concerning the invocation of *Miranda*, on page 24 of the transcript, tape number -- tape number seven that I'm working off of, is as soon as the defendant says, "Just take me to jail, I don't want to talk anymore," the interrogation is stopped immediately. And [Officer] Barnes states "Okay. Just relax." And they immediately leave, and this is all, of course, demonstrated on the video. And, thereafter, Officer Sutton comes in. There's no evidence that Officer Sutton was acting specifically as an agent on behalf of the interrogating officers to soften Mr. Jackson up. I accept Officer Sutton's testimony that he went in basically to see how Mr. Jackson was doing and offer him a drink. The video is the best evidence.
>
> Mr. Jackson initiates a conversation with Officer Sutton, and it's clear to the Court that Mr. Jackson initiates the further contact, or request to talk to Mr. –to Detective Barnes and Joseph. When Joseph and Barnes go back into the interview room, the first thing they ask Mr. Jackson is if he wants –whether or not he wants to talk to them. They verify that Mr. Jackson is initiating the contact, because if Mr. Jackson is not initiating the contact, the further interrogation of the defendant would be inappropriate and in violation of *Miranda*.

> And so when the officers go back in, and when the interrogating officer goes back in, their first order of business is to make sure that Mr. Jackson wants to talk and is initiating further contact. And when Mr. Jackson replies, "Yes, sir," they -- Detective Barnes makes the statement, "Okay, what's up"? And I think that's important because Detective Barnes is not focusing Mr. Jackson on any particular statement or issue in the case. He's basically saying what do you want to talk about. That could be what's going to happen to him, anything in general terms, but Mr. Jackson goes back in to talking about the particular offense.
>
> So I don't believe that this is in violation of *Miranda*. The Court rules that Mr. Jackson initiated the contact. The officers were acting in good faith and re-contacted Mr. Jackson for further interview.

(3 RT 1302-1304.)

> The court further found:
>
> As far as the issue of involuntary confession, again the videotape is the best evidence. The Court has reviewed the videotape. And taking note of the defendant's emotional state and demeanor, and the way he conducted himself in answering the questions, as well as the tone of the interview by the officers, the context of their questions, and how they propounded the questions to Mr. Jackson, I agree with [defense counsel] it's the totality of the circumstances. And taking the interview in its totality, the Court does not find that this interview or questioning technique was coercive; therefore, the motion is denied.

(3 RT 1304.)

Here, Jackson contends that the detectives had a duty to re-read him his *Miranda* rights after Jackson indicated to Officer Sutton that he wanted to talk to Detectives Barnes and Joseph again. (AOB 273-279.) However, as the court noted, the record shows that Jackson clearly re-initiated contact with the detectives.

In *Bradshaw*, the Supreme Court found the defendant, who had used almost the exact language that Jackson did here, had chosen to initiate further discussion with the authorities, and that it was indicative of a desire

for generalized discussion about the case. There, during the interrogation, the defendant asked for an attorney, and the officer's questioning ceased. (*Oregon v. Bradshaw*, *supra*, 462 U.S. at pp. 1041-1042.) At some point thereafter, the defendant asked, "Well, what is going to happen to me now?" The officer responded that the defendant, having requested an attorney, did not have to speak to him. The defendant said he understood, and his subsequent actions resulted in statements later used against him. (Id., at p. 1042.) The Supreme Court, finding that the defendant had chosen to initiate further discussions about the case with the authorities, did not have his rights under *Miranda* violated. (*Id.* at pp. 1044-1046.)

> Although ambiguous, the respondent's question in this case as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation; it was not merely a necessary inquiry arising out of the incidents of the custodial relationship. It could reasonably have been interpreted by the officer as relating generally to the investigation.

(*Id.* at pp. 1045-1046.)

Here, Jackson expressly affirmed his desire to speak with detectives. Jackson argues that his statement to Officer Sutton could only be interpreted as "he wanted out of that room!" (AOB 275.) However, after hearing and watching the tape of the entire interview, the trial court drew a different inference, making a "'predominately factual'" finding, which is supported by substantial evidence. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 731; see also *People v. Bradford*, *supra*, 15 Cal.4th at p. 1311 [substantial evidence review includes trial court's resolution of disputed inferences].)

Since Jackson initiated further conversation, the trial court did not err in failing to grant Jackson's motion to suppress his subsequent statements.

## V. THE COURT PROPERLY ADMITTED THE EVIDENCE OF AN EXPERIMENT CONDUCTED BY CRIMINALIST MARK TRAUGHBER

Jackson argues that the court prejudicially erred in admitting evidence of an experiment conducted by criminalist Mark Traughber. (AOB 280-283.) The court properly admitted the testimony and Jackson's argument is without merit.

> A party who seeks to introduce experimental evidence must show as foundational facts that the experiment was relevant, that it was conducted under conditions the same as or substantially similar to those of the actual occurrence, and that it will not consume undue time, confuse the issues, or mislead the jury. The party need not, however, show that the conditions were absolutely identical. Under Evidence Code section 352, the trial court has wide discretion to admit or reject experimental evidence.

(*People v. Jones* (2011) 51 Cal.4th 346, 375-376, internal citations omitted.)

Reversal is warranted only when a trial court's decision to admit or exclude such evidence demonstrates a clear abuse of discretion. (*Ibid.*)

During direct examination, the prosecutor asked Traughber about the large stained area on the carpet in Ms. Myers Myers' hallway.[16] Traughber testified that he screened the area of the carpet, including the carpet padding, for blood, and the area tested negative. (12 RT 2627-2628.) The only place Traughber found blood was on the hallway heater vent. (13 RT 2687.) Traughber testified that if bleach is poured onto any biological fluid, it will destroy the DNA. Also, that bleach would soak through the carpet, the carpet pad, and to the floor. (12 RT 2628.)

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[16] Detective Ellis had previously testified that the stain appeared to be bleach, and that a bleach bottle was located right inside the hallway bathroom on the floor. (7 RT 1777-1779; 8 RT 1847.)

During cross-examination Traughber testified that there was no way to test whether the carpet stain in Ms. Myers' hallway was caused by bleach. (13 RT 2691.) Counsel asked Traughber whether he conducted testing or experiments to determine whether pouring bleach on a bloodstain would obliterate the blood stain. Traugher responded that he already knew that to be true, based on common knowledge. (13 RT 2692.) He stated that bleach "will clean blood. It will destroy DNA. It basically oxidizes [makes colorless] everything." (13 RT 2692-2693.) Counsel asked Traughber if bleach would destroy the appearance of blood on carpet as it destroys the DNA, and whether bleach would destroy seminal fluid. Traughber responded that it would. (13 RT 2700.)

During rebuttal, in response to counsel's cross-examination, the prosecutor sought to introduce experiments Traughber had done at his request to show that bleach destroys blood. (16 RT 3113.) Defense counsel objected to the admission of the experiments, arguing that because the conditions were not exactly the same, the evidence was irrelevant. The court overruled the objection. (16 RT 3112-3114.)

Traughber explained his experiment as follows: He took a piece of carpet in the laboratory and poured bleach on it. He testified that the bleach smell was on the carpet the following day, but after the first day there was no bleach smell. His conclusion was that sodium hypochlorite [the active ingredient in bleach] is very reactive, but it is all consumed reacting with carpet, decomposing on its own, or both. Traughber also tested the effect of bleach on a drop of his own blood, and explained that the bleach completely destroyed the blood. Further, after pouring bleach on an unreactive plastic surface and leaving it to dry for four days at room temperature, Traughber concluded that bleach decomposes on its own. (16 RT 3117-3124.)

The court properly overruled counsel's objection to this testimony. Here, defense counsel questioned Traughber about the effect of bleach on blood during cross-examination, making his experiment testing relevant to that exact question. Further, while the conditions may not have been identical, they were substantially similar. This was not a highly technical experiment – it essentially consisted of pouring bleach on carpet to see what happens. The fact that Traughber conducted the experiments in the lab rather than recreating the exact same conditions present in Ms. Myers' home does not make the evidence inadmissible.

In any event, the admission of the experiments was harmless. Overwhelming evidence supported the prosecution's theory that the stain in Ms. Myers' hallway was the result of bleach used to clean up blood. Detective Ellis testified that the large stain in Ms. Myers' hallway appeared to be bleach, and that a bleach bottle was located out of place nearby. Ms. Myers' family members also testified that the stain was a large bleach stain, and it looked like someone had "thrown bleach all over the place." (8 RT 1931, 1947, 2026.) Ms. Myers' blood was found on the heater vent in the same hallway. Traugher testified in response to defense counsel's questioning that bleach destroys blood and oxidizes any surface it touches. As Traughber pointed out, such information is common knowledge. (13 RT 2692.) Accordingly, it is not reasonably probable that Jackson would have received a more favorable result had the evidence not been admitted, and his argument should be rejected. (*People v. Watson, supra,* 46 Cal.4th at p. 836.)

## VI. THE COURT PROPERLY INSTRUCTED THE JURY THAT IT MUST FIND JACKSON FORMED THE INTENT TO STEAL PRIOR TO KILLING MS. MYERS, AND SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT HE DID SO

Jackson contends that the trial court failed to instruct the jury that to convict him of robbery, it must find the intent to steal was formed prior to Ms. Myers' death. He further argues that the evidence was insufficient to show when he formed the intent to steal from Ms. Myers. (AOB 284-292.) The court properly instructed the jury, and sufficient evidence supports the jury's findings. Jackson's arguments are without merit.

### A. The Jury Was Properly Instructed on Intent to Steal

"Robbery is 'the felonious taking of personal property in the possession of another, from [her] person or immediate presence, and against [her] will, accomplished by means of force or fear.' (§ 211.) The intent to steal must be formed either before or during the commission of the act of force." (*People v. Wallace* (2008) 44 Cal.4th 1032, 1077.)

The defense requested the court instruct the jury with CALJIC No. 8.81.17, which provides:

> To find the special circumstance(s) referred to in these instructions as murder occurring during the commission of a robbery, burglary or an attempt robbery or attempt burglary to be true, you must find beyond a reasonable doubt that the defendant specifically intended to rob and/or burglarize Ms. Myers prior to, or during the course of, the infliction of the fatal wound.

(15 CT 4197; 21 RT 3965-3966.)

The court instead instructed the jury with the relevant standard portions of CALJIC No. 8.81.17, as requested by the prosecution and the defense, which provided:

> To find that the special circumstance referred to in these instructions as Murder in the Commission of Robbery is true, it must be proved:

1a. The murder was committed while the defendant was engaged in the commission or attempted commission of a Robbery;

and

2. The murder was committed in order to carry out or advance the commission of the crime of Robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the Robbery was merely incidental to the commission of the murder.

(15 CT 4135.)

Jackson first contends that CALJIC 8.81.17 as given, failed to instruct the jury that it had to find Jackson formed the intent to steal while Ms. Myers was still alive in order to convict him of robbery and find the special circumstance true. (AOB 284-289.)

CALJIC No. 8.91.17 properly instructed the jury that it had to find Jackson committed the robbery while Ms. Myers was alive. It specifically instructs that the murder must have been committed while the defendant was engaged in the commission of the robbery, and that the murder was committed to carry out or advance the robbery, or to avoid detection. Thus, in order to find the special circumstance true, the jury necessarily found that Jackson intended to rob Ms. Myers before he killed her.

Further, the jury was instructed with CALJIC No. 9.40, (defining robbery); CALJIC No. 8.21(defining felony murder in the commission of a robbery); in addition to the after-acquired intent instruction (CALJIC No. 9.40.2); and the instruction regarding the concurrence of act and specific intent (CALJIC No. 3.31). (15 CT 4143, 4126, 4144, 4121.) As this Court has repeatedly held, these instructions together "adequately informed" the jury "concerning the point in time the intent to steal must have been formed." (*People v. Zamudio* (2008) 43 Cal.4th 327, 361, citing *People v. Hughes* (2002) 27 Cal.4th 287, 360; *People v. Hayes* (1990) 52 Cal.3d 577,

626; *People v. Hendricks* (1988) 44 Cal.3d 635, 643.) Jackson's proposed instructions would "merely have elaborated on these general instructions" and the trial court's refusal to give them was not error. (*People v. Zamudio*, supra, 43 Cal.4th at p. 361; *People v. Hayes*, *supra*, 52 Cal.3d at p. 626.)

### B. Sufficient Evidence Supports the Robbery Conviction and Robbery Special Circumstance

Jackson contends that even if the jury was properly instructed, the evidence regarding when he formed the intent to steal was insufficient, requiring reversal of the robbery conviction and special circumstance finding. (AOB 290-292.)

The inquiry for sufficiency of the evidence is the same for a robbery conviction as it is for a robbery special circumstance, this Court views the entire record in the light most favorable to the prosecution to determine if it discloses "'substantial evidence – that is, evidence which is reasonable, credible and of solid value,'" such that a trier of fact could find the defendant guilty of the charged offense, or special circumstance, beyond a reasonable doubt. (*People v. Clark* (2011) 52 Cal.4th 856, 943.) "Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence." (*Id.*, internal quotation marks omitted.))'" The test on appeal is whether substantial evidence supports the conclusion of the trier of fact, not whether the evidence proves guilt beyond a reasonable doubt.'" (*People v. Johnson* (1980) 26 Cal.3d 557, 576, quoting from *People v. Reilly* (1970) 3 Cal.3d 421, 425.) Reversal on the basis of insufficient evidence is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction]." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

Jackson admitted to detectives that he was inside Ms. Myers' home late at night – uninvited, and that he eventually stabbed her, killing her. Ms. Myers' money and jewelry were missing. (14 CT 3881-3884.) This is

sufficient evidence that Jackson was in Ms. Myers' home with the intent to take her property. It is the most rational explanation for why he was in her home. When Ms. Myers interrupted Jackson, he decided to kill her.

Nevertheless, Jackson contends that the fact that he took only cash from one envelope and left behind other sums of money and valuables weighs against his forming the intent to steal prior to the murder. That Jackson left other items of value in Ms. Myers' home does not render unreasonable a finding that Jackson committed a robbery. (See *People v. Hughes, supra,* 27 Cal.4th at pp. 357–358.) "If a person commits a murder, and after doing so takes the victim's wallet, the jury may reasonably infer that the murder was committed for the purpose of obtaining the wallet, because murders are commonly committed to obtain money." (*People v. Carrington* (2009) 47 Cal. 4th 145, 187; *People v. Marshall* (1997) 15 Cal.4th 1, 35.)

Further, Ms. Myers was known to keep $3,000 - $4,000 in a manila envelope at a time, hence the evidence supported the reasonable inference that Jackson very likely took a substantial amount of money from her. (8 RT 1899-1900, 1917, 2020.) Jackson also stole Ms. Myers' car. "[W]hen one kills another and takes substantial property from the victim, it is ordinarily reasonable to presume the killing was for purposes of robbery." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 166 [internal quotation marks omitted]; *People v. Kelly* (1992) 1 Cal.4th 495, 529 [same].) Accordingly, the evidence was sufficient to support the jury's verdicts and findings on the robbery charges and the related special circumstance allegations.

## VII. THE ROBBERY SPECIAL CIRCUMSTANCE ALLEGATIONS DOES NOT VIOLATE THE EIGHTH AMENDMENT

Jackson argues that, as applied in the present case, the robbery special circumstance violated the Eighth Amendment to the federal Constitution

because it allowed the jury to impose death for an accidental killing. Jackson further claims that a lack of direct evidence as to what happened at the time of Ms. Myers' murder is evidence that he did not intentionally kill her. (AOB 293-303.) Jackson's claims have been repeatedly rejected by this Court and should be rejected here as well.

This Court has "repeatedly rejected the claim that an intent to kill or any other similar mental state is required under the Eighth Amendment in order to establish death eligibility for the actual killer in a felony murder, and [has] also rejected the related claim that the imposition of the death penalty under these circumstances fails to adequately narrow the class of death-eligible offenders." (*People v. Martinez* (2010) 47 Cal.4th 911, 966-967, citing *People v. Anderson* (1987) 43 Cal.3d 1104; *People v. Earp* (1999) 20 Cal.4th 826, 905; *People v. Stanley* (2006) 39 Cal.4th 913, 958, 968.)

Nevertheless, Jackson contends that under California law, the jury could have convicted him of murder during the commission of robbery even if the killing was accidental, without malice, or was committed while he was in a fugue state. (AOB 293.) Jackson told detectives he was in Meyers' home when she surprised him. He first punched her and then stabbed her with a machete-type knife. He put her in her car, and then a short time later he threw her out onto the highway. There is no evidence that the killing was accidental, without malice, or committed when Jackson was in a fugue state. He did not claim otherwise in his statement to police and no evidence shows anything other than the cold-blooded intentional killing of a defenseless elderly woman in her own home. Jackson's claim must be rejected.

## VIII. THE PROSECUTOR DID NOT COMMIT MISCONDUCT IN HIS GUILT PHASE CLOSING ARGUMENT

Jackson contends the prosecutor committed prejudicial misconduct during closing argument by making reference to other unrelated cases, and by arguing that Jackson committed sex crimes against Myers, which he argues was not supported by the evidence. (AOB 304-315.)

"'A prosecutor's misconduct violates the Fourteenth Amendment to the United States Constitution when it "infects the trial with such unfairness as to make the conviction a denial of due process." [Citations.] In other words, the misconduct must be "of sufficient significance to result in the denial of the defendant's right to a fair trial." [Citation.] A prosecutor's misconduct that does not render a trial fundamentally unfair nevertheless violates California law if it involves "the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury." [Citations.]'" (*People v. Clark* (2011) 52 Cal.4th 856, 960.)

When the alleged misconduct consists of remarks to the jury, "'the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we "do not lightly infer" that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements. [Citation.]'" (*People v. Brown* (2003) 31 Cal.4th 518, 553-554, quoting *People v. Frye* (1998) 18 Cal.4th 894, 970.)

> A defendant's conviction will not be reversed for prosecutorial misconduct, however, unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct. [Citation.] Also, a claim of prosecutorial misconduct is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury. [Citation.]

(*People v. Crew* (2003) 31 Cal.4th 822, 839.)

Jackson takes issue with the following comments made during the prosecutor's closing argument:

> It's a gross understatement to say that we live in a violent world. Our newspapers and our TV news inundate us with a steady stream of violent stories: Shootings, killings, robberies, rapes. It's become so commonplace we hardly pay attention to it anymore. We have almost become numb to it.
>
> Against this backdrop of violence, not to mention the war on terrorism but on our home front, there are still certain crimes, certain horrendous crimes that impact on our lives with all the subtlety of a bomb going off. It shocks our sensibilities and shocks our conscience.
>
> Who among us did not gasp in horror and disbelief when you heard about what happened to 12-year-old Polly Klaas, stolen from her home during a slumber party while her mother slept in another room, raped and murdered by some psychopath. Or what was your reaction when you heard about 5-year-old Samantha Runyon, kidnapped from in front of her home in Orange County, raped and murdered and her little naked body left on a roadway? Or Anthony Martinez, a 10-year-old in Beaumont, similarly kidnapped in front of his home? The implications of these crimes affect us all. We should be safe in our homes. We want to believe that we are.
>
> Yet another type of crime, equally monstrous, equally horrendous, but far more rare, occurring far less frequently than these horrendous crimes against children. When was the last time you heard reports or stories of someone targeting elderly single women for sexual assault and murder? These crimes are far more rare. The Night Stalker perhaps may come to mind, perhaps the Boston Strangler. That's just the point. Years and years may pass, decades may pass before you hear reports of crimes like this. It takes a sick, sadistic, perverted predator to target innocent, vulnerable, elderly women living alone for vicious sexual assault.

(22 RT 4041-4042; AOB 304-305.)

Jackson contends that the prosecutor "blatantly appealed to the passions and prejudice of the jury," by citing cases involving children, and

that mentioning Samantha Runyon could have no other purpose or effect. (AOB 308.)

As an initial matter, Jackson made no objections to any of the comments he now contends were misconduct and his claims are therefore forfeited. It is well established a criminal defendant may not complain of prosecutorial misconduct on appeal in the absence of a timely objection and a request for a curative admonition at trial. (*People v. Dykes* (2009) 46 Cal. 4th 731, 757; *People v. Stanley* (2006) 39 Cal.4th 913, 952.) Jackson attempts to circumvent forfeiture by arguing that trial counsel's failure to object here resulted in ineffective assistance of counsel. However, the Sixth Amendment does not require counsel to raise frivolous objections, and the failure to object rarely constitutes constitutionally ineffective legal representation. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 804–805; *People v. Boyette* (2002) 29 Cal.4th 381, 424.) It did not constitute ineffective assistance here.

In any event, Jackson's claims are without merit. The prosecutor's argument was not improper. He was laying out the theory of the case by pointing out how rare such violent crimes against elderly women were, and therefore the same person – Jackson – must have committed the crimes against Ms. Myers and Ms. Mason here. It was not error to point out that people are shocked by such violent crimes. The prosecutor did not provide the jury with graphic details of the other cases, he just stated that they had occurred. He was exercising his wide latitude to vigorously argue his case during closing argument. (*People v. Lee* (2011) 51 Cal.4th 620, 647.) No misconduct occurred.

Jackson also complains about the following statements made during closing argument:

> The person who attacked Gerry Myers, like the person who attacked Myrna Mason, their primary motivation wasn't theft. It

> was a concurrent or secondary motivation, yes. The primary motivation was something else: Violent, vicious sexual assault. (22 RT 4055.)
>
> Why do you think the defendant had to dispose of Gerry Myers's body? The rational conclusion is not to cover up a theft; to cover up a rape. He knew his DNA was in her body and that's why he had to get rid of her body and dispose of it. Otherwise why not leave her there like Myrna Mason? (22 RT 4055.)
>
> Again, this isn't a lot of blood for someone who has been violently murdered, suggesting she didn't bleed a lot from the manner in which she was killed, which suggests that it wasn't a stabbing like the defendant indicated in his statement but more than likely, based upon all the evidence that you have, she was strangled just like Myrna Mason during the vicious, violent sexual assault that was his primary motivation. (22 RT 4056.)
>
> Begin your analysis of the evidence in this case with the crimes that occurred on June 22nd, 2001, the crimes against Myrna Mason. Because it's the details of the commission of those crimes, the defendant's conduct in the commission of those crimes and afterwards, the evidence that was collected during the investigation of those crimes, and the defendant's statements when he was being questioned about those crimes that prove beyond a reasonable doubt that he is also the one who viciously attacked and murdered Geraldine Myers on May 13th, 2001.

(22 RT 2046; AOB 305-306.)

Jackson contends this argument was improper because there was no evidence that Ms. Myers was sexually assaulted, and because the prosecutor "attempted to reduce his burden...by stating, in effect, that the facts of the Mason case proved the Myers case beyond a reasonable doubt." (AOB 305, 309.) The prosecutor was properly arguing inferences from the evidence presented at trial.

The prosecutor's primary argument was that the crimes had very distinct similarities for which direct evidence existed, and those similarities were circumstantial evidence that Jackson also sexually assaulted Ms.

Myers. This was a reasonable inference drawn from the evidence. "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Abel* (2010) 53 Cal. 4th 891, 926; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179.)

And there is likewise no merit to Jackson's claim that the prosecutor was "attempting to reduce his burden." The burden of proof was not even mentioned in this part of the argument. The prosecutor's theory was that the similarity of the crimes proved the same person killed both women. This does nothing to lighten the prosecution's burden of proving every element of the charges and special circumstance allegation beyond a reasonable doubt.

Jackson also takes issue with the prosecutor's following comments made during rebuttal:

> We also know from that and from all the other little pieces of evidence Mr. Aquilina tried to pick apart here that on May 13th of that same year, some six weeks before, Bailey Jackson, and no one else, attacked and slaughtered Gerry Myers in her home and disposed of her body. (22 RT 4127.)
>
> The one thing you have to recognize, the one thing that's clear in this case, what that man's capable of, we know, what he did to Ms. Mason. When you put that together with all of the circumstantial and physical evidence, including his scent on that envelope at the scene of Gerry Myers's house, there is no doubt that he is the one that committed that crime. And when you find, and if you find that that dog tracking evidence, that station ID, despite the ninhydrin spray, is credible and reliable based on all the other circumstantial evidence in this case, that can't be reconciled with anything but his guilt. There is one obvious and only one conclusion you can come to. He is guilty of special circumstances first-degree murder. And you need to find him that.

(22 RT 4158-4159; AOB 305-306.)

Jackson contends that there was no evidence that Ms. Myers was "slaughtered" in her home. (AOB 306-307.) To the contrary. Ms. Myers was last seen alone in her home. When her family discovered her missing, they also discovered a large bleach stain in the hallway, and clothing and cleaning supplies out of place nearby. Ms. Myers was never seen again. Just as the arguments above, that Ms. Myers was killed in her home was a permissible reasonable inference drawn from the evidence. (*People v. Abel*, *supra,* 53 Cal. 4th at p. 926.) There was no error during closing argument. The prosecutor did not use deceptive or reprehensible methods to attempt to persuade either the court or the jury. And there was no error that rendered Jackson's trial fundamentally unfair. (*People v. Clark*, *supra*, 52 Cal.4th at p. 960.) Even had the prosecutor omitted the arguments Jackson complains of, there is no reasonable probability he would have received a more favorable result. (*People v. Crew*, *supra*, 31 Cal.4th at p. 839.)

## IX. THE TRIAL COURT HAD NO DUTY TO INSTRUCT THE JURY WITH CALJIC NO. 2.50 ABSENT A REQUEST

Jackson contends that the trial court should have instructed the jury, sua sponte, with CALJIC No. 2.50 [Evidence of Other Crimes] and that its absence allowed the prosecutor to "improperly conflate" the crimes against Ms. Mason with the crimes against Ms. Myers. (AOB 316-321.) The crimes against Ms. Mason were not "other crimes" within the meaning of CALJIC No. 2.50. The instruction was inapplicable and properly withdrawn.

The prosecution initially requested CALJIC No. 2.50, but withdrew the request at the instruction conference. Defense counsel did not object. (21 RT 3939.) Jackson argues that even though he did not request the instruction at trial, or object to its being withdrawn, the court should have nevertheless instructed the jury, sua sponte, with CALJIC No. 2.50.

CALJIC No. 2.50 provides as follows:

Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he/she] is on trial.

[Except as you will otherwise be instructed,] [This] evidence, if believed, [may not be considered by you to prove that defendant is a person of bad character or that [he/she] has a disposition to commit crimes. It may be considered by you [only] for the limited purpose of determining if it tends to show:

[A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [or] [the identity of the person who committed the crime, if any, of which the defendant is accused] [or] [a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offense[ s] defendant also committed the crime[s] charged in this case];]

[The existence of the intent which is a necessary element of the crime charged;]

[The identity of the person who committed the crime, if any, of which the defendant is accused;]

[A motive for the commission of the crime charged;]

[The defendant had knowledge of the nature of things found in [his/her] possession;]

[The defendant had knowledge or possessed the means that might have been useful or necessary for the commission of the crime charged;]

[The defendant did not reasonably and in good faith believe that the person with whom [he/she] engaged or attempted to engage in a sexual act consented to such conduct;]

[The crime charged is a part of a larger continuing plan, scheme or conspiracy;]

[The existence of a conspiracy].

> For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [You are not permitted to consider such evidence for any other purpose.]

(15 CT 4181-4182.)

Jackson argues that the instruction should have been given so as to instruct the jury on the limits of the sex crimes evidence against Ms. Mason when it was considering the crimes against Ms. Myers. (AOB 319.) Jackson is wrong. CALJIC No. 2.50 was properly withdrawn because it was inapplicable to his case. The instruction specifically applies to evidence that has been introduced for the purpose of showing that the defendant committed a crime "other than that for which [he/she] is on trial." (CALJIC No. 2.50, italics added.) The evidence against Jackson with regard to the sex crimes against Ms. Mason is not "other crime" evidence – Jackson was on trial for those crimes.

Moreover, as Jackson acknowledges, the trial court had no duty to give CALJIC No. 2.50 in the absence of a request. (*People v. Benavides* (2005) 35 Cal.4th 69, 94; *People v. Padilla* (1995) 11 Cal.4th 891, 950, overruled on another point in *People v. Hill* (1998) 17 Cal.4th 800, 822–823, fn. 1.) Jackson argues, however, that an exception recognized in *People v. Collie* (1981) 30 Cal. 3d 43, 64, applies to his case. (AOB 318-319.) Collie recognized there may be "an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie*, supra, 30 Cal. 3d at p. 64.) That is not such a case. The court had no duty to instruct the jury with CALJIC No. 2.50 because it was inapplicable and Jackson's argument to the contrary should be rejected.

## X. THE JURY WAS PROPERLY INSTRUCTED THAT IT HAD TO FIND JACKSON KNEW MS. MASON WAS ALIVE BUT UNCONSCIOUS WHEN HE ASSAULTED HER AS CHARGED IN COUNT 10

Jackson contends that the prosecutor's argument allowed the jury to convict him in count 10 on an improper theory, in violation of his Sixth and Fourteenth Amendment rights to a jury trial. (AOB 322-325.) The jury was properly instructed that it could convict Jackson only upon finding the prosecution proved every element of the crime beyond a reasonable doubt. Jackson's argument is without merit.

Jackson was charged in count 10, with sexual penetration of Ms. Mason by a foreign object while she was unconscious, in violation of section 289. (3 CT 716.) The court instructed the jury with CALJIC No. 10.33 as follows:

> Defendant is accused in Count Ten of having violated section 289, subdivision (d) of the Penal Code, a crime.
>
> Every person who commits an act of Sexual Penetration and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act, is guilty of a violation of Penal Code section 289, subdivision [(d)) [(e)], a crime.
>
> "Sexual penetration" is the act of causing the penetration, however slight, of the genital or anal opening of any person for the purpose of sexual arousal, gratification, or abuse by any foreign object, substance, instrument, or device, or by any unknown object.
>
> The words "foreign object, substance, instrument, or device" include any part of the human body, except a sexual organ.
>
> The "specific intent to cause sexual abuse," as used in this instruction, means a purpose to injure, hurt, cause pain or cause discomfort. It does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent.

> "Unconscious of the nature of the act" means the alleged victim was incapable of resisting because she was: a. Unconscious or asleep; or b. Not aware, knowing, perceiving, or cognizant that the act occurred;
>
> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person committed an act of sexual penetration upon another person;
>
> 2. The alleged victim was at the time unconscious of the nature of the act; and
>
> 3. The unconsciousness was known to the person committing the act; and
>
> 4. The penetration was done with the purpose and specific intent to cause sexual arousal, gratification, or abuse.

(15 CT 1454; [CALJIC No. 10.33. Forcible Acts of Sexual Penetration – Lack of Consent –Intoxicants, etc., -- Unconsciousness].)

Jackson contends that while sexual penetration with a foreign object as charged in count 10 required a finding that the victim be alive at the time of the act, "the prosecutor's argument suggested to the jury" that it could find Jackson guilty even if Jackson believed Ms. Mason was dead at the time of the sexual penetration. (AOB 232.)

The prosecutor argued to the jury:

> Penetration with a foreign object. The elements that need to be proven beyond a reasonable doubt dealing with this are sexual penetration, penetration of the sexual organs of the victim in this case. And in this case, while the victim was unconscious, which is shown by her statements and the condition she found herself in when she woke up, and it was done with the intent to gratify or abuse. As I suggested earlier, this wasn't an act of sexual gratification on the defendant's part. He was done with his sexual gratification. This was an act designed for abuse, defilement, and hate.

(22 RT 4071.)

Later in his argument, in discussing Jackson's statements to the police, the prosecutor told the jury:

> But he can't remember anything else he did? That doesn't make sense. You remember the oral copulation. That doesn't make sense. He knows what he did. He just doesn't want to talk about it. When you think about it, he is so sure that he didn't leave any sperm there is why he's comfortable in leaving her body there. The evidence indicates, and it's undisputed, he left her for dead. He strangled her until her ears bled. And then he positioned her body and put a rake in her for her to wake up with that when he lives four doors down?
>
> The defense wants you to believe that he is a bumbling, I think was the word they used, a bumbling type of criminal. But if you think about it, ladies and gentlemen, is he? Is he? Is there any physical evidence that he left at the Myrna Mason scene like the Gerry Myers scene? Is there anything he left there? There is her blood on his pants, the tiniest little drop. There is a shoe print in the dirt. That's outside. What is there of him there? One sperm. Not enough to get DNA off of.
>
> If she doesn't regain consciousness, he is home free. He knows the trash is coming the next morning. And you think 40 days from then, on June 22nd, you think two weeks from then that TV is still going to be at his place? Do you think there's anything that's connecting him? Is he a bumbling criminal? Saying he didn't clean that scene, there is no cleanup at that scene, what did he leave behind? Except Ms. Mason was still alive, and the defendant got caught by surprise.

(22 RT 4138-4139.)

Jackson argues that the prosecutor's statement that Jackson "had strangled Mason and left her for dead" invited the jury to convict Jackson even if it believed that he thought Ms. Mason was dead when he inserted a rake into her vagina. (AOB 324.) Jackson is taking the prosecutor's statement entirely out of context. In considering the prosecutor's full argument, not just the few lines Jackson includes in his brief, it is clear that the prosecutor was arguing that Jackson knew Ms. Mason was still alive –

but that he left her to die, knowing that he had not left any evidence behind, and thinking that she would ultimately die from the injuries he inflicted and he would be "home free." The prosecutor's argument in no way invited the jury to convict Jackson without finding every element of the charge beyond a reasonable doubt. The prosecutor specifically told the jury that count 10 required Ms. Mason to be "unconscious," and that Jackson believed he was "home free" if she did not regain consciousness. The prosecutor never argued that Jackson believed Ms. Mason was dead when he assaulted her. The prosecutor did not present a legally incorrect theory to the jury.

Moreover, the court also instructed the jury with CALJIC No. 1.00, in pertinent part:

> You must accept and follow the law as I state it to you, regardless of whether you agree with it. If anything concerning the law said by the attorneys in their arguments or at any other time during the trial conflicts with my instructions on the law, you must follow my instructions.

(15 CT 4085.) Jurors are presumed to understand and follow the court's instructions. (*People v. Yeoman* (2003) 31 Cal.4th 93, 139.) There is no support for Jackson's argument, and it should be rejected.

## XI. JACKSON RECEIVED A FAIR TRIAL

Jackson contends that the cumulative effect of the trial court's errors compels reversal of the judgment. (AOB 325-328.) His trial was conducted with due process and fairness, thus, this argument fails.

A defendant is entitled to a fair trial, but not a perfect one. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) Notwithstanding his arguments to the contrary, the record contains few, if any, errors, and no prejudicial error has been shown. To the extent any error arguably occurred, the effect was harmless. As shown in the arguments above, the record demonstrates that Jackson received a fair trial and the verdicts were supported by

compelling evidence. His claims of cumulative error should, therefore, be rejected.

## XII. CALCULATION OF JACKSON'S DETERMINATE SENTENCES

Jackson first argues that if this Court is persuaded by his contention in Argument X, then his sentence of 25 years to life imposed on count 10 should be reversed. (AOB 329-331.) As set forth above, Jackson's Argument X is without merit and there are no grounds upon which to reverse his sentence on count 10.

Next, Jackson argues that if this Court finds the evidence was insufficient to support his robbery conviction in count 3, as he argues in Argument VI (AOB 290-292), then his burglary conviction in count 2 must be stayed pursuant to section 654. (AOB 331-332.) This is so, argues Jackson, because without the robbery conviction, he could only be guilty of entering Ms. Myers' home to commit murder, and the crimes then constituted a single course of conduct within the meaning of section 654. (AOB 333.) As set forth above, sufficient evidence supports count 3. Jackson's argument is based on pure speculation. Moreover, Jackson committed the burglary of Ms. Myers' home well before he decided to murder her. It was not a single course of conduct. Jackson next argues that the court improperly imposed consecutive sentences on counts 2 (burglary of Geraldine Myers), 3 (robbery of Geraldine Myers), and 10 (sexual penetration with a foreign object of Ms. Mason), and that remand is necessary. He contends the court imposed consecutive sentences without making any findings with regard to whether the burglary of Ms. Myers was separate from her murder, or that the burglary and other crimes against Ms. Myers were committed on separate occasions. (AOB 333-334.)

As is pertinent to Jackson's argument here, the court sentenced Jackson to death for the murder of Ms. Myers as charged in count 1. (46 RT 7427-7428.) It then sentenced him to 25 years to life for count 10, and

25 years to life for the burglary of Ms. Myers in count 2, to be served consecutively to count 10, and another 25 years to life for the robbery of Ms. Myers charged in count 3. The court ordered the sentence on count 3 stayed pursuant to section 654. (24 CT 6896-6897; 46 RT 7432-7433.) Jackson's claim that the court improperly ordered the sentence on count 3 to run consecutively to the sentence on count 10 is without merit. (AOB 333.)

Section 654, subdivision (a), provides in relevant part: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision." Section 654 prohibits multiple sentences where a single act violates more than one statute, and where the defendant commits different acts that violate different statutes but the acts comprise an indivisible course of conduct with a single intent and objective. (*People v. Latimer* (1993) 5 Cal.4th 1203, 1209; *Neal v. State of California* (1960) 55 Cal.2d 11, 19-20.) The question of whether the defendant held multiple criminal objectives is one of fact for the trial court, and, if supported by any substantial evidence, its finding will be upheld on appeal. (*People v. Osband* (1996) 13 Cal. 4th 622, 730-731.)

Here, Jackson had committed the burglary of Ms. Myers' home well before he murdered her. According to his own statement, he did not know that Ms. Myers was home as he entered her home. He decided to kill her when he saw her. Accordingly, Jackson had separate objectives in committing those crimes and the court properly ordered the burglary count to run consecutive to the murder count.

Jackson also contends that pursuant to the pre-2006 version of section 667.61, his sentences for the sex crimes against Ms. Mason should not have been imposed separately. (AOB 335-33.)

At the time of Jackson's crimes, subdivision (g) of section 667.61, provided:

> The term specified in subdivision (a) or (b) shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified in subdivision ( a) or (b) shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.

For the purposes of Penal Code section 667.61, subdivision (g), sexual offenses occurred on a "single occasion" if they were committed in close temporal and spatial proximity. (*People v. Jones* (2001) 25 Cal.4th 98, 107.) Under this rule, a single sentence, rather than multiple sentences, is appropriate for "a sequence of sexual assaults by defendant against one victim that occurred during an uninterrupted time frame and in a single location." (*Ibid.*)

The holding in Jones dictates that Jackson's sexual crimes against Ms. Mason were committed "during a single occasion" within the meaning of that case. (See *People v. Jones, supra*, 25 Cal.4th at p. 107.) Therefore, Jackson's prison terms of 25-years-to-life for the sex crimes against Ms. Mason should have been imposed concurrently.

## PENALTY PHASE ARGUMENTS

### I. A PENALTY PHASE RETRIAL AFTER A JURY IS UNABLE TO REACH A VERDICT IS CONSTITUTIONAL

Jackson argues that where "the defense can show that post-trial discussions with jurors make clear that lingering doubt is what led to the hung jury," the prosecution should be barred from retrying the penalty phase, and barred from admitting evidence that was not admitted during the first penalty phase. (AOB 341-347.) Jackson does not offer a persuasive

reason for why this Court should adopt a position contrary to settled California law.

Section 190.4, subdivision (b), provides, in part: "If the trier of fact is a jury and has been unable to reach a unanimous verdict as to what the penalty shall be, the Court shall dismiss the jury and shall order a new jury impaneled to try the issue as to what the penalty shall be." Following a second hung jury, the trial court has the discretion to order a new jury or sentence the defendant to life imprisonment without the possibility of parole. (Pen. Code, § 190.4, subd. (b).) Here, the first penalty jury was unable to reach a unanimous verdict as to the appropriate penalty for Jackson, and thus a second penalty jury was impaneled, and it recommended the death penalty.

Jackson acknowledges that California law permits penalty phase retrials following a jury deadlock. (AOB 342.) Nonetheless, Jackson argues that his case is different because some jurors in his first penalty phase indicated a lingering doubt as to his guilt. Jackson contends that allowing a retrial under these circumstances violates the Double Jeopardy Clause. (AOB 345-347.) The United States Supreme Court has addressed the propriety of a penalty phase retrial in the context of a double jeopardy claim. In *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 107-110 [123 S.Ct. 732, 154 L.Ed.2d 588], the high court held that the double jeopardy clause did not bar a penalty retrial after appellate reversal of the capital defendant's conviction, notwithstanding that in accordance with Pennsylvania law, the defendant had been sentenced to life without parole following juror deadlock at the penalty phase. According to the Supreme Court, "the touchstone for double-jeopardy protection in capital-sentencing proceedings is whether there has been an 'acquittal.'" (*Sattazahn v. Pennsylvania, supra*, 537 U.S. at p. 109); accord *Poland v. Arizona* (1986) 476 U.S. 147, 155-57 [106 S.Ct. 1749, 90 L.Ed.2d 123] [holding no double

jeopardy violation in seeking death penalty upon retrial when defendant was not acquitted in the first capital-sentencing proceeding]; Cf. *United States v. Perez* (1824) 22 U.S. (9 Wheat) 579, 579-80 [6 L.Ed. 165] [holding discharge of deadlocked jury without consent of defendant and without acquittal does not bar retrial].) Given that the double jeopardy clause permits retrial following juror deadlock under such circumstances, it surely permits retrial following the juror deadlock in the case at hand.

Moreover, this Court has consistently held penalty phase retrials are constitutional. A penalty phase retrial after a jury is unable to reach a penalty verdict does not violate the Eighth Amendment or any other federal and state constitutional provisions. (*People v. Taylor* (2010) 48 Cal.4th 574, 633-634; *People v. Gurule* (2002) 28 Cal.4th 557, 645; *People v. Davenport* (1995) 11 Cal.4th 1171, 1192-1194[ penalty-phase only retrials are not unconstitutional per se, and do not violate rights to due process, equal protection of the law, a fair trial, or a reliable and proportional sentence, or analogous provisions of the California Constitution]. Accordingly, Jackson's argument is without merit.

## II. THE TRIAL COURT PROPERLY CONDUCTED VOIR DIRE AND IMPANELED TWO IMPARTIAL JURIES

Jackson argues that the trial court violated his constitutional and statutory rights to a fair trial by conducting a group, and not individual, voir dire, by asking prospective jurors leading questions, denying his request to ask case-specific questions during voir dire, and in preventing the defense from asking questions based on the specific facts of the case during death-qualification voir dire. (AOB 348-365.) The trial court properly exercised its discretion in denying Jackson's request for sequestered voir dire. There was no error.

Jackson requested an individualized and sequestered jury prior to both trials. The court properly denied both requests, adopting its ruling made in

response to the first request for both denials.[17] (27 RT 4883.) The court ruled as follows:

> As far as the sequestered voir dire of the jury, that request will be denied. The statutory scheme in California is to conduct jury voir dire in all cases, including death penalty cases, in the full view of the panel, unless good cause is shown otherwise. And in this particular instance, the Court will be proceeding in accordance with the statutory scheme. The *Hovey*[18] [ ] request for individual voir dire is denied. And also, just for the record, that's one reason why we give out questionnaires, so we can up front solidify some of these questions before actual voir dire occurs in front of other jurors. And I've conducted *Hovey* voir dire before in death penalty cases, sequestered voir dire and -- that was quite a number of years ago -- but in my opinion, and my observations, which I'm sure mean very little to the [S]upreme [C]ourt or federal California court, it has been my experience that it really doesn't make any difference whether it's sequestered voir dire or voir dire in front of the panel on the issue of death. Generally speaking, people maintain their opinion, whatever it is. So at any rate, that request will be denied.

(3 RT 1320-1321.)

Code of Civil Procedure section 223 provides in relevant part that "[v]oir dire of any prospective jurors shall, where practicable, occur in the presence of the other jurors ... ." Group voir dire may be "impracticable" when it has resulted in "actual, rather than merely potential, bias." (*People*

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[17] Jackson acknowledges that his argument that section 223 is unconstitutional has been repeatedly rejected by this Court (AOB 351, citing *People v. Taylor, supra,* 48 Cal.4th at pp. 604-605..) He has not provided any persuasive reason for this Court to revisit this issue.

[18] A "*Hovey*" voir dire is a procedure by which prospective jurors are asked individually about their views concerning the death penalty and may be excused if they would not vote to impose the death penalty under any circumstances. (See *Hovey v. Superior Court* (1980) 28 Cal.3d 1, 80–81.)

*v. Taylor*, *supra*, 48 Cal. 4th at p. 606; *People v. Vieira* (2005) 35 Cal.4th 264, 288.) This Court has repeatedly noted that "there is no federal constitutional requirement that a trial court conduct individualized, sequestered voir dire in a capital case. (*People v. Lewis*, *supra*, 43 Cal.4th at p. 494; *People v. Ramos*, *supra*, 34 Cal.4th at pp. 511–513.)" (*People v. Taylor*, *supra*, 48 Cal. 4th at p. 606.) Nor did the trial court's denial of the motion for individual, sequestered voir dire violate any of defendant's rights under the state Constitution or other state law. (*Ibid; People v. Lewis*, *supra*, 43 Cal.4th at p. 494; *People v. Waidla*, *supra*, 22 Cal.4th at pp. 713–714 [denial of motion for individual, sequestered voir dire reviewed for abuse of discretion].)

The trial court acted well within its discretion in determining that group voir dire was "practicable" here. The court was aware it had discretion to order individual, sequestered voir dire. For the reasons it stated, the court reasonably rejected Jackson's concern that "individual jurors are often hesitant and embarrassed to express their true attitudes and opinions in front of other jurors who are total strangers," requiring a departure from its usual practice of questioning prospective jurors in large groups. (4 CT 1088.) Moreover, as the court noted, prospective jurors received lengthy questionnaires to complete on their own time, which allowed them to answer questions privately. The trial court's approach to voir dire was reasonable on this record. (Cf. *People v. Ramos*, *supra*, 34 Cal.4th at p. 514 [group voir dire was practicable where the trial court used juror questionnaires and allowed counsel privately to question certain prospective jurors].) Accordingly, the trial court neither abused its discretion nor violated defendant's constitutional rights in denying Jackson's motion for individualized voir dire.

Jackson further maintains that the trial court asked leading questions that undermined the likelihood of obtaining a fair and "accurately death-

qualified jury." (AOB 356-360.) Jackson contends that even though the court asked jurors if they could set their personal feelings aside and follow the law -- and the jurors assured the court and parties that they could be fair and do so, that because it was a group setting, the jurors' assurances were unreliable. (AOB 359-360.) There is simply no basis for Jackson's claim. Jackson did not object to the manner of questioning and has forfeited this claim on appeal. In any event, Jackson's claim lacks merit. The court's manner of conducting voir dire will not be disturbed on appeal unless it renders the trial fundamentally unfair. (*People v. Whalen* (2013) 56 Cal.4th 1, 31; *People v. Carter* (2005) 36 Cal.4th 1215, 1250.) As set forth below, the court's manner of questioning jurors was proper.

Jackson points to the questions posed to two jurors. First, the questioning of Juror No. 1,

> ...
>
> Q: All right. And your father is retired LAPD?
>
> A: Yes, sir.
>
> Q: And you have a cousin in the FBI?
>
> A: That's correct.
>
> Q: Based upon your family connection with law enforcement, and obviously based upon your plans to be an FBI agent, nonetheless, do you feel you could be fair judge to both the parties in this case?
>
> A: Yes, sir.
>
> Q: All right. Police officers will be testifying in this case. Actually, at this point, if you recall the witness list and the questionnaire, there are a number of police officers who will be testifying. And as a judge in this case, you will be called upon to basically evaluate the credibility of all witnesses that testify, whether it be a defense witness or a prosecution witness, a police officer or a layperson, or anyone else, it's up to you as a judge in the case to judge their credibility, which means you

may believe them, you may not. You may accept part of their testimony; you may reject other parts. It's entirely within your discretion to do that. Under the law we expect you to do it fairly and not be biased because what a particular witness does for a living. That includes a police officer. If a police officer testifies, you can't give that individual any additional credibility simply because he or she is a police officer. Obviously, common sense tells you, you can evaluate their training, their education, their on-the-job experience, the presence of a bias, absence of a bias, all of those things, in evaluating testimony of a police officer, as well as any other officer. But you can't automatically say, Well, I'm going to be an FBI agent. My father is retired LAPD, so I'm going to probably adopt their testimony simply because they are a police officer. Would you do that in this case.

A: No, sir.

Q: Keeping in mind, police officers are human like anyone else?

A: Yes.

Q: Are you open to the idea that police officers can make mistakes?

A: Absolutely.

Q: Okay. I assume living with your dad for a number of years, from time to time, he may have made some mistakes?

A: I have been around enough in law enforcement to see them make mistakes.

Q: So nonetheless, you can be a fair judge in this case; is that correct?

Q: I believe so.

Q: On the issue of death, you put yourself just about in the middle, as far as your personal opinion is concerned. So the ultimate question is in this case: Are you equipped to listen to the evidence, weigh the evidence, weigh aggravation and mitigation in your own mind, give it whatever weight you think it deserves because it's a personal decision as a juror of the case,

give it whatever weight you think it deserves, weigh that and arrive at a just decision, whether it's death or life without the possibility of parole. Could you do that, based upon the evidence and you weighing the aggravating and mitigating circumstances in this case.

A: Yes, sir.

(28 RT 5313-5318.)

Jackson contends that the court "gave" Juror No. 1 "the answer" when it explained that the juror could not give police officers additional credibility simply because they were in law enforcement, and that Juror No. 1 essentially had no choice by to say that he would not do so. (AOB 358.) The court's explanation that law enforcement officers' testimony cannot be given additional weight simply because he or she is a police officer was entirely proper. Nothing in the court's questioning engendered a particular answer from potential juror.

Jackson also contends that the court's questioning of Juror No. 6 made it impossible to determine whether Juror No. 6 really meant it when he said he could be fair and impartial. (AOB 359-360.) The court questioned Juror No. 6 as follows:

...

Q: In your questionnaire, you also indicate that you are strongly in favor of the death penalty.

A: And as we were talking to Mr. Johnson [preceding prospective juror], and Mr. Johnson of course was honest in his responses, if we had a jury of 12 people that had a personal opinion consistent with Mr. Johnson, to wit, everyone convicted of murder should receive the death penalty, then the defendant obviously would not receive a fair trial, is that correct, [Juror No.6]?

A: That's Correct.

Q: Because, why are we even here if we have jurors who will automatically impose the death penalty? Kay? That's not the

law, as you know. But as far as your personal opinion is concerned, you are entitled to have any personal opinion you think is appropriate, as long as that personal opinion doesn't interfere with a juror following the law and participating in our trial. [Juror No.6], do you feel you could participate in our trial?

A: Yes.

Q: Even though you are strongly in favor of the death penalty, you feel that you can evaluate the evidence with an open mind, weigh that evidence, and realistically, if you are convinced after evaluating the evidence that life without possibility of parole is the correct decision in this case, realistically do you think you could vote that?

A: Yes.

Q: On the other hand, if after evaluating the evidence fairly, if you feel that death is the appropriate sentence, you would vote death?

A: Yes.

Q: So at this point in timer [Juror No. 6], are you open to both possible scenarios, depending on how you, [Juror No. 6], as the judge, evaluates the case?

A: Yes, sir.

Q: All right. [Juror No. 6], as far as if the evaluation of a police officer's testimony -- I think in your questionnaire you indicated that you were unsure about that do you remember that part of your questionnaire?

A: No, I don't, sir.

Q: Okay. You've heard my explanation now to [Juror No.1], as far as evaluating the testimony of a police officer?

A: Right.

Q: Do you feel you can evaluate the testimony of a police officer using the same standards or guidelines that you would evaluate anyone else?

A: Yes.

Q: And if a police officer testifies, they can make mistakes like anyone else? You have to listen to what they have to say, their demeanor on the stand, their attitude on the stand, whether they can recollect what they are testifying about, whether there's a bias, interest, or other motive, maybe exaggerate or fabricated, those are factors that you should be thinking about any time a witness testifies, including a police officer. Can you do that?

A: Yes.

Q: All right. And you have prior jury service back in the mid '70s; is that correct?

A: Correct, sir.

Q: With a drive-by shooting?

A: Yes.

Q: Anything about that experience which might affect your decision in this case?

A: No, sir.

Q: Through your job employment, you have been to, I believe, Norco State Prison, right?

A: Yes, sir.

Q: How long ago was that, sir?

A: Oh, it has been over a year since we did any work

Q: All right.

A: We work in communications. We were there to repair the communication system when it has problems.

Q: You also went to Patton State Hospital?

A: Yes.

Q: Did you form any opinions about Norco State Prison or the inmates? I don't know if you had any contact with the inmates,

but did you form any opinions about the state prison system which might affect your objectivity in this case?

A: I don't think so, no.

Q: Okay. And a general question, [Juror No. 6], would you like to -- would you like to say anything based upon what I've said earlier today, or anything in the questionnaire, or anything you've thought about since we last were in court last week? Anything that comes to mind?

A: No, I don't think so, sir.

Q: No. All right. Thank you, sir.

(28 RT 5325-5329.)

Jackson maintains "that it is entirely possible that Juror No. 6 would, indeed, make effort to be fair to appellant," but that because the court "led" the juror to his answers, and based on the dismissal of the Mr. Johnson because of his bias, no one can be sure. (AOB 359-360.) The court's questioning of Juror No. 6 was proper. The court's questions did not invite the juror to answer the questions in any particular fashion and there is no indication that the juror was anything but candid with the court. Jackson's argument is without merit, because a possibility of bias is not sufficient. The defendant in *People v. Vieira* (2005) 35 Cal.4th 264, made the same argument based on almost identical circumstances. This Court held that "[t]he possibility that prospective jurors may have been answering questions in a manner they believed the trial court wanted to hear identifies at most potential, rather than actual, bias and is not a basis for reversing a judgment." (*Id.*, at p. 289.) Jackson has failed to show any actual juror bias. As such, the trial court did not abuse its discretion in proceeding with group voir dire.

Finally, Jackson argues that the trial court erred in preventing the defense from asking questions based on the specific facts of the case during

death-qualification voir dire. (AOB 360-365.) Defense counsel did not object to the questions asked, and did not request specific questions be asked. The court's procedures adequately ascertained prospective jurors' attitudes on case-specific factors that might disqualify them to participate in a capital trial. Jackson's argument is without merit.

"[D]eath-qualification voir dire must avoid two extremes." (*People v. Cash* (2002) 28 Cal.4th 703, 721-722.) "It must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried," and "it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented." (*Ibid*, citing *People v. Jenkins* (2000) 22 Cal. 4th 900, 990-991 [not error to refuse to allow counsel to ask juror given "detailed account of the facts" in the case if she "would impose" death penalty].)"

The defense cannot be categorically denied the opportunity to inform prospective jurors of case-specific factors that would cause them to vote for death at the time they answer questions about their views on capital punishment. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1287.) By definition, such an opportunity arises where the trial court instructs all prospective jurors on such case-specific factors before any death qualification begins. (*Ibid.*) When prospective jurors are thereafter asked whether they would automatically vote for life or death regardless of the aggravating and mitigating circumstances, it is logical to assume that they have answered the question with those case-specific factors in mind, and are aware of the factual context in which the exchange occurs. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1287.)

Trial courts have "considerable discretion in deciding where to strike the balance in a particular case. (*People v. Zambrano* (2007) 41 Cal.4th

1082, 1120-1121, overruled on other grounds *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Champion* (1995) 9 Cal. 4th 879, 908.)

While the record contains no indication that defense counsel requested permission to ask potential jurors such questions, Jackson states that it is "clear" that counsel made such a request, and the request was denied. (AOB 360.) Jackson bases this argument on the following statement from the court to a prospective juror:

> Do you think, and again, I'm not going to allow the attorneys to give you specifically any facts in the case because I don't want the jury to start prejudging any of the facts, but do you think that rendering a death verdict in this case is a realistic possibility, depending upon how you evaluate the evidence?

(28 RT 5330.)

The court's statement does not suggest that defense counsel requested permission to ask jurors specific questions. And because the record does not reflect such a request, it is apparent that none was made. In any event, the trial court never ruled that prospective jurors were prohibited from learning about the circumstances of Jackson's crimes, or from considering them when expressing their views on capital punishment. The court provided the jurors with the circumstances of the case multiple times during voir dire.

At the outset of jury selection, before anyone completed either the preliminary or general questionnaire, and before jurors were orally examined about their answers on either written form, the court explained to the panel:

> ...
>
> As I indicated this is not a typical criminal trial. This is called a penalty phase trial. The jury selected in this case will be selecting 12 jurors, plus four alternates. And the jury ultimately in this case will be determining punishment. The district attorney in this matter is seeking the death penalty.

> In the matter of People versus Bailey Jackson a jury has previously found the defendant guilty of the first degree murder of 82 year-old Geraldine Myers on or about the 13th of May, 2001, the date of the murder. The same jury further found true special circumstance allegations that the murder occurred during the commission of robbery and burglary. The same jury found the defendant guilty of the sexual assault and deliberate and premeditated attempt murder of 84 year-old Myrna Mason, crime occurring on or about June 22nd, 2001. The jury ultimately selected in this case, as I indicated, will determine the issue of punishment...

(28 RT 5189-5191.)

Case-specific factors were also included in the preliminary questionnaire. The confidential questionnaire set forth the following facts:

> On May 13, 2001, 82 year-old Geraldine Myers disappeared from her home in the Brockton Arcade area of the city of Riverside, and she has not been heard from since.
>
> On June 22, 2001, 84 year-old Myrna Mason was robbed and sexually assaulted in her home in the Brockton Arcade area of the city of Riverside.
>
> The defendant, Bailey Jackson, has been charged with the special circumstances murder of Geraldine Myers, and with the attack on Myrna Mason.

(See eg. 23 CT 6558.)

The questionnaire then asked jurors specific questions regarding their feelings about capital punishment. Thus, jurors were well aware that the case involved sexual assault and the murders of two elderly women. The court's procedures in this case were adequate to ascertain the prospective jurors' attitudes on case-specific factors that might disqualify them to participate in the penalty phase of a capital trial. No error occurred. Moreover, there was no prejudice because Jackson fails to explain what additional inquiry was necessary for him to intelligently exercise a

peremptory challenge. (*People v. Ramos* (1997) 15 Cal.4th 1133, 1158.) Nothing about the voir dire was inadequate in terms of selecting a fair jury.

## III. THE COURT PROPERLY ADMITTED JACKSON'S STATEMENTS TO INVESTIGATORS

Jackson renews his argument that the court erred in admitting his statements made to investigators wherein he admitted killing Ms. Myers because the statements were obtained in violation of *Miranda v. Arizona*, *supra*, 384 U.S. 436. He maintains the error was compounded during the penalty phase because the court admitted an additional statement Jackson made to investigators while driving to the different locations where Jackson said he dumped Ms. Myers' body. (AOB 366-369.) As set forth above in Argument IV, the court properly admitted Jackson's statements to investigators made during the taped interview, there was no *Miranda* violation. The court also properly admitted Jackson's statement made to investigators during the car ride, as it was in the course of the same interview, and Jackson had not revoked his *Miranda* waiver.

On June 22, 2001, during the interview at the police station, Jackson agreed to drive with investigators towards Victorville, to show them where he disposed of Ms. Myers' body. The group then left the police station and drove towards Victorville. There was no break in the interview. (14 CT 3928.) While Jackson was in the car with Detective Barnes, Jackson told Detective Barnes that if he was involved in a murder he would dispose of the body, and would use bleach to clean up the murder scene. (33 RT 5777-5779.)

When the prosecutor asked Detective Barnes about this statement during the penalty phase, defense counsel objected that he had not had a chance to litigate the issue of Jackson's statement in relation to his *Miranda* rights. The prosecutor argued that the statements made during the car ride were all part of the same interview, and that the *Miranda* issue was litigated

during the guilt phase. The prosecutor maintained that there was no indication that Jackson ever revoked his *Miranda* waiver during the recorded conversation during the car ride. Defense counsel did not disagree. In listening to the recording of the car ride, defense counsel said "[t]here's comments made of a casual nature by a lot of people in the car but nothing having to do with this case." (33 RT 5778-5779.) The court overruled counsel's objection.

The prosecutor then asked Detective Barnes if he recalled Jackson saying that if he was involved in a murder, the first thing Jackson would do would be to get rid of the body, and that he would "throw down" some bleach to clean up the scene. Detective Barnes said he remembered Jackson making such a statement, and that was the end of the discussion of that topic. (33 RT 5777-5779.)

Here, Jackson contends that for the same reasons set forth in Argument IV, his admissions made during the car ride were improperly admitted during the penalty phase because he did not receive new *Miranda* warnings following his statement, "Man just take me to jail man, I don't wanna talk no more," made during the interview at the police station. (AOB 368-369.) As set forth above, Jackson initiated further contact with investigators. There was no break at all in the interview between the questioning at the police station, and the car trip to Victorville. No new *Miranda* warnings were required and Jackson's argument fails.

## IV. THE COURT PROPERLY ADMITTED THE DOG-SCENT EVIDENCE

Jackson argues that the trial court erred in denying his request for a *Kelly* or an Evidence Code section 402 hearing regarding the dog-scent evidence, denying his motion to exclude Dr. Harvey's expert testimony, and in admitting evidence of dog trails conduct in between the two penalty phase trials. (AOB 370-393.)

### A. Dr. Harvey's Testimony Was Properly Admitted in the Penalty Phase for the Same Reasons It Was Properly Admitted in the Guilt Phase Trial

At the second penalty phase Jackson renewed the pre-trial motions from the guilt phase, including his objections to the Orange Street station dog trail and the ninhydrin experiments. The court made the same rulings, denying Jackson's motions to exclude such evidence. (27 RT 2852-2853.) Jackson argues that this evidence was erroneously admitted at the penalty phase retrial for the same reasons it was erroneously admitted at the guilt phase trial, as set forth in Argument II. (AOB 370-371.) For the same reasons set forth in Argument II, the court properly admitted the evidence and Jackson's argument fails.

Jackson claims to raise two issues specific to the penalty phase. He argues that 1) the trial court improperly denied his motion to exclude Dr. Harvey's testimony about research in which she used an STU, and 2) that the court erred in admitting evidence of dog trailing conducted in between the two penalty phase trials. (AOB 372-393.)

At the penalty phase Jackson moved to exclude any testimony from Dr. Harvey regarding research where an STU was utilized, or alternatively, that the court order a *Kelly* hearing prior to its admission. (28 RT 4891.) The court clarified that the prosecution was not introducing any primary evidence of tracking based on the use of an STU. The court stated that it was not aware of any law requiring a *Kelly* hearing on the background qualifications of an expert, and denied the motion. (28 RT 4895- 4896.)

Jackson previously raised this issue with regard to Dr. Harvey's testimony at the guilt phase. (AOB 228-231.) While Jackson again contends that this presents a *Kelly* issue, it does not. As set forth in Argument II, above, no evidence gathered using an STU was admitted or even at issue, thus *Kelly* was inapplicable. Jackson's argument challenges

the foundation for Dr. Harvey's expert opinion, which as respondent explained in Argument II, supra, the court properly exercised its discretion in admitting.

Jackson contends that had Dr. Harvey been prevented from presenting her studies to the second penalty phase jury, Jackson would have been "virtually assur[ed] a different result." (377-379.) There is no basis for Jackson's position. Dr. Harvey's testimony regarding her studies of the reliability of bloodhounds was the same at both trials, the one that resulted in a deadlocked jury, and the trial in which the jury returned a death verdict. (17 RT 3329-3333; 37 RT 6481-6485.) The second penalty phase jury saw and heard Maggie identify Jackson multiple times, and it was able to assess her reliability independently of Dr. Harvey's research. The jury also heard all of the other evidence tying Jackson to Ms. Myers' murder, which, as the guilt phase jury determined, left no reasonable doubt that Jackson was guilty of the charged crimes.

Jackson further contends that the court erred in admitting dog trailing conducted between the two penalty phase trials. (AOB 379-389.)

In February 2005, Dr. Harvey participated in a station identification procedure at the San Bernardino Police Department with her dogs Shelby and Dakota. That location was chosen because Jackson had never been there before. (37 RT 6510-6511.) The trail began in the parking lot. Dr. Harvey presented Shelby with a scent pad and Shelby began to trail immediately. This indicated that Shelby found a match for the scent on the ground. (37 RT 6512-6513, 6599.) Shelby trailed through the sally port, and then into the building. Shelby smelled three doors and chose the door she wanted to enter. That door entered into a holding area for prisoners. Shelby trailed to one of two doors at the end of that corridor. After going through that door, Shelby was in a different corridor with eight locked jail cells. Shelby smelled all eight doors and ended up standing between doors

seven and eight. When door eight was opened at Dr. Harvey's request, Shelby entered. She smelled the multiple detainees in cell eight and did not make an identification of anyone. Shelby entered cell seven where Jackson was alone. She did not alert or make an identification of him. Shelby did not indicate that she wanted to continue on the trail. The trail was terminated at that time. (37 RT 6513-6516, 6520.)

Dr. Harvey then conducted the same trail with Dakota. Dakota was faster and seemed to pick up the scent more quickly than Shelby. Dakota went directly to cell seven. She walked in, smelled Jackson, and walked back out. Dr. Harvey was "not happy" with Dakota's identification because for Dakota to "alert" on someone, she is supposed to jump on them. Dr. Harvey asked Dakota to "show me" again, but Dakota refused. Based on her training and experience with Dakota, that meant that Dakota had already made the identification. (37 RT 6516-6518.) In Dr. Harvey's opinion, Dakota had identified Jackson's scent as being on the scent pad. (37 RT 6524.) The videotape of Shelby and Dakota trailing was played for the jury. (37 RT 6519.)

The defense expert, Dr. Lawrence Meyers, associate professor of veterinary medicine at Auburn University, had studied human scent and scent dogs since 1982. (42 RT 7114-7116.) Dr. Meyers had only worked with one bloodhound, in the 1980s, and had not currently participated in any studies on human scent and canine evidence. (42 RT 7178.) Dr. Meyers is not considered by other experts to be part of the scientific community related to human scent or scent evidence canine work. (42 RT 7177.) Dr. Meyers had been involved in research of dog trailing, but was not a member of any bloodhound organization. (42 RT 7118.) Dr. Meyers believes that some chemicals, both environmental and man-made, can contaminate human scent making it "difficult if not impossible" for dogs to detect. He stated that dogs can discriminate through some levels of

contamination. (42 RT 7124.) Dr. Meyers believed that Dr. Harvey cued Shelby and Dakota to stop at door number seven, and also cued the dogs by providing verbal encouragement. Dr. Meyers believed that the queuing of the dogs "called into question" the accuracy of the dog trailing. (42 RT 7148-7154.) Given that Dr. Harvey did not know Jackson's location, Dr. Meyers did not believe the queuing had any effect. (42 RT 7159.) Dr. Meyers attempted to discredit Dr. Harvey's opinions. He opined, based on the video tapes of Dakota and Shelby's trailings, that Jackson's scent was not on the scent pad presented to the dogs at the San Bernardino station. (42 RT 7154-7157.)

Dr. Meyers was aware of several studies testing the durability of human scent. In one study five sheets of paper with targeted odors were eradiated, a method that "will kill pretty much anything that has a cell membrane." Following the eradiation six dogs trailed to and correctly identified the target corresponding to the scent pad, establishing that human scents can survive eradiation. (42 RT 7164-7165.) In another study, four pieces of paper were sprayed with swimming pool chlorine and the bloodhounds were able to match the scents and trail to and correctly identify the targets. (42 RT 7165-7166.) In another case, the scent article was a letter that had been mailed, and then eradiated, before it was presented to the dog. The dog was able to trail from an intersection near the target person's house, to the house, even though the target person had moved six months prior. (42 RT 7182-7183.)

Jackson argues that Dr. Meyers' opinion, along with studies in the appendix of his brief, "highlight the unreliability of the San Bernardino trails," and the error in the court admitting them without a *Kelly* hearing.[18]

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[18] These articles are not part of the record on appeal and are improperly contained in the appendix. (Cal. Rules of Court, rule 8.204(d).)

(AOB 388-389.) For all the same reasons set forth above in Argument Two, a *Kelly* hearing was not required prior to admission of the dog trailing evidence at the penalty phase.

Jackson also renews his argument that the dog trailing evidence was admitted in violation of his right to confrontation outlined in *Crawford v. Washington*, *supra*, 541 at U.S. p. 36 and its progeny. (AOB 389-392.) As set forth above in Argument Two, the dogs behavior was not testimonial in nature, taking it out of the *Crawford* context. Moreover, Dr. Harvey, the dogs' handler, was available for cross-examination regarding the dogs' behavior and identification. Jackson's argument is without merit.

## V. THE TRIAL COURT PROPERLY ALLOWED SERGEANT JOHNSON TO TESTIFY THAT HE WAS NOT AWARE OF ANY OTHER HOMICIDE CASES IN WHICH THE VICTIM MATCHED THE DESCRIPTION OF MS. MYERS

Jackson contends that the court erred in allowing Riverside Police Sergeant Stephen Johnson testify that he was not aware of any homicide or abduction cases in the city or county of Riverside where the victim matched the description of Ms. Myers. (AOB 395-396.) This argument is without merit.

Sergeant Johnson testified that in May and June of 2001, he was a detective in the homicide unit of the Riverside Police Department. He assisted in the investigation of the disappearance and murder of Ms. Myers, and the attempted murder and sexual assault of Ms. Mason. (35 RT 6125-6126.) The prosecution asked Sergeant Johnson whether he was aware of any homicide or abduction cases involving an elderly woman with red hair who was taken from her home and dumped somewhere, other than Ms. Myers. Sergeant Johnson replied that he was not. Counsel objected on grounds of relevance, Evidence Code section 352, and due process. The court overruled the objection. (34 RT 6127-6128.)

Although he objected to Sergeant Johnson's answer on relevance grounds, section 352, and due process, Jackson now contends that it also lacked foundation because there was no evidence to show Sergeant Johnson "truly knew" if there had been another victim matching the description of Ms. Myers. (AOB 395-396.) Because he did not object on this ground below, Jackson has forfeited this claim. In any event, Sergeant Johnson had personal knowledge of the subject matter and the court properly overruled counsel's objection. (Evidence Code section 702, subdivision (a.)

Evidence Code section 702, subdivision (a) requires that "the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter." Sergeant Johnson was a detective in the homicide unit of the police department. He was assisting in the investigations of the crimes against both Ms. Myers and Ms. Mason. This is a sufficient foundation to show that Sergeant Johnson had personal knowledge of whether any other women matching Ms. Myers' description had been abducted or killed in the city or county of Riverside.

Jackson's claim that the court erred in overruling his objection on 352 grounds fails as well. "The [trial] court's exercise of discretion under Evidence Code section 352 will not be disturbed on appeal unless the court clearly abused its discretion, e.g., when the prejudicial effect of the evidence clearly outweighed its probative value." (*People v. Robinson* (2005) 37 Cal.4th 592, 625-626.) There was no abuse of discretion here. Jackson described to detectives how he killed an elderly woman with red hair, dumping her body in an undisclosed location. Sergeant Johnson's knowledge that there was no other case where the victim was a woman matching this description was highly probative of identification of Jackson as the perpetrator. There was nothing improper in admitting his answer. The court did not err.

## VI. THE PROSECUTOR'S PENALTY PHASE CLOSING ARGUMENT WAS PROPER

Jackson contends that the prosecutor committed misconduct during closing argument in the penalty phase for the same reasons he alleged the guilt phase argument was improper. Jackson also acknowledges that counsel did not object to a single instance of the alleged misconduct at trial. (AOB 397-414.) Jackson has forfeited his claims by failing object below. Regardless, the prosecutor did not err and Jackson's claims lack merit.

The same standard is applied on appeal to evaluate a claim of prosecutorial misconduct in the penalty phase as in the guilt phase. *People v. Guerra* (2006) 37 Cal.4th 1067, 1153, internal citations & quotation marks omitted, overruled on other grounds, *People v. Rundle* (2008) 43 Cal.4th 76, 151.) "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Under California law, a prosecutor who uses deceptive or reprehensible methods of persuasion commits misconduct even if such actions do not render the trial fundamentally unfair. Generally, a claim of prosecutorial misconduct is not cognizable on appeal unless the defendant made a timely objection and requested an admonition. In order to be entitled to relief under state law, defendant must show that the challenged conduct raised a reasonable likelihood of a more favorable verdict. In order to be entitled to relief under federal law, defendant must show that the challenged conduct was not harmless beyond a reasonable doubt." (*People v. Blacksher* (2011) 52 Cal.4th 769, 828, fn. 35, emphasis added, internal quotation marks & citations omitted; *People v. Clark* (2011) 52 Cal.4th 856, 960.) When misconduct has been established, the determination of prejudice is based on deciding whether there is "a reasonable possibility that the jury construed or applied the prosecutor's comments in an objectionable manner. In

conducting this inquiry, [the court does] not lightly infer that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Guerra, supra*, 37 Cal.4th at p. 1153.)

The prosecutor is entitled to vigorously argue, and "opprobrious epithets may be employed if reasonably warranted by the evidence." (*People v. Garcia* (2011) 52 Cal.4th 706, 759-760; *People v. Dykes* (2009) 46 Cal.4th 731, 774, internal quotation marks omitted; *People v. Zambrano* (2007) 41 Cal.4th 1082, 1173 [where supported by the evidence, prosecution may call the defendant a liar and a sociopath in closing argument], overruled on other grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As he did in his guilt phase arguments, Jackson argues that the prosecutor "improperly became a witness" to "appeal to the fears and prejudices of the jury" in his opening remarks as follows:

> When we experience evil either as victims of crime or witnessing a tragic or horrendous event, sometimes simply learning about an evil event occurring it affects us. And the closer we are to it, the more it affects us, the deeper, the stronger.
>
> Who among us did not really gasp in horror when we learn of what happened to five-year old Samantha Runyon snatched from her front yard by a sadistic, child molester, tortured, killed, left posed naked on a roadway.
>
> Which of us did not similarly gasp in horror when we learned what happened to teenager Polly [Klass], snatched from her own bedroom in the middle of the night, parents sleeping in another room by a pervert, career criminal; brutally murdered.
>
> Ten-year old Anthony Martinez snatched from his front yard by another sick, pervert child molester. These horrendous crimes shock us deeply, disturb us; and they cause us to realize a number of things: One, there are evil predators that exist in our community exist to do us harm. Two, we are not safe in our

> own homes. And, number three, we must condemn these crimes and these criminals with every fiber of our being.
>
> As equally horrendous and shocking as these crimes against children are the crimes you heard about in this case, far more rare. It takes a unique, uniquely sadistic and perverted and evil predator to target elderly women living alone for murder and vicious sexual assault. When was the last time you heard reports of crimes like these occurring? The Boston strangler maybe. The rarity of the occurrence of these types of crimes is but one of the compelling circumstances upon which we can condemn Bailey Jackson.

(AOB 398-400; 43 RT 7309-7310.)

As an initial matter, Jackson did not object to any of the alleged instances of misconduct and has therefore forfeited these claims. (*People v. Blacksher, supra*, 52 Cal.4th at p. 828, fn. 35.) Jackson contends that to the extent his claims are forfeited, counsel's failure to object constituted ineffective assistance of counsel. As set forth above, the Sixth Amendment does not require counsel to raise frivolous objections, and the failure to object rarely constitutes constitutionally ineffective legal representation. (See *People v. Gutierrez* (2009) 45 Cal.4th 789, 804–805; *People v. Boyette* (2002) 29 Cal.4th 381, 424.) As explained below, the prosecutor did not err, thus counsel's failure to object to the alleged instances of misconduct did not constitute ineffective assistance.

As in the guilt phase, the prosecutor's theory of the case was that because these types of heinous crimes are exceedingly rare, given the evidence in this case, the same person must have been responsible for the crimes against Ms. Myers and Ms. Mason. Further, that because of the shocking nature of the crimes, Jackson deserved the ultimate punishment for his actions. The prosecutor's references to other shocking and heinous crimes derived from common and common experience, and were not improper. (*People v. Hill, supra*, 17 Cal. 4th at p. 819.)

The prosecutor certainly did not make himself an "unsworn witness" in this case by referencing other notorious crimes. There was no implication that the prosecutor knew of additional evidence about Jackson or Jackson's crimes that was unavailable to the jury "tend[ing] to make the prosecutor his own witness -- offering unsworn testimony not subject to cross-examination." (See *People v. Bolton* (1979) 23 Cal.3d 208, 213.)

Moreover, even if the prosecutor was appealing to the passions of the jury, he was permitted to do so at the penalty phase. "Unlike the guilt determination, where appeals to the jury's passions are inappropriate, in making the penalty decision, the jury must make a moral assessment of all the relevant facts as they reflect on its decision (*People v. Jackson* (2009) 45 Cal.4th 662, 691, quoting *People v. Leonard* (2007) 40 Cal.4th 1370, 1418.) "Emotion must not reign over reason and, on objection, courts should guard against prejudicially emotional argument. [Citation.] But emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment. [Citation.]" (*People v. Gonzales* (2011) 51 Cal.4th 894, 946, internal quotation marks omitted; *People v. Jackson* (2009) 45 Cal.4th 662, 691; *People v. Leonard* (2007) 40 Cal.4th 1370, 1418.)

Jackson contends that the prosecutor also erred, again making himself an unsworn witness and arguing facts not in evidence based on the following statement:

> Actions speak louder than words. Bailey Jackson did what he wanted, when he wanted, to who he wanted for his own personal satisfaction. Monetary gain. As it turns out in May and June of 2001 for sadistic and perverted sexual pleasure.

(43 RT 7318-7319; AOB 400.)

Jackson also sets forth a series of comments in which the prosecutor argued that Jackson's motives for crimes against both women were sexual gratification and monetary gain. (AOB 400-403.) For example, the prosecutor's comment:

> The manner in which he committed these crimes. Crimes against Gerry Myers, crimes again[st] Ms. Mason describe a high degree of viciousness, callousness, cold-heartedness and just down right cruelty.
>
> And that is something that is above and beyond the commission of the crime itself. He didn't just rob. He didn't just burgle. He didn't just rape. He did more."

(43 RT 7327.)

Jackson argues that these statements were improper because there was no evidence that Ms. Meyers was sexually assaulted. (AOB 401.) As set forth above, the prosecutor's theory was that the crimes against Ms. Mason and Ms. Meyers had very distinct similarities for which direct evidence existed, and those similarities were circumstantial evidence that Jackson also sexually assaulted Ms. Myers. This was a reasonable inference drawn from the evidence. "Prosecutors have wide latitude to discuss and draw inferences from the evidence at trial. [Citation.] Whether the inferences the prosecutor draws are reasonable is for the jury to decide." (*People v. Abel* (2010) 53 Cal. 4th 891, 926; *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 179.) A prosecuting attorney has a wide range in which to state his views as to what the evidence shows and the conclusions to be drawn therefrom. (*People v. Perez* (1962) 58 Cal.2d 229, 245.) The prosecutor's argument went no further than arguing reasonable inferences from the record. Moreover, the jury was instructed that statements by the attorneys during trial were not evidence. (24 CT 6836.) There was no error.

Jackson also argues that the prosecutor misinformed the jury as to how to determine punishment, and sought to minimize to the jury what it would be doing in voting for death. (AOB 404-408.) Jackson complains of several statements, including the following:

> You're here to determine punishment. The evidence that has been presented to you falls under three categories. I spoke about these in my opening statement. To the defendant's crimes. Of

course, your opinion to the defendant's punishment has to take into consideration what he did to get himself here. The circumstances of his crimes. Why he is here.

You're also going to hear, you have heard, evidence of his background. Background in aggravation. His criminal background, which reflects his character, which is the third category you should take into consideration. His crimes, his background, and his character.

Within his character you're to consider whatever it is the defendant wanted to present to you. Every killer, murderer, who commits a special circumstances murder is eligible for the death penalty. But not every special circumstances murderer receives the death penalty.

Why is that? Because it is not mandatory. It is not automatic. We leave it up to 12 individuals selected at random from the community to sit as representatives of the community. And to determine from among those that are eligible for the death penalty, does this individual defendant deserve it.

And the determination as to whether or not an eligible killer like Bailey Jackson deserves it, you take into consideration not just that crime that brought him here that made him eligible for the death penalty, but everything else that he has done.

(AOB 403-404; 43 RT 7311-7312.)

Jackson contends that that this statement was improper because the prosecutor did not mention that Jackson's background itself could be a mitigating circumstance. (AOB 405.) The prosecutor was under no obligation to tell the jury that Jackson's background could be a mitigating circumstance, and Jackson cites to no authority stating otherwise. Moreover, the prosecutor did tell the jury that it was required to carefully weigh aggravating and mitigating circumstances in coming to its ultimate decision:

You need to make a reasoned, well-thought-out judgment in this case. Not a gut reaction. Recognize obviously the weight you attach to a particular aggravating fact and circumstance as to

> what he did to these victims cause an emotional reaction and you can recognize that.
>
> And that equates to the weight that you would give that particular fact or circumstance. Your overall determination of the appropriate penalty should be a well-reasoned judgment of weighing aggravating against mitigating circumstances.

(43 RT 7314-7315.)

Yet Jackson contends that even this statement was improper because it invited jurors to use their emotions in making their decision. This, combined with asking the jurors to imagine themselves in the victims' shoes, he argues, was overreaching on the prosecutor's part. (AOB 405-407.)

As Jackson acknowledges, California law permits such arguments. (See E.g., *People v. Slaughter* (2002) 27 Cal.4th 1187, 1212 [penalty phase arguments that urged the jury to stand in the victims' shoes and consider the pain and fear felt by the victims and the years of life of which the victims were deprived proper]; *People v. Cole* (2004) 33 Cal.4th 1158, 1233; *People v. Chatman* (2006) 38 Cal.4th 344, 388; *People v. Jackson* (2009) 45 Cal.4th 662, 692 [penalty phase arguments urging the jury to consider the anguish felt by the victims' families proper]; *People v. Mendoza* (2007) 42 Cal.4th 686, 706 [penalty phase summations stating that all members of society are victims when a person is murdered and describing the jurors as the conscience of an injured society proper].) As this Court has made clear, "emotion is relevant to a jury's assessment of the suitability of the death penalty." (*People v. Gonzales* (2011)51 Cal.4th 894, 960, citing *People v. Leonard*, *supra*, 40 Cal.4th at p. 1418 ["'emotion need not, indeed, cannot, be entirely excluded from the jury's moral assessment'"].) As such, there was no overreaching by the prosecutor, and there was nothing improper about his closing argument.

Lastly, Jackson argues that the prosecutor committed "something akin to *Caldwell* [19]error," by minimizing to the jury "what they would be doing in voting for death." Jackson objects to the bracketed language in the prosecutor's comment:

> Attempt has been made here, and I'm sure another one would be made shortly to equate your well-reasoned, determined verdict as a killing of the defendant. And you should feel insulted by that. Because what you are doing when you determine a verdict of death is warranted based upon all of the aggravating factors, and carefully weighing the mitigating factors is a well-reasoned judgment.
>
> It is not equated with a crime of murder. [You are not killing the defendant when you render a verdict of death. You are sentencing him to death, yes, and he should be executed for what he did, yes. But it is not a killing. A brutal taking somebody out in the backyard and shoot him without giving his him his fair day in court.]

(AOB 407; 43 RT 7282-7383.)

The prosecutor's comment was not *Caldwell* error. In *Caldwell*, the prosecutor's rebuttal argument indicated that the jury's decision to impose death would be reviewed by the Mississippi Supreme Court. The United States Supreme Court reversed the penalty determination, holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." (*People v. Collins* (2010) 49 Cal.4th 175, 232, quoting *Caldwell*, at pp. 328–329.) The Supreme Court expressed concern that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact

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[19] (*Caldwell v. Mississippi* (1985) 472 U.S. 320 [105 S.Ct. 2633, 86 L.Ed.2d 231].)

choose to minimize the importance of its role." (*Ibid*, quoting *Caldwell, supra*, 472 U.S. at p. 333.)

That did not happen here. The prosecutor's comment was in response to defense counsel's argument that the jury "can't kill a man without answering those questions." (43 RT 7373.) The prosecutor was explaining the difference between "killing a man" and a well-reasoned determination, made after weighing the mitigating and aggravating factors, that the death penalty is appropriate. There was no attempt to lead the jury to believe that their responsibility for making that determination rested with someone else. Jackson's argument is without merit.

Jackson contends that the prosecutor's "serial misconduct and overreaching" were prejudicial and require reversal of the death judgment. (AOB 411-414.) First of all, no error occurred. Even if there was error, it was harmless. Claims of "state law error at the penalty phase of a capital case requires reversal only when there is a "reasonable (i.e., realistic) possibility" the error affected the verdict." (*People v. Cowan* (2010) 50 Cal.4th 401, 491, citing *People v. Brown*, *supra*, 46 Cal.3d at pp. 447–448.) This standard is "the same, in substance and effect," as the harmless-beyond-a-reasonable-doubt standard of *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 491, citing *People v. Jones*, *supra*, 25 Cal.4th at p. 1264, fn. 11; *People v. Ochoa* (1998) 19 Cal.4th 353, 479.) Even if the prosecutor's comments can be construed as a misstatement of facts, or to have included facts that were not in evidence, the jury was instructed that the statements of counsel were not evidence. (24 CT 6838; CALJIC No. 1.02.) The jury is presumed to have followed the instructions. (*People v. Cowan*, *supra*, 50 Cal.4th at p. 491.) There is no realistic probability that the prosecutor's comments affected the verdict. Jackson's argument must be rejected.

## VII. THE COURT PROPERLY INSTRUCTED THE JURY AT THE PENALTY PHASE RETRIAL

Jackson contends that the trial court erred in refusing to instruct the jury with certain instructions at the penalty phase retrial. (AOB 416-428.) However, Jackson was not entitled to instructions inviting the jury to relitigate his convictions. The court properly instructed the jury that it could consider whether it had a lingering doubt as to Jackson's guilt, which was more than was required. There was no error.

Jackson first argues that the court erred in denying his request to instruct the jury with CALJIC No. 2.16 [Dog-Tracking Evidence] at the penalty phase. (AOB 416-421.) CALJIC No. 2.16 provided as follows:

> Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes charged in Counts One, Two, and Three of the Amended Information, to wit: Murder, Burglary, and Robbery. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of these crimes. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of these crimes.
>
> The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.
>
> In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question.

(15 CT 4101.)

The court denied Jackson's request to instruct the jury with CALJIC No. 2.16, ruling:

> Again, 2.16 I believe would be encouraging the jury to relitigate and evaluate the issue of guilt. Obviously, Mr. Aquilina is free to argue any of this; however, to give them a pinpoint instruction on the sufficiency of dog tracking evidence this pertains only --

> goes to reasonable doubt in the original conviction. I did give 2.16 to the original jury. The objection is noted. 2 .16 will not be given.

(43 CT 7257-7258.)

Next, Jackson contends that the trial court erred in refusing to instruct the jury with CALJIC No. 2.01 [Sufficiency of Circumstantial Evidence – Generally] at the penalty retrial. (AOB 421-423.)

Defense counsel requested the court instruct the jury with CALJIC No. 2.01 as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.
>
> Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his/her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [his/her] guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable.

(24 CT 6880.)

The court denied Jackson's request for this instruction, stating that it would instruct the jury with CALJIC No. 2.00[20], defining direct and circumstantial evidence, but that giving CALJIC No. 2.01 would "be encouraging the jury to relitigate the actual convictions in this case," which the court did not find to be "necessary or appropriate." (43 RT 7257.)

Jackson also argues that the court erred in denying his request that the court instruct the jury with a special instruction regarding the lack of a published appellate decision regarding the use of an STU. (AOB 425-426.) Defense counsel proposed the following instruction:

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[20] Evidence consists of the testimony of witnesses, writings, material objects, or anything presented to the senses and offered to prove the existence or non-existence of a fact.

CALJIC No. 2.00 provided as follows:

> Evidence is either direct or circumstantial.
>
> Direct evidence is evidence that directly proves a fact. It is evidence which by itself, if found to be true, establishes that fact. Circumstantial evidence is evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.
>
> An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established by the evidence.
>
> [It is not necessary that facts be proved by direct evidence.
>
> They also may be proved by circumstantial evidence or by a combination of direct and circumstantial-evidence. Both direct and circumstantial evidence are acceptable as a means of proof. Neither is entitled to any greater weight than the other.]

(24 CT 6838.)

The jury is hereby advised that the court has taken judicial notice of the following fact which you must accept as true:

> The "scent transfer unit" device or STU-100 constitutes a novel scientific technique, which no appellate court in the State of California has found to have been accepted as legally reliable or generally accepted in the relevant scientific community.
>
> Authorities:
>
> Evidence Code sections 451 (a), 457;
>
> *People v. Mitchell* (2003) 110 Cal. App.4th 772;
>
> *People v. Willis* (2004)115 Cal. App.4th 379.

(24 CT 6884; Defense special instruction L.)

The court was correct in denying counsel's requests for these instructions. The instructions were only relevant to Jackson's guilt or innocence – a determination that had already been made in the guilt phase. Jackson's penalty phase jury was not charged with deciding whether he was guilty of capital murder beyond a reasonable doubt. The guilt phase jury determined Jackson's guilt and the truth of the special circumstance allegations beyond a reasonable doubt. "As a matter of law, the penalty phase jury must conclusively accept these findings." (*People v. Harrison* (2005) 35 Cal.4th 208, 256, citing *People v. Cain* (1995) 10 Cal.4th 1, 66, and *People v. DeSantis* (1992) 2 Cal.4th 1198, 1238.)

The retrial jury was tasked only with determining which penalty to impose, based on the evidence presented, and taking into consideration the mitigating and aggravating factors presented. (43 RT 7301.) As this Court has explained, "in the penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto* (2003) 30 Cal.4th 226, 263, quoting *Tuilaepa, supra*, 512 U.S. at p. 972; accord *People v. Virgil, supra*, 51 Cal.4th at pp. 1278-1279.)

Accordingly, defense counsel was not entitled to relitigate matters which were resolved in the guilt phase, and Jackson sets forth no authority indicating otherwise.

Counsel was, however, permitted to argue that a lingering or residual doubt as to Jackson's guilt remained. Certainly, "there will be a tension between the legislatively stated preference not to retry the question of guilt at the second penalty phase trial (§ 190.4, subd. (b)) and the defendant's right to ensure that the jury consider evidence that might raise a doubt, albeit amorphous or slight, that his role was less heinous than the prior jury's findings established." (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1239.) Thus, the court instructed the jury with CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved. This presumption placed upon the People, the burden of proving the defendant guilty beyond a reasonable doubt. In this case, the defendant, Bailey Jackson, has been convicted of the offenses and allegations set forth in the Information. A copy of this document has been marked as an Exhibit and will be available for your review during deliberations.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.
>
> You may not relitigate or reconsider matters which were resolved in the guilt phase, but you may consider residual or lingering doubt, if it exists in your mind, as a circumstance in mitigation. A lingering or residual doubt is defined as that state of mind between beyond a reasonable doubt and beyond all possible doubt.

> Each individual juror may consider, as a mitigating circumstance, any residual or lingering doubt in the mind of that juror, as to whether the defendant murdered Geraldine Myers.

(24 CT 6860; 43 RT 7305.)

Counsel was entitled to argue, and did argue, that a residual or lingering doubt as to Jackson's guilt existed, and the court properly instructed the jury on this point. (CALJIC No. 2.90; 43 RT 7387-7391.) That is more than the law requires. (See *People v. Gonzales*, (2012) 54 Cal.4th 1234, 1299 [no requirement to instruct on lingering doubt].) The court correctly refused to instruct the jury with CALJIC Nos. 2.16, 2.01, and defense proposed special instruction L.

Jackson also contends that the court erred in denying his request to instruct the jury with CALJIC No. 2.71 [Admission – Defined]. (AOB 423-425.) The court explained that "Again, I think this goes to the People's burden of proof beyond a reasonable doubt to prove the elements charged against the defendant, doesn't apply at this stage of the case." (43 RT 7259.) CALJIC No. 2.71, as requested by defense counsel, read as follows:

> An admission is a statement made by [a][the] defendant which does not by itself acknowledge [his/her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his/her] guilt when considered with the rest of the evidence.
>
> You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part.
>
> [Evidence of an oral admission of [a] [the] defendant not made in court should be viewed with caution.]

(24 CT 6882.)

While it appears that this instruction should be given upon defense request when the admission is not recorded, (*People v. Livaditis* (1992) 2 Cal.4th 759, 783), the instruction was unnecessary here. "The purpose of

the cautionary instruction is to assist the jury in determining if the statement was in fact made." (*People v. Livaditis*, *supra*, 2 Cal.4th at p. 783, quoting *People v. Beagle* (1972) 6 Cal.3d 441, 456.) Here, Jackson's admissions were recorded and the jury listened to the recordings. His statements were uncontradicted. He did not contend that the statements were not made, were fabricated, or were inaccurately remembered or reported. There was no conflicting testimony concerning the precise words used, their context or their meaning. Accordingly, no cautionary instruction was warranted, and any error in the court's failure to give it was harmless. (*People v. Livaditis*, *supra,* 2 Cal. 4th at p. 784; *People v. Stankewitz* (1990) 51 Cal.3d 72, 94.)

Finally, Jackson contends that the instructional errors in the penalty retrial were prejudicial and deprived him of due process. (AOB 426-428.) Because there was no instructional error in the penalty phase, no prejudice ensued and Jackson was not deprived of his rights.

## VIII. EVEN WITHOUT JACKSON'S ROBBERY CONVICTION AND ROBBERY SPECIAL CIRCUMSTANCE TRUE FINDING, THE JURY'S RECOMMENDATION OF DEATH WOULD BE THE SAME

Jackson argues that if, as he argued in Argument VI, the robbery conviction with respect to Ms. Myers should be reversed, then the robbery special circumstance must also be reversed, making the entire premise upon which the second penalty trial proceeded, and upon which the second jury imposed death, flawed. (AOB 429-430.) This argument is without merit. As set forth above, there is no basis upon which to reverse the robbery conviction or special circumstance as to Ms. Myers. Even if there were, there is no reasonable possibility of a different result. (*People v. Cowan, supra,* 50 Cal.4th at p. 491.) Jackson argues that had the jury been instructed that factors in aggravation included just one special circumstance instead of two, it would have "tipped the scales in his favor." (AOB 430.)

Not so as the jury still would have heard all of the facts and evidence underlying Jackson's crimes against Ms. Myers.

An invalid special circumstance produces constitutional error only when the jury could not have given aggravating weight to the same facts and circumstances under the rubric of some other, valid sentencing factor. (*People v. Halvorsen* (2007) 42 Cal.4th 379, 422.) In numerous cases where two multiple murder circumstances were erroneously charged and found true, this Court has stricken the superfluous finding and concluded there was an absence of prejudice. (*People v. Halvorsen*, *supra*, 42 Cal.4th at p. 422.)

Even if the jury would have heard that Jackson was convicted of just one special circumstance and not two, it would not have changed any of the evidence presented. The overwhelming evidence in aggravation remains the same. Jackson's victimization of such vulnerable victims, and the brutality of his crimes, is unaffected by eliminating a robbery special circumstance and robbery conviction from the moral decision facing the jury. Accordingly, there is no reasonable probability that the jury would have reached a different result.

## IX. CALIFORNIA'S DEATH PENALTY LAW IS CONSTITUTIONAL

Jackson raises several routine challenges to California's capital-sentencing scheme that he acknowledges this Court has repeatedly rejected. (AOB 431-446.) Consistent with this Court's decision in *People v. Schmeck* (2005) 37 Cal.4th 240, 304, addressing the presentation of these routine and generic claims, Jackson "briefly" presents the challenges to urge their reconsideration and to preserve them for federal review. (AOB 431.) As this Court has previously decided, none of these claims has merit.

### A. The Application Of Penal Code Section 190.3 Factor (A) Did Not Violate Jackson's Constitutional Rights

Jackson contends that factor (a) under section 190.3, which requires penalty phase jurors to consider the circumstances of the present offenses leads to the arbitrary and capricious imposition of the death penalty. (AOB 432-433.) However, "[t]he 'circumstances of the crime' factor stated in section 190.3, factor (a) does not foster arbitrary and capricious penalty determinations. [Citation.]" (*People v. Bramit* (2009) 46 Cal.4th 1221, 1248; see also *People v. Virgil*, *supra*, 51 Cal.4th at p. 1288; *People v. Williams* (2008) 43 Cal.4th 584, 648.) Jackson offers no reason for this Court to reconsider its previous holdings.

### B. The Application Of Penal Code Section 190.3 Factor (B) Did Not Violate Jackson's Constitutional Rights

Jackson contends that factor (b) under section 190.3, which requires penalty phase jurors to consider criminal activity involving force or violence is unconstitutional because application of factor (b) does not require the jury to unanimously find beyond a reasonable doubt that the criminal activity occurred. (AOB 433-435.) This Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis* (2009) 46 Cal.4th 1255, 1319; *People v. Burney* (2009) 47 Cal.4th 203, 267-268.) Jackson additionally asserts "allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated [his] Fifth, Sixth, Eighth, and Fourteenth Amendment rights" (AOB 435.) That did not happen in the case. In any event, he concedes this Court has repeatedly rejected similar arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43,77, citing *People v. Balderas* (1985) 41 Cal.3d 144, 204-205, and *People v. Medina* (1990) 51 Cal.3d

870, 906-907.) Jackson presents no reason for this Court to reconsider its prior holdings.

### C. Factor (c) of Section 190.3 Provides Adequate Guidance and Is Constitutional

Jackson contends factor (c) under section 190.3, which requires penalty phase jurors to consider prior felony convictions, is unconstitutional because application of factor (c) does not require the jury to unanimously find Jackson committed prior felonies. (AOB 435-436.) As previously discussed, this Court has consistently rejected the claim that the constitution requires jury unanimity or a particular burden of proof on aggravating factors. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 848; *People v. Lewis*, *supra*, 46 Cal.4th at p. 1319; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.) Jackson gives this Court no reason to reconsider its previous decisions.

### D. Consideration of Defendant's Age is Constitutional

Jackson asserts that factor (i), which permits consideration of a defendant's age, is unconstitutionally vague. (AOB 436-437.) It is well established a defendant's age at the time of the crime is not unconstitutionally vague. (*Tuilaepa v. California* (1994) 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750]; *People v. Sanders* (1995) 11 Cal.4th 475, 563-564; see also *People v. Box*, *supra*, 23 Cal.4th at p. 1215.) Jackson gives this Court no reason to reconsider its previous holdings.

### E. CALJIC No. 8.85 Adequately and Correctly Instructs the Jury on the Penalty Phase Sentencing Factors

Jackson next raises several challenges to CALJIC No. 8.85, the pattern jury instruction setting forth penalty phase sentencing factors, and claims the instruction: (1) failed to delete inapplicable sentencing factors; (2) contained vague and ill-defined factors, particularly factors (a) and (k); (3) limited factors (d) and (g) by adjectives such as "extreme" or

substantial"; and (4) failed to specify a burden of proof as to either mitigation or aggravation. (AOB 437-438.) This Court has previously found that "CALJIC No. 8.85 is both correct and adequate." (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1248, quoting *People v. Valencia* (2000) 43 Cal.4th 268, 309.)

A trial court is not required to delete inapplicable sentencing factors from the instruction. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1248; *People v. Watson* (2008) 43 Cal.4th 652, 701; *People v. Perry* (2006) 38 Cal.4th 302, 319.) The sentencing factors set forth in CALJIC No. 8.85 are not unconstitutionally vague and arbitrary. (*People v. Famalaro* (2011) 52 Cal.4th 1, 43; *People v. Moon* (2005) 37 Cal.4th 1, 42; *People v. Earp*, supra, 20 Cal.4th at p. 899.) The use of the adjectives "extreme" and "substantial" in factors (d) and (g) do not unconstitutionally limit the mitigating factors the jury may consider. (*People v. Bramit*, *supra*, 46 Cal.4th at p. 1249; *People v. Perry*, *supra,* 38 Cal.4th at p. 319; *People v. Smith* (2005) 35 Cal.4th 334, 374.) Finally, there is no constitutional requirement that the jury be instructed regarding a burden of proof as to sentencing factors. (*People v. Virgil*, *supra*, 51 Cal.4th at pp. 1277-1278; *People v. Young*, *supra*, 34 Cal.4th at p. 1233; *People v. Earp*, *supra*, 20 Cal.4th at p. 899.) Jackson's challenges to CALJIC No. 8.85 are without merit, and he offers no justification for this Court no to reconsider its previous decisions.

### F. California's Capital Punishment Statute Adequately Narrows the Class of Eligible Offenders

Jackson next contends California's death penalty statute violates the Eighth Amendment because it fails to meaningfully distinguish between those defendants subject to capital punishment and those defendants not subject to capital punishment. (AOB 438-439.) As this Court has observed,

> California's death penalty statute does not fail to narrow the class of offenders who are eligible for the death penalty, as is required by the Eighth Amendment, nor has the statute been expanded "beyond consistency with" the Fifth and Fourteenth Amendments. [Citations.]

(*People v. Salcido* (2008) 44 Cal.4th 93, 166; see also *People v. Hoyos* (2007) 41 Cal.4th 872, 926; *People v. Demetrulias* (2006) 39 Cal.4th 1, 434.) Jackson gives this Court no reason to reconsider its earlier holdings.

### G. There Is No Constitutionally Required Burden of Proof at the Penalty Phase

Jackson contends the failure to assign a burden of proof in California's death penalty scheme should be revisited in light of the United States Supreme Court's decision in *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556]. (AOB 439-440.) However, this Court has determined on many occasions that Penal Code section 190.3 and the pattern instructions are not constitutionally defective because they fail to require the state to prove beyond a reasonable doubt that an aggravating factor exists, and that aggravating factors outweigh mitigating factors. This Court has also consistently rejected the claim that the pattern instructions are defective because they fail to mandate juror unanimity concerning aggravating factors. (See, e.g., *People v. Russell* (2010) 50 Cal.4th 1228, 1271-1272; *People v. Bramit*, *supra*, 46 Cal.4th at pp. 1249-1250; *People v. Burney*, *supra*, 47 Cal.4th at pp. 267-268.)

> [U]nder the California death penalty scheme, once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole. [Citation].

(*People v. Ward* (2005) 36 Cal.4th 186, 221, quoting *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) As this Court explained in *Prieto*, "in the

penalty phase, the jury merely weighs the factors enumerated in section 190.3 and determines 'whether a defendant eligible for the death penalty should in fact receive that sentence.'" (*People v. Prieto*, *supra*, 30 Cal.4th at p. 263, quoting *Tuilaepa*, *supra*, 512 U.S. at p. 972; accord *People v. Virgil*, *supra*, 51 Cal.4th at pp. 1278-1279.) Jackson offers no justification for this Court to reconsider its previous holdings.

### H. The Absence of Written Findings as to Mitigating and Aggravating Factors Is Constitutional

Jackson contends that the Constitution requires the jury to make written findings as to the aggravating and mitigating factors relied on in the jury's penalty determination. (AOB 440-441.) This Court had repeatedly held "[t]he absence of written findings reflecting the jury's consideration of the sentencing factors does not violate a defendant's constitutional rights." (*People v. Gonzales* (2011) 51 Cal.4th 894, 957; see also *People v. Jackson* (2009) 45 Cal.4th 662, 700-701; *People v. Stanley* (2006) 39 Cal.4th 913, 965.) Jackson gives this Court no reason to reconsider its previous decisions.

### I. The Instructions Are Not Unconstitutional for Failing to Inform Jury That if Circumstances in Mitigation Outweigh Those in Aggravation, It Must Impose Life Without Possibility of Parole

Jackson asserts the instructions failed to inform the jury that if it determined that the mitigating factors outweighed the aggravating factors it had to return a sentence of life without parole. (AOB 441-442.) This Court's previous decisions rejecting this claim are sound and need not be reconsidered. (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Tate* (2010) 49 Cal.4th 635, 712; *People v. McWhorter* (2009) 47 Cal.4th 318, 379.) Jackson offers no reason for this Court to reconsider its previous holdings.

### J. CALJIC No. 8.88 Is Not Impermissibly Vague for Using the Phrase "So Substantial"

Jackson claims that the phrase "so substantial" as used in CALJIC No. 8.88 (see 24 CT 6868), created at unconstitutionally vague standard. (AOB 442.) This Court has repeatedly rejected this claim. (*People v. Tate*, *supra*, 49 Cal.4th at pp. 712-713; *People v. Friend* (2009) 47 Cal.4th 1, 90; *People v. Salcido*, *supra*, 44 Cal.4th at p. 117; *People v. Coffman & Marlow*, *supra*, 34 Cal.4th at p. 123.) Jackson offers no justification for this Court to reconsider its prior decisions.

### K. Inter-Case Proportionality Review Is Not Constitutionally Mandated

Jackson contends that the absence of intercase proportionality review in California's death penalty law is unconstitutional. (AOB 442-443.) However, "[i]ntercase proportionality review is not constitutionally required." (*People v. Gonzales*, *supra*, 51 Cal.4th at p. 957; see also *Pulley v. Harris* (1984) 465 U.S. 37, 50-51 [104 S.Ct. 871, 79 L.Ed.2d 29]; *People v. Murtishaw* (2011) 51 Cal.4th 574, 597.) Jackson offers no reason for this Court to reconsider its previous holdings.

### L. Disparate Sentence Review Is Not Required in Capital Cases

Jackson contends that a capital defendant in California is constitutionally entitled to the same sort of disparate sentence review available to non-capital defendants under California's determinate sentencing law. (AOB 443-444.) However, this Court has routinely rejected the notion that capital defendants are constitutionally entitled to disparate sentence review. (*People v. Thomas*, *supra*, 51 Cal.4th at p. 507; *People v. Bunyard* (2009) 45 Cal.4th 836, 861; *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1067.) Jackson offers no basis for this Court to reconsider its prior rulings.

### M. California's Death Penalty Statute Does Not Violate the International Covenant on Civil and Political Rights and Prevailing Civilized Norms

Jackson contends that the California Death Penalty Law violates the International Covenant on Civil and Political Rights. (AOB 444-445.) This Court has repeatedly rejected similar arguments and should do so again here. International law does not prohibit a sentence of death where, as here, it was rendered in accordance with state and Federal Constitutional and statutory requirements. (*People v. Blacksher*, *supra*, 52 Cal.4th at p. 849 [rejecting claim "again"]; *People v. Gonzales* (2011) 52 Cal.4th 254, 334; *People v. Hamilton* (2009) 45 Cal.4th 863, 961; *People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah* (2005) 35 Cal.4th 395, 500; *People v. Ward,* supra, 36 Cal.4th at p. 222; *People v. Elliot* (2005) 37 Cal.4th 453, 488.) Jackson offers no justification for this Court to reconsider its earlier rulings.

### N. Jackson's Punishment Is Commensurate with His Crimes

Jackson contends that the death penalty violates the Eighth Amendment's prohibition against cruel and unusual punishment. (AOB 445.) However, this Court has repeatedly held that California's death penalty statute does not constitute cruel and unusual punishment. (*People v. McWhorter*, *supra*, 47 Cal.4th at p. 379; *People v. Brasure* (2008) 42 Cal.4th 1037, 1072; *People v. Moon*, *supra*, 37 Cal.4th at p. 47.) Jackson offers no reason for this Court to reconsider its previous holdings.

### O. There Are No Constitutional Errors to Cumulate

Jackson contends that the constitutional defects identified in this claim, ante, cumulatively demonstrate that California's death penalty law violates the Eighth and Fourteenth Amendments. Jackson's argument fails for the simple reason that, as discussed above, this Court has soundly and

repeatedly rejected each of Jackson's constitutional challenges to the death penalty. (See *People v. Eubanks* (2011) 53 Cal.4th 110, 154 ["Having concluded that none of defendant's challenges to our state's capital sentencing scheme have merit, we reject this general claim as well."].) Jackson offers no reason for this Court to reconsider its prior decisions.

## X. Jackson has not established cumulative error

Jackson contends the "cumulative effect" of the trial court's errors undermines the integrity of his guilt and penalty phase proceedings and warrants reversal of his conviction and death sentence. (AOB 447-448.) Jackson, however, has not established any errors, and even if error is assumed, he has shown no prejudice; his contention necessarily fails. (*People v. Abilez*, *supra*, 41 Cal.4th at p. 523.)

## CONCLUSION

For the forgoing reasons, respondent respectfully requests the judgment and penalty be affirmed.

Dated: June 25, 2013

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 45,177 words.

Dated: June 25, 2013

KAMALA D. HARRIS
Attorney General of California

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Deputy Attorney General
Attorneys for Plaintiff and Respondent

## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **People v. Bailey Jackson**
No.: **S139103**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On June 26, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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The Honorable Patrick F. Magers
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 26, 2013, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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