No. S139103

IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

vs.

BAILEY JACKSON

Defendant and Appellant.

Automatic Appeal from the Superior Court
of Riverside County
Case No. RIF097839
Honorable Patrick F. Magers, Judge

APPELLANT'S REPLY BRIEF

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INTRODUCTION AND COMMENT ON RESPONDENT'S STATEMENT OF FACTS

Underlying all of the legal disputes between appellant and respondent are fundamentally different views of the facts, in two areas. The first is with regard to the dog-scent identification of appellant by the dog Maggie Mae in the Orange Street station basement on June 25, 2001; the second is the quantum of other evidence of appellant's guilt of the murder of Geraldine Myers.

Regarding the so-called trailing in the station-house basement which led to an apparent alert on appellant, the fundamental difference is this: respondent asserts that this was no different in kind from any other dog-trailing which starts at a crime scene and leads to a suspect, whether hiding in weeds or in an apartment complex. Appellant disagrees, believing he has amply shown that this dog-scent "identification" procedure was distinguishable in crucial, and dispositive ways.

Regarding the remaining evidence – that is, how strong the evidence of guilt was if the dog-sniff evidence is removed from the equation – respondent believes that it was "overwhelming." Appellant believes that to so characterize it is simply ludicrous.

Everything else proceeds from there.

The aforesaid dispute regarding facts extends to respondent's statement of the facts. (Respondent's Brief ["RB"] 3-18.) Appellant would be remiss in not correcting the errors, mostly of omission, therein set forth. While there is at least one instance of such an omission creating a directly misleading impression not supported by the record (though stated twice), there are many more instances of respondent stating the case for the prosecution without acknowledging the countervailing evidence or inferences for appellant.

The most striking omission in terms of misleading the Court appears twice: in the discussion of Angie Fortson's evidence (RB 14) and in the discussion of appellant's father's defense testimony. (RB 17.) Angie Fortson told Investigator Martin Silva that appellant's father, Bailey Albert Jackson (also referred to as Jackson, Sr.), drove a Greyhound Bus on the Riverside-Las Vegas route, and that Bailey told her they could get ride on that bus for free. (20 RT 3828.) Respondent then states that, according to Greyhound's records, Jackson, Sr.'s last day of employment with Greyhound was June 24, 2001. (RB 14, citing 20 RT 3885, 3887.) Respondent makes the same point in discussing the father's testimony that his last day on the job was March 30 of that year. (RB 17, citing 20 RT 3874, 3870.) This, respondent says again, was refuted by the Greyhound

employment records. (*Ibid.*, citing 20 RT 3886-3887.) Whether purposefully or not, both of these references to the Greyhound employment records leave the misleading impression that Jackson, Sr. *could* have been driving a bus from Las Vegas on or shortly after Mother's Day, which fell on May 13 in 2001, and thus that appellant could have driven Geraldine Myers car there and ridden back to Riverside on his father's Greyhound bus. The testimony from Jackson, Sr.'s supervisor, however, was that the *only* driving Jackson, Sr. did for Greyhound in May or June of 2001 was on June 21 and June 24. (20 RT 3885-3887.) Indeed, a "Driver's Earnings Listing" sheet from Greyhound, found in appellant's room and a part of Exhibit 108, shows that Jackson Sr.'s earnings from May, 2001 were from "Vacation." (Ex. 108.) Accordingly, contrary to the impression left by respondent, appellant could not have returned from Las Vegas on a bus driven by his father on or about May 13, 2001.

Other omissions and errors abound:

1. In the very first introductory paragraph of respondent's statement of facts, respondent states, unequivocally, that, "In addition to confessing to the attack on Ms. Mason, Jackson also described stabbing Geraldine Meyers (sic) . . . ." (RB 3.) This is a half-truth, repeated throughout the brief. At no time during his interrogation did Jackson state that he was describing

anything other than the attack the night before on Myrna Mason, which he repeated twice during the course of the interrogation. (14 CT 3897, 3914-3915.) Whomever he was describing attacking with a knife (if anyone other than in his fantasies or delusions) is entirely unknown. Indeed, whether or not he was describing Ms. Myers, whether or not he stabbed her, or indeed whether or not he threw her from the car is entirely uncorroborated by any physical evidence.[1]

Respondent again discusses Jackson's "Confession" (RB 11) as if he had indeed clearly confessed to killing Myers. The problems with respondent's characterization of what appellant said as a confession regarding Myers are exemplified by the following quote from respondent's brief:

> 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.) (RB 12.)

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[1] One wonders how, if appellant threw Ms. Myers from the car on a freeway, as he told the detectives he did, the body was never found, either on or beside the freeway.

All of this would, indeed, be damning, if it had anything to do with the disappearance of Geraldine Myers. The description, however, is almost entirely corroborated by what happened at *Mason's* house the night before appellant was interrogated. First, these statements immediately followed his real confession, "I did it," referring to Mason. The statements were made in response to all of the questioning about the Mason crimes that came before the break in questioning. Second, Mason testified (through her preliminary hearing testimony, read to the jury), that the perpetrator confronted her in the hall of her house. (16 RT 3046.) Third, it was at Mason's house that the front door had a dead-bolt that was keyed on both sides (16 RT 3086-3087), and a window next to it that had a large amount of dust and possible (but not recoverable) fingerprints on the outside, along with four scrape marks that could have been made by someone wearing gloves. (7 RT 1728-1730, 1740.) Fourth, the final sentence in respondent's paragraph clearly relates to Mason: "Jackson said that he took her TV and checkbook prior to leaving." (RB 12.) While a TV and checkbook were indeed taken from Mason (13CT 3715, 3718; 7 RT 1693-1694, 1697-1699), there is no evidence anywhere in the record that either a television or checkbook was taken from Myers. In short, the facts

surrounding the "confession" related much more closely to the Mason case than the Myers case.

Respondent has, by the above-quoted paragraph, unwittingly proven appellant's point: there was no confession regarding Myers here, and even what might be considered "admissions" are so conflated with what happened at Mason's as to have little meaning without corroborating evidence regarding Myers, of which there was little to none. There was no evidence of a woman thrown out of a car on the freeway; there was no body found at any of the places suggested by appellant in his interview with the police; there was no evidence that he ever had or pawned the jewelry stolen from Myers' residence; and there was only conflicting or merely suggestive evidence as to everything else.

3. Respondent describes the envelope found on Myers' bed as "[a] manila envelope in which Ms. Myers kept her money [which] was ripped open and sitting on the bed. (8 RT 2025.)" (RB 5.) The manila envelope was certainly *similar* to those in which she kept her money. But Douglas Myer's statement that it "was" one she kept on her nightstand (8 RT 1961-1962) was countered by Robin Myer's testimony that it was one she saw in her grandmother's purse the previous Saturday. (8 RT 2027.) There was no

forensic evidence that the envelope ever contained money, only an inference that it did.

4. Respondent's statement that there was no money remaining in Myer's purse is incorrect. (RB 5) Respondent cites the testimony of Evidence Technician Tim Ellis, who stated that he did not remember seeing any money in the purse. (7 RT 1784.) Respondent omits, however, the testimony of both Robin Myers and her sister Deanna that Deanna found money in a white envelope in Myers' purse in the kitchen when the sisters first explored their grandmother's house on the Tuesday following Myers' disappearance. (8 RT 2028; 9 RT 2071.)

5. Respondent's description of Angie Fortson's testimony regarding Mother's Day, 2001 (RB 14), is also incomplete. While respondent accurately reports Fortson's initial statements in response to the prosecutor's question on direct examination, she entirely ignores Fortson's contradictory statements that immediately followed, on cross examination. In particular, respondent relates Fortson's statements that, after appellant had been gone for some two hours, he returned sweaty, and Fortson, angry at him, went to sleep and found him gone the next morning. (14 RT 2756-2761.) What respondent failed to include was the contrary testimony, in the following cross-examination, that she had been upset that she had not

seen her son that day, and that Jackson comforted her by having sex with her for about four to five hours commencing at 11:30 p.m.[2] (14 RT 2804-2805.) That's what she told the detectives the morning after Jackson's arrest. (14 RT 2805-2806.) While it is true that respondent mentions these facts, in one sentence, in describing Fortson's defense testimony (RB 17, citing 20 RT 3778-3779), the fact is that Fortson's testimony, as well as what she told the detectives, was contradictory, even during her prosecution-case testimony. (*See* Appellant's Opening Brief ["AOB"] 23-28.)

6. Respondent did the same partial reporting with respect to Sheena Fortson's testimony, reciting only the testimony supporting the prosecution's case (RT 14-15) without giving the full picture. (*See* AOB 32-36.) For example, respondent states that "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. (RB 14-15, citing 16 RT 3011, 3037) Respondent omits, however, that right after that testimony, Sheena denied that she ever told Detective Silva that appellant had gone with Angie that same two or three nights after

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[2] This contravenes the inference that Jackson must have left shortly after Fortson went to sleep, at 11:30 p.m., to drive to Las Vegas.

Mother's Day. (16 RT 3013.) Nor does respondent mention that, on cross-examination, Sheena stated that, when she was speaking with Silva in 2003, she could not remember Mother's Day of 2001, or if Jackson was there then. (16 RT 3018.) This puts a rather different cast on the matter.

7. In perhaps the best example of respondent's crabbed statement of the facts, appellant's entire penalty-phase defense case, including his starkly horrendous childhood, is reported in one paragraph, consisting of three sentences and slightly more than five lines of text. (RB 18.)

The factual setting in this case is rich and complex, and not reducible, as respondent has done, to 16 pages of partially-complete and at times misleading text. It is possible that a given juror may have credited only the specific pieces of evidence respondent chose to include in its prosecution-centric statement of facts and ignored all of the evidence and alternative inferences that respondent chose to omit. But a reviewing court cannot do this. "In appraising the prejudicial effect of trial court error, an appellate court does not halt on the rim of substantial evidence or ignore reasonable inferences favoring the appellant." (*People v. Butts* (1965) 236 Cal.App.2d 817, 832.) Rather, the reviewing court looks to the whole record, including defense-favorable evidence and including problems with the prosecution's witnesses. (*People v. Russell* (2006) 144 Cal.App.4th

1415, 1433 [prejudice found because evidence not "so overwhelming that a rational jury could not reach a contrary result"]; *People v. Randle* (2005) 35 Cal.4th 987, 1004 [reversal where "the evidence was . . . susceptible of the interpretation" favoring the defense]; *People v. Giardino* (2000) 82 Cal.App.4th 454, 467 [prejudice found "because the evidence supports conflicting conclusions"]; *People v. Arcega* (1982) 32 Cal.3d 504, 524 [reversal called for where evidence "is open to the interpretation" that defendant not guilty of charged offense].) Accordingly, it is upon appellant's statement of facts in his opening brief which the Court should rely in evaluating the evidence and legal arguments.

ARGUMENT - GUILT PHASE

I. THE MYERS COUNTS SHOULD HAVE BEEN SEVERED FROM THE MASON COUNTS

Regarding the trial court's denial of appellant's severance motion, respondent understandably relies on *People v. Soper* (2009) 45 Cal.4th 759 [hereinafter, "*Soper*"], Penal Code section 954, and the preference for joint trials. (RB 20-21) Where respondent fails is in its insistence on cross-admissibility, even where there is none, and in never quite answering appellant's point that there is *nothing* about the sexual assault on Ms. Mason that would be admissible in a separate trial on the Myers counts. Neither can she overcome the fact that this was an exceedingly weak murder case joined with an extraordinarily strong and inflammatory non-murder case.

The gravamen of appellant's argument is that, despite the existence of *some* cross-admissibility, the other factors in the case – the inflammatory nature of the sex charges in the Mason case, regarding which there was no parallel evidence in the Myers case; and the coupling of a weak capital case with a strong non-capital case containing those inflammatory charges – required severance, and now requires reversal of the capital murder conviction. (AOB 147-148.)

Respondent's first point is that because murder and rape are offenses of the same class, they are properly joined. (RB 23.) This is merely stating the obvious. The question was not whether they could be properly joined, but whether they should have been. Respondent goes on to note that because the statutory prerequisites of joinder were met, appellant can establish error only upon a clear showing of prejudice, and then further notes, citing *Soper's* statement, quoted also in appellant's opening brief, that cross-admissibility "normally" is alone sufficient to dispel any suggestion of prejudice. (RB 23-24; AOB 146; *Soper*, *supra*, 45 Cal.4th at p. 780.)

The argument comes down to this: (1) whether *Soper* admits of any exceptions by its use of the term "normally," or whether such exceptions should exist notwithstanding *Soper*, and (2) whether this case requires such an exception. Respondent says no; appellant repeats, yes.

Appellant does not argue that there is no cross-admissibility. Rather, appellant's point is that those factors which are cross-admissible could have been introduced at a separate trial of the Myer's counts without admitting the details of the highly inflammatory sexual assault and three choking

incidents – facts of the Mason case for which there was no similar evidence, not even in appellant's so-called admissions, relating to the Myers case.[3]

Respondent initially appears to contend, without serious analysis, that at a separate trial on the Myers capital murder charge the Mason crimes would have been admissible on the issues of intent, common plan or design, and identity. (RB 24-25.) As appellant has argued in his opening brief, the issues of cross-admissibility are substantially less obvious than respondent suggests. (AOB 143-145.) Thus, with respect to identity, the fact that two elderly ladies' houses were entered late at night, five weeks and four blocks apart, and items were stolen from them, is not so unusual and distinctive as to be like a signature. (*People v. Ewoldt* (1994) 7 Cal.4th 380, 403.) With regard to intent, there was no evidence of sex crimes against Myers, making cross-admissibility of the Mason sex crimes – and even the choking – inadmissible under Evidence Code sections 1101, subdivision (a) and 352.

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[3] Appellant also disagrees with respondent's reference to "trace evidence in the form of his scent, at both crime scenes, which was detected and identified by a trained bloodhound." (RB 25.) As argued extensively in his opening brief and this brief, the Myers-related dog-sniff evidence was inadmissible.

As stated in appellant's opening brief, there are no grounds on which the sex crimes against Mason would have been admissible in a separate Myers-crimes trial. (AOB 144-145.)

Second, respondent relies on the trial court's finding that the entire recorded interview "where he admitted killing Ms. Myers" would have been admissible for impeachment purpose in a separate trial, and that there was no way to sanitize the confession to omit the details of the rape of Ms. Mason from the Jackson interview. (RB 25, citing 3 RT 1317-1318.) Respondent repeats, but does not show, that there would be no basis, under evidence code section 352, to properly redact the most inflammatory details of the police interview, most of which is about the details of another case, and in which appellant – contrary to respondent's repeated suggestion – *never* admitted to attacking Myers.[4] But in the relevant portion of the interrogation, in which the alleged Myers-related admissions occur, there is no reference to the sexual assault or the choking incidents involving Mason. (14 CT 3882 *et seq.*) Thus, to say that the interview could not have been redacted in a separate trial of the Myers counts strains credulity. Respondent never suggests how information or questioning about the sexual

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[4] This assumes also that the "confession" portion of the interview was properly admissible at all, which appellant has challenged in his opening brief.

offenses against Mason was relevant to impeaching any statements conceivably relating to Myers.

Further, respondent's discussion of purported Myers-related "admissions" requires some response. For example, there is respondent's repetition of the trial court's finding that Jackson had admitted "eating a sandwich in Myer's house when she 'surprised' him." (RB 26.) As explained in the foregoing section, however, that part of Jackson's "admissions" referred to what happened the night before the interview, at the Mason house, and many of the references therein are consistent with other evidence tied to the Mason incident, but not by any corroborating evidence relating to Myers.[5] (See *ante*, at pp. 4-5.)

Then there is the reference to Jackson – still talking about the night before – saying he stabbed "her" with a large knife in the back, with the blade coming out through her chest. We know that did not occur with

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[5] To review: Mason testified (through her preliminary hearing testimony, read to the jury), that the perpetrator confronted her in the hall of her house. (16 RT 3046.) There is no similar evidence regarding Myers. Moreover, it was at Mason's house that the front door had a dead-bolt that was keyed on both sides (16 RT 3086-3087), and a window next to it that had a large amount of dust and possible (but not recoverable) fingerprints on the outside, along with four scrape marks that could have been made by someone wearing gloves. (7 RT 1728-1730, 1740.) Finally, while Jackson said he took "her" TV and checkbook prior to leaving, this clearly related to Mason, not Myers. (13CT 3715, 3718; 7 RT 1693-1694, 1697-1699).

Mason, but if it occurred with Myers, that completely undercuts the prosecutor's repeated remarks suggesting a sexual assault against Myers, as there was no blood on the bed, as well no evidence of blood in the interior of the car from which, if Jackson's "admission" is to be believed, he threw her out the window.

Respondent's next point, that the evidence against Jackson was very strong, simply does not survive scrutiny. (RB 26.) Taking respondent's points one by one:

1. "Jackson admitted to doing so [murdering Ms. Myers]." No, he never did, and as appellant has shown, his so-called admissions are self-contradictory and corroborated more by evidence from what happened at Myrna Mason's house than the meager evidence of what happened at Myers'. (See *ante*, at pp. 4-5.)

2. The newspaper clipping found in the locked cabinet "in his room at his parents' house." (*Ibid.*) Detective Shumway testified that he could not be sure which of the papers shown to the jury in Exhibit 108 came from the box and which were found elsewhere in the room. (13 RT 2731.) Indeed, the key to the box came from appellant's mother. (13 RT 2729-2730.) The contents of Exhibit 108, however, includes just 1 page that clearly relates to appellant, 6 other pages that could be tied to appellant, and

32 pages which cannot. Keeping in mind that appellant and his father had the same first and last names, but different middle names, the only pages within Exhibit 108 which either clearly or possibly relate to appellant are (1) a 1999 appointment letter from the Department of Social Services, addressed to Bailey Junior Jackson (a name used by appellant); (2) a 3-page Day's Inn receipt for the period March 11 - April 9, 2000, in the name of Bailey Jackson; (3) a Budget Rent-a-Truck receipt with a nearly illegible name but which appears to be to "Bailey M. Jackson"; (4) a bank card statement page addressed to "Billy Jackson"; and (5) a Riverside Medical Clinic statement made out to "Bailey Jackson". (Ex. 108.) The remaining 32 pages include (1) the article about Myers' disappearance; (2) another article involving a crime in another state; (3) and 29 pages that either clearly or presumably relate to Jackson, Sr. (including 13 pages related to his Greyhound employment), to Jackson's mother Cleona, and one page to his brother Jason. (Ex. 108.) Moreover, appellant's father testified that appellant did not have a key to the locked cabinet. (20 RT 3873.) The locked cabinet, he said, contained items that he and his wife wanted to save, and that he, Jackson, Sr., cut out the article, but could not remember why he

did so.[6] (20 RT 3876-3877.) So, while respondent wants to include this article "found in his room" as part of the "very strong" Myers case against appellant (RB 26), this article, in light of the remaining contents and the testimony, has little if any incriminating significance.

3. The next item supposedly comprising this very strong Myers case was that appellant had an unexplained absence at the time Ms. Myers disappeared. (RB 26.) To begin with, that depends on which version of Angie Fortson's several stories you believe, as she also testified that the night he went out might have been the night before, and that he was with her all of Mother's Day and that night. (14 RT 283-2835.) Moreover, even if we assume that he left for some period of time, that is just as consistent with innocence as with guilt. Indeed, California juries are commonly instructed that if there are two reasonable interpretations of a fact, one of which points to innocence, the other guilt, they must adopt the innocent explanation. (CALJIC 2.01.) This is particularly true because Fortson also testified that Jackson's disappearing at night was not uncommon. (14 RT

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[6] In the penalty phase, Jackson, Sr. testified that his wife cut out the article, and "she keeps stuff like that." (39 RT 6850.) Indeed, Exhibit 108 contains another newspaper article about a capital murder case (from somewhere that includes a "Belmont County Common Pleas Court," with no apparent connection to appellant. Appellant's father's penalty-phase testimony also affirmed that appellant did not have the key to the locked cabinet, and nothing in it was his. (39 RT 6848-6849.)

2756.) Respondent wants to have it both ways: to rely on Fortson when it is convenient to do so, but to ignore her testimony when it is not.

4. Finally, respondent points to the dog-scent evidence: "[Jackson's] scent was found on Myers' property inside her home." (RB 26.) That, of course, is the subject of a major portion of appellant's brief, and this reply: We don't actually know *why* Maggie trailed to and alerted on appellant; it could have been for any number of reasons not related to his scent being on the envelope.[7] (See, *e.g.*, AOB at 175.)

Respondent finally returns to section 954's preference for the preservation of judicial resources and public funds which, she says, far outweighs severance. (RB 26-27.) It does not, however, outweigh due process. This is not a "mere imbalance in the evidence." (RB 26.) No, the jury did not convict appellant of Myers' murder because of the strength of the Myers case alone; they convicted him because of the failure to sever, and consequent admission of the incredibly inflammatory Mason-related evidence, and because the trial court made a complete mess of its dog-sniff-

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[7] Contrary to what respondent suggests (RB 25), the prior undisputed scent trailings involving appellant and the Mason crime scene, did not corroborate the "accuracy and reliability" of the later Myers' scent identification procedure, but rather simply provided another reason why the dog may have alerted on appellant, thereby undermining the significance of any implied identification.

evidence rulings, from the admission of the evidence to the jury instructions regarding it.

II. RESPONDENT IS INCORRECT THAT THE DOG-SCENT EVIDENCE WAS EITHER RELIABLE OR ADMISSIBLE

A. AMONG THE CASES CITED AS PRECEDENT BY RESPONDENT, THE ONLY ONE THAT IS TRULY APPLICABLE TO THIS CASE FOUND THAT A *KELLY* HEARING IS NEEDED TO ESTABLISH THE ADMISSIBILITY OF SCENT-IDENTIFICATION EVIDENCE

> Trained canines *can* track scents and detect vapors emitted by drugs and explosives. When the proof is in the pudding -- one either finds dope or a bomb, or not -- false alerts (and they do happen) can't lead to a miscarriage of justice. But using a handler's interpretation of their dog's behavior as evidence is extremely risky. Lacking a scientific underpinning and validated performance standards, scent comparisons and lineups are nothing more than voodoo. Dogs aren't calibrated instruments. As living things they are subject to many influencers, yet unlike their handlers they can't be cross-examined. Could they have been affected by subtle, perhaps unintended cues from their handler? Might they simply have alerted in error? (J. Wachtel, *Would You Bet Your Freedom on a Dog's Nose?* Police Issues (Nov. 8, 2009) <http://www.policeissues.com/html/technology_09.html> (as of Oct. 14, 2013.) (Emphasis in original.)

Respondent's dog-scent argument is flawed in the same way that the trial court's decision was flawed – by not recognizing, or not taking into account, the differences between well-established tracking or trailing evidence and the scent-identification that took place here.

While it is true that the dog Maggie, in the Orange Street Station basement on June 25, 2001, followed a scent from the beginning of the track to the locker room, and ultimately to appellant, the cases which

approve dog tracking evidence are factually distinguishable, while the case which disapproves of scent-identification evidence, which the trial court ignored, is factually closest to this case.

Thus, in trying to dispute that *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), applied to the scent-identification in this case, respondent claims that human "scent discrimination" by dogs is not new to California law, nor a newly developed scientific technique, citing *People v. Gonzalez* (1990) 218 Cal.App.3d 403, 414, *People v. Malgren* (1983) 139 Cal.App.3d 234, 238, and *People v. Craig* (1978) 86 Cal.App.3d 905, 915-916. (RB 31, 33.) Using the term "scent discrimination," however, muddies the water, for not one of these cited case involved scent discrimination. Rather, they all involved trailing (or, inaccurately but more commonly, tracking). All of them involved fresh scents from a recent crime scene or post-crime escape vehicle to individuals, or where individuals had fled, and were not asked to discriminate between those persons and others. Thus, in *Craig*, the dog successfully trailed along the pathway taken by occupants of a Chevy Nova. Earlier, the three men had robbed a gas station, and still earlier one of them had snatched a purse from a woman who saw him getting into the Nova. The dog sniffed inside the Nova and then trailed to a location where the men had been detained by the police. (86 Cal.App.3d at pp. 909-911.) In *Malgren*, the dog trailed along a fresh track to a suspect hiding, out of breath

and perspiring, in high bushes in a game reserve behind the house he had burgled. The bottoms of his pant legs were wet, and there were mud and grass stains on his shoes, consistent with the ground between the house and where he was found. (139 Cal.App.3d at pp. 237, 240). And in *Gonzalez*, the dog trailed along a fresh trail from the burglary scene. A deputy had seen a man fleeing the scene on foot, and the dog trailed to a man, defendant Gonzalez, hiding by lying down in a vineyard. (218 Cal.App. 3d at pp. 405-407.) These cases do *not* establish the validity of "scent-discrimination" evidence under California law.[8]

Instead, the only case which actually involved what respondent has called scent discrimination, *People v. Mitchell* (2003) 110 Cal.App.4th 772 (*Mitchell*), held that the process had *not* been approved in California, and *did* require a *Kelly* hearing prior to its use in a court proceeding. (100 Cal.App.3d at p. 793.).

The factual distinctions between the pure trailing cases and *Mitchell*, which, like this case, involved a scent-item that was not fresh and a choice at the end of trail, made *Mitchell* the precedent that the trial court was bound,

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[8] "Discrimination" implies choosing between scents – what appellant has referred to as scent identification. Trailing involves following a fresh scent to a suspect. While trailing may involve discriminating between a scent trail left by a suspect and other scents present along the track, the term "discrimination" as used by respondent conflates the two processes – trailing, and identifying-by-choosing – in a misleading manner.

but failed, to follow. Thus, respondent is simply wrong in characterizing this is as simply a dog trailing case which happened to be set in a controlled environment. (RB 38-39.)

Mitchell also highlights the other distinction between this case and the three appellate cases cited by respondent, *i.e.*, the age and possible contamination of the scent item. It is not sufficient to answer the requirement that the trail not be stale or contaminated (*Malgren, supra*, 139 Cal.App.3d at p. 238) by merely ignoring the age and possible contamination of the scent item because it is not a "trail." *Malgren*, and the other cases all involved fresh scents, so the focus was naturally on the integrity of the scent on the trail. Ignoring the age or contamination of a scent item, says *Mitchell*, is to ignore the differences (in both *Mitchell* and this case) which "require a dramatic revision of the final element of the *Malgren* test[.]" (110 Cal.App.4th at p. 790.) That the *trail* in this case (along the basement hallways) was fresh (RB 40) was irrelevant, given that the *scent item* – the envelope from Myers' bed – was both 40 days old and had been soaked with ninhydrin. *Those* are the facts which take this case out of the realm of *Craig, Gonzales,* and *Malgren*, and into the realm of *Mitchell*, and thus *Kelly*.

This was not like the traditional dog sniff trailing where a dog is relied upon to trail a scent from the crime scene (or escape vehicle) from

which the perpetrator has fled and leads the police to a hiding suspect — a circumstance which contains its own built in indicia of reliability. Rather, in this instance, as presented by the prosecution, the dog was purported to have found an identical match between the scent on a ninhydrin-treated crime scene object seized 40 days earlier and the scent of a man (appellant) whom the police had brought to the basement of the Orange Street station. Whether that is what Maggie was doing when she trailed appellant's scent in the hallways (if it was his scent she followed) – that is, whether in her dog consciousness she was following an exact match to a scent on the envelope is by no means clear. Whether there is any scientific basis for confidence that this is what Maggie was in fact doing and/or for confidence that she had the capacity to reliably make such a determination, should have been the subject of a *Kelly* hearing.

It should also be noted that Deputy Coby Webb, Maggie's handler, did not precede the trail with a "negative trail," which involves having the dog scent on an item whose scent is not present, to insure that she will not trail absent a scent.[9] So we are left with no basis for confidence that Maggie

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[9] At least in research, a negative trail is considered crucial to validate the results, as described by prosecution expert Lisa Harvey and others in a 2006 paper:

> A trail is considered negative after a scent is

(continued...)

wasn't simply following the freshest or most distinctive scent to the locker room, or the scent she was familiar with from having sniffed appellant three days before at the Spruce Street station. Perhaps appellant's scent was on the 40-day-old, ninhydrin-treated envelope. Perhaps not. Maggie cannot tell us. We will never know.

Respondent exhaustively sets forth Maggie's and Deputy Webb's qualifications. (RB 40-41.) But other than the first two items mentioned, *all* of the listed training took place *after* the June, 2001 trailing in this case, and is thus both irrelevant and misleading. Indeed, in the second penalty trial, Deputy Webb admitted that the June 25th trail to Jackson at the Orange Street

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[9] (...continued)
presented to the bloodhound and the dog cannot match the scent on the article to any scent located on the ground. The article scent is collected from an individual who is known to have never been in the area in which the dog will be trailing. If the dog performs the negative correctly he or she will not trail. The dog will typically stand in place or circle the immediate locale briefly, and then stop, thereby letting the handler know there is no trail, and the scent is a negative. During the current study, if any dog trailed off of the negative scent, that dog was later eliminated from the data.

(Harvey, *et al., The Use of Bloodhounds in Determining the Impact of Genetics and the Environment on the Expression of Human Odortype* (2006) 51 J. Forens.Sci. 1109, 1110.)

station basement was the first station house identification trail to a suspect in an orange jumpsuit that Maggie had done.[10]

But Maggie's qualifications are not the issue, here. The issue is, rather, whether this scent identification procedure, a clear step beyond a standard trailing situation, had been accepted at the time of trial either by the relevant scientific community, which the court precluded determining by denying the *Kelly* hearing, or by an appellate court, which it had not.

Respondent also minimizes the ninhydrin treatment, referencing the Harvey test trials from a ninhydrin-treated envelope. (RB 42.) As appellant has explained in his opening brief, at pages 224-226, short of a 40-day wait following the contamination and similar storage conditions, any such tests were irrelevant and inadmissible under *People v. Bonin* (1989) 47 Cal.3d 808, 847.

Respondent, also at RB 42, repeats Deputy Webb and Lisa Harvey's self-validation fallacy. "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." (RB 42.) As extensively shown in appellant's opening brief, there are any number of reasons Maggie

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[10] The transcript is somewhat unclear, because while Maggie had done a total of 12 station house identification procedures by the time of trial, it may be that this was her first station house identification. (38 RT 6726.)

might have trailed to the locker room and alerted on Jackson other than his scent, if it was still there, on the envelope. (AOB 175-176, 191-204.) Especially in the absence of a negative trail, discussed *ante*, to test Maggie's refusal to trail absent a scent, and because Maggie might have been simply following the freshest scent in the hallway, or appellant's because she was familiar with it, respondent's reliance on the simple fact of Maggie's having trailed goes well beyond the science. The fact that a machine gives a reading of blood alcohol level does not mean it was properly calibrated or is accurate. The fact that Maggie – a sentient being not capable of machine-like calibration – trails does not prove anything with regard to the presence of Jackson's scent on the envelope.

Respondent, finally, makes appellant's point for him: "Here, unlike in *Mitchell* and *Willis* [*People v. Willis* (2004) 115 Cal.App.4th 379], the trial court heard expert testimony on these subjects, not just anecdotal stories." But it was not just the trial court that heard this expert testimony – the court heard it along with the jury, rather than in a pre-trial *Kelly* or, at minimum, Evidence Code section 402 hearing.

Respondent compounds the error in the next section of its brief (RB 43-45), by describing only Lisa Harvey's and Douglas Lowry's testimony for the People, as if the defense expert, Dr. Lawrence Myers, had not testified and presented substantial evidence contradicting Harvey's views. Indeed,

even Lowry made the point that he questioned whether his dog would have been able to get a scent off of a ninhydrin-laced envelope after 40 days, another point respondent fails to mention. (38 RT 6675, 6677-6678.) The purpose of a *Kelly* hearing is to resolve the validity of the evidence *before* it is heard by the jury, not while. As appellant explained in his opening brief, all of the hallmark dangers of scientific testimony are present here: The procedure conveyed a "misleading aura of certainty," by "appearing in both name and description to provide some definitive truth which the expert need only accurately recognize and convey to the jury." (*People v. Stoll* (1989) 49 Cal.3d 1136, 1155-1156; *People v. Leahy* (1994) 8 Cal.4th 587, 606; *Mitchell, supra,* 110 Cal.App.4th 783.) Moreover, the dangers are enhanced when the procedure is used to identify the perpetrator of the crime. (*Kelly, supra,* 17 Cal.3d at p. 32.) Worse, the dangers are further enhanced when the instrument used is not a machine but an animal subject to the vagaries of sentient beings.

Respondent can call this a trailing, but while it involved some trailing, it also involved a scent article which had been treated with ninhydrin and left on an evidence shelf for 40 days. And it involved the dog having to choose among three persons at the end of the trail – a choice which lent an even further aura of validity, but which we cannot know was caused by the possible scent of the perpetrator on the envelope (if it still existed) or

because of any number of factors which may have cued the dog, from the difference in clothing between the detectives and appellant, to the difference in demeanor; to the fact that appellant was the only one whose scent was familiar to Maggie, to inadvertent cuing by the handler, the detectives, or by appellant. None of these additional factors were present in, nor approved of, in *Craig, Gonzalez,* or *Malgren.*

Finally, it must be noted that respondent's brief is entirely bereft of comment on, let alone refutation of, the substantial research presented with appellant's opening brief, research which shows that, under any name, the validity of scent-identification is far from settled. To the extent that respondent may be suggesting that once the evidence presented to the jury had come in, there was validation of the court's decision not to hold a *Kelly* hearing, is to turn *Kelly* on its head.

B. THE QUESTIONS LEFT UNANSWERED BY THE COURT'S FAILURE TO HOLD A *KELLY* HEARING ARE WHAT MAKE THE *CRAWFORD* ISSUE NOT NONSENSICAL

Respondent rejects appellant's argument (AOB 208-212) regarding his Sixth Amendment rights under *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and its progeny. It is precisely the questions raised by the above-referenced research ignored by respondent – questions about the scent remaining on the envelope; about the possible inadvertent cuing by the

handler or detectives or even appellant himself – which make the Sixth Amendment argument raised by appellant valid. Respondent calls this nonsensical, raising the specter that application of *Crawford* would prevent dog evidence from ever being introduced. (RB 45-47.) Not so.

In the normal trailing case, such as that presented in *Craig, Gonzalez,* and *Malgren*, a simple description of what the dog did was sufficient: the dog smelled, the dog tracked, the dog alerted on or stopped at the location occupied (or recently vacated) by the suspect. The dog would not have to testify because, if the *Malgren* foundation is laid, there is little to question.

In this case, however, question abound, questions which really could only be answered by Maggie. Were you really trailing the scent on the article, or merely the strong scent recently left by one or more of the three men who had just been there? When you got into the locker room, did you really pick out Jackson because his was the scent on the article, or because (1) his was the strongest scent along the hallway and in the locker room, or (2) he was the one who stood out because he was distinctively dressed, or (3) gave off subtle cues that he was the one you were seeking; or (4) because you picked up cues from your handler; or (5) you recognized his scent from three days earlier? These and other questions are all valid questions, raised by the research and cases set forth in appellant's opening brief at pages 189-

208. Unfortunately, these are *not* questions which could be answered by cross-examining the handler, Deputy Webb.

And Maggie's alert, in light of the purpose for which the praosecutor sought its introduction, *was* testimonial. According to the prosecutor, it said: "This is the man who's scent is on the envelope." Further, it was made in a formal setting – a "trail" that was specifically set up to elicit this "testimony." And it presented evidence no less crucial to the prosecution's case than the laboratory results involved in *Melendez-Diaz* (2009) 557 U.S. 305 [certificate confirmed substance was cocaine] and *Bullcoming v. New Mexico* (2011) 564 U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 [substitute laboratory analyst's testimony reciting results of blood alcohol level test].

Perhaps if dog-scent identification such as presented in this case (and *Mitchell*) is eventually approved, following a *Kelly* hearing, and by appellate decision, then the *Crawford* issues will fall away. The process will have been validated and many of the questions satisfied. Until then, the dog's testimonial actions raise questions unanswerable by the handler, just as the lab report and substitute analyst could not answer all of the questions raised by the testing results in *Melendez-Diaz* and *Bullcoming*.

C. THE COURT'S REFUSAL TO HOLD A FOUNDATIONAL HEARING WAS COUNTER TO THE APPLICABLE PRECEDENT

Contrary to respondent's contention (RB 47-48), all of the questions raised in the foregoing sections apply equally to the court's refusal to hold a foundational hearing, in particular with regard to the fifth prong of the *Malgren* test as it applied to the contamination of the envelope.

The trial court had before it not only the declaration (though unsigned) of the defense expert, but the substantial questions raised in the articles presented with appellant's *Kelly* motion. (See AOB at pp. 178-180; 4 CT 866, *et seq.*) Thus, it is not enough to answer that the prosecutor had laid a sufficient foundation in the preliminary hearing, in light of the questions subsequently raised by those articles and by appellant's expert. Respondent concludes that there is "no possibility that had the defense expert testified, instead of submitting a declaration, that the court would have found otherwise." (RB 48.) This is to presume the unknowable, and, again, turns procedure on its head: There is no way to know how convincing Dr. Myers would have been on the issue, or what other research would have been brought to bear in such a hearing. Indeed, had the prosecution brought in Douglas Lowry to support their position, he would have corroborated Dr. Myer's similar doubts about scent remaining on a 40-day-old envelope soaked in ninhydrin. (38 RT 6675, 6677-6678.)

The court rejected application of *Mitchell*. This was error, but to the extent that it chose instead to rely on *Malgren*, it simply failed to comply with *Malgren's* foundational requirement. *Malgren* specifically requires freshness of the trail and a lack of contamination, which in this case required the court to conduct a foundational hearing on the contamination of the envelope. Instead, the court ruled that what was presented by Deputy Webb at the preliminary hearing constituted sufficient foundation. (2 RT 981.) What Deputy Webb described in her preliminary hearing testimony, however, had nothing to do with a 40-day old ninhydrin-treated scent object. (2 CT 291-310 [direct], 322-341 [cross].) Indeed, Webb's "contamination" story related to Maggie involved two of the people in a scent lineup having touched a scent article. "That is contamination." (2 RT 336.)

For the trial court to have relied on this as foundation, and then to allow the jury to make their own judgments on scientific validity based on the expert testimony – to settle the scientific dispute – turns the very idea of a foundational hearing on its head. That was the job of the trial court in a foundational hearing.

Under *Mitchell*, the trial court should have held a *Kelly* hearing. Under *Malgren*, it should have held a foundational hearing. It ignored both of these precedents, to appellant's prejudice.

D. THE COURT ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE THE SCENT IDENTIFICATION ON THE BASIS OF CONTAMINATION OF THE SCENT ITEM

Many of the foregoing points relate also to respondent's argument regarding the denial of appellant's Evidence Code section 352 motion to exclude the Lowry and Harvey ninhydrin studies, and the defense request to exclude the manila envelope because of contamination. (RB 48-52.)

On this issue, however, appellant refers the Court to his opening brief argument, at pages 218-227. There seems little further to add, except this: The tests run by Harvey and Lowry contravened the holding in *People v. Bonin, supra,* 47 Cal.3d at p. 847, in that they did not come close to duplicating the 40 days the envelope had sat on an evidence shelf. The research clearly shows that, even without the ninhydrin, both time and conditions of storage are substantial factors in the survival of scent. (See Opening Brief Appendix B: G.A.A. Schoon, *The effect of the ageing of crime scene objects on the results of scent identification line-ups using trained dogs* (2004) 147 Forensic Sci. Int'l 43-47; Appendix G: Hudson, *et al., The Stability of Collected Human Scent Under Various Environmental Conditions* (2009) 54 J. Forens. Sci. 1270.)

These were *not* matters for the jury to decide.

E. THE FAILURE TO EXCLUDE HARVEY'S STUDIES BASED ON USE OF THE STU RUNS COUNTER TO THIS COURT'S PRECEDENT

Regarding the failure of the court to exclude Dr. Harvey's studies on the basis of her use of the STU, a device which has *still* not been approved in a California appellate case, respondent has it wrong.

First, respondent did make a small but crucial omission in its argument: "Counsel asked Dr. Harvey how scents were collected for use in dog-scent research studies." (RB 53.) The question posed to Dr. Harvey was actually how scents were collected in *her* studies. (18 RT 3418.)

Second, respondent relies on Harvey's answer to the question whether the STU is a device "that has been accepted in [her] scientific community." Harvey answered by saying yes, we use it and three other agencies use it.[11] (18 RT 3422-3423.) This is not an answer, for it implies that these four constitute a fair sampling of the researchers in her field.

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[11] One of the agencies cited by Harvey was the FBI, although it is not clear whether they used it in research or in the field. But in a 2009 article, the author described an e-mail from the FBI which stated that they "did not currently use dogs to do scent ID lineups." (Wilber, *Does It Pass the Smell Test*? (July 12, 2009) Victoria Advocate <http://victoriadvocate .com/news/2009/jul/12/lw_scentlineup_071209_56411/> (as of July 8, 2013).)

Third, the cases cited by respondent (RB 54) are inapposite. *People v. Gardeley* (1996) 14 Cal.4th 605 concerned gang-expert opinion, not a "scientific" device. Thus, in that context, *Gardeley* states,

> Expert testimony may also be premised on material that is not admitted into evidence as long as it is material that is reasonably relied upon by experts in the particular field in forming their opinions. [Citation] Of course, *any material that forms the basis of an expert's opinion testimony must be reliable.* [Citation.] For "the law does not accord to the expert's opinion the same degree of credence or integrity as it does the data underlying the opinion. Like a house built on sand, the expert's opinion is no better than the facts on which it is based." [Citation.] " (*Id.*, at p. 618; emphasis added.)

Similarly, the issue in *People v. Montiel* (1993) 5 Cal.4th 877, 918-919, was the opinion of a psychopharmacologist who disclosed prejudicial hearsay material regarding the defendant's state of mind. In this case, at issue is not *material* used in forming an opinion; it is an assertedly reliable *scientific device*, used as the basis for research, the reliabiity of which device *still* has not been accepted in a published California opinion.

Indeed, in a 2006 Los Angeles Times article regarding the STU, the author described several different Southern California cases in which its use led to false arrests.[12] (H.G. Reza, *Hound helper may not be up to snuff* (Dec.

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[12] According to the article, the STU and the dogs who scented on their scent pads led to the following false arrests:

–Jeffrey Alan Grant was arrested as suspected of serial rape, on the basis of an STU identification. DNA evidence cleared him four months

(continued...)

7, 2006) Los Angeles Times <http://articles.latimes.com/2006/dec/07 /local/me-scent7> (as of July 8, 2013).) In a recent Ninth Circuit case involving an STU scent pad, the court, evaluating a *Brady* claim, noted that (1) the same dog and handler involved in that case had, in 1997, identified two different men as the source of scent on the murder suspect's shirt; and (2) in 2001, had identified as the perpetrator a person who had been in prison at the time of the crime. (*Aquilar v. Woodford* (9th Cir. 2013) 725 F.3d. 970, 2013 U.S. App. LEXIS 15395 at 30.)

Yet this is the device which underpinned Harvey's research, which respondent would have the court blindly accept as valid research. The cases cited by appellant at pages 230-231 of his opening brief indicate that the trial court's ruling was invalid, and an abuse of discretion. (*People v. Parnell* (1993) 16 Cal.App.4th 862, 869 [psychologist's opinion based on defendant's

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[12] (...continued)

later.

–Josh Connole was arrested as a suspect in a string of arsons and vandalism at four SUV dealerships. A bloodhound followed the scent from an STU gauzepad provided by the FBI to Connole's home. He spent four days in jail, successfully sued the FBI and the City of West Covina for false arrest, and a Caltech student was later convicted for the crimes

–James Ochoa was falsely accused of carjacking and robbery after an STU was used to obtain the scent from a cap and shirt left in a stolen vehicle and a bloodhound followed the scent to Ochoa's house two blocks away. DNA tests completed before the trial excluded him as the person who wore the items; he was charged anyway; and spent 20 months in prison before the DNA was matched to another man in custody in Los Angeles for another carjacking. (*Ibid.)*

hypnotically-induced statements inadmissible]; citing *People v. Bledsoe* (1984) 36 Cal.3d 236, 251 [rape trauma syndrome does not purport to be scientifically reliable means of proving that rape occurred, and is inadmissible to prove it did]; *People v. Bowker* (1988) 203 Cal.App.3d 385, 390-391 [child sexual abuse accommodation syndrome is not admissible to support opinion as to how abused child would behave].) If a psychologist's opinion based on rejected-under-*Kelly* hypnotically induced statements is inadmissible, then research based on a never-approved-under-*Kelly* device – one shown to have yielded repeated errors – is similarly inadmissible.

F. THE ERRORS WERE PREJUDICIAL

With respect to whether appellant would have been found guilty of the Myers murder absent the dog-scent evidence, respondent and appellant view the strength of the remaining evidence against appellant differently. (RB 55-57; AOB 232-236.)

Respondent characterizes appellant's view as self-serving, by ignoring what respondent characterizes as "the extraordinary similar circumstances of the crimes." (RB 56.) Appellant does not view these as extraordinarily similar, because there is no evidence of what actually happened at the Myers house, and respondent's description cannot therefore be of significant probative value. The circumstances certainly are not so similar as to support a finding beyond a reasonable doubt that what happened to Myrna Mason

also happened to Geraldine Myers. Indeed, as argued elsewhere, appellant also believes that the two cases were ill-joined, and much of what happened to Mason would have been inadmissible at a separate Myers trial. More to the point, these so-called "extraordinary" similarities do not rise to the point of overcoming either the state or federal standards of prejudice. Absent the dog-scent-identification evidence, there is at minimum a reasonable possibility, "more than an abstract possibility," that the jury would not have convicted appellant of the Myers murder. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918, and cases there cited.) *A fortiori*, neither would it overcome that federal harmless-beyond-a-reasonable-doubt standard. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

Respondent repeats the canard regarding the newspaper clipping found in Jackson's room at his parent's home. (RB 56, refuted *ante,* at pp. 16-17.) To say that "Jackson 'disappeared' for a couple of days following Mrs. Myer's disappearance" (RB 56) cherry-picks one portion of Angie Fortson's testimony and ignores another. (Compare, *e.g.*, 14 RT 2761 [she went to sleep about 11p.m. Mother's Day night and did not see Jackson until 10 p.m. the next night] with 14 RT 2804-2806 [they went to bed together at 11:30 p.m. and made love most of the night]. To say that Joe Taufaao "reported that he had gone around that same time" (RB 56) is not accurate. Taufaao spoke only of what he had been told by Jackson and/or Fortson,

denied he told detectives that Jackson said he had just returned; said instead they had spoken of how much fun it would be to go to Law Vegas, or that they had been there a month earlier. (14 RT 2979) To say that Jackson's father drove a Greyhound bus back and forth from Riverside to Las Vegas (RB 56) is flat out misleading – as shown above, he did not drive for Greyhound in May, 2001. (See *ante* at pp. 2-3.) And to say that Angie Fortson may have gotten the Nevada Bell cards from Jackson's dad proves nothing whatsoever – we already know that he used to drive that route, and did so again twice in late June.

So, too, with the Vans Shoes. They were never found or connected to appellant, except by Angie Fortson – who also said that appellant was with her all of Mother's Day night. Anyone wearing the same size Vans shoes could have left that print.

Finally, respondent's characterization of the non-dog-sniff evidence as "incredibly incriminating facts and circumstances" is simply belied by the comments of the prosecutor in his arguments the jury:

> But what it comes down to, ladies and gentlemen, is this: Based on the instructions and based on all the evidence, *if you* find that you rely on and *believe and find trustworthy that dog identification* of that bloodhound of the scent on that envelope, if you believe that, *the defendant's guilty as charged with the first-degree, special circumstances murder of Gerry Myers.* That's an issue for you to resolve. It's one piece of circumstantial evidence. *It's the most damning and condemning piece that there is in this case.* You need to examine that

> evidence because I think you'll see everything that was done, despite contamination of the scent article with ninhydrin spray, despite other people handling the envelope, shows that *the accuracy and reliability of that identification is without a doubt. And that's really all you need.* (22 RT 4060; emphases added.)

The problem is this: most of the other evidence was *either countered by other testimony* – e.g., the testimony of Angie and Sheena Fortson which contradicted one or another of their police interviews; the facts contradicting appellant's interrogation statement; the fact that the newspaper article came from a locked box for which his mother had the only key and was accompanied by much that had nothing to do with him – *or was consistent with innocence*: he may have owned a pair of Van's shoes; he tried to borrow money from the neighbor on those two nights. We cannot possibly know what evidence *other* than the dog-sniff evidence the jury might have relied upon, which of Angie or Sheena Fortson's contradictory statements they might have believed, which part of Jackson's supposed admissions rang true and as being Myers-related. That is what brings the erroneous admission of the dog-scent evidence up to the level of prejudice, under either the federal or the state standard. (AOB 232-236.) The prosecutor believed it was the most compelling part of his case for guilt (22 RT 4060, 4151), and one or more jurors were likely to have agreed.

III. THE TRIAL COURT'S REMAINING ERRORS WITH REGARD TO THE DOG-SNIFF EVIDENCE EXACERBATED THE INITIAL ERROR IN ADMITTING THE EVIDENCE AT ALL

A. THE PHOTOS OF THE BLOODHOUND AND THE WITNESS/JURY MISCONDUCT WERE PART OF A LARGER NARRATIVE ERRONEOUSLY ALLOWED TO DOMINATE THE GUILT DETERMINATION

With respect to the next two of respondent's arguments (RB 57-59 and 59-63), appellant will chiefly reassert the arguments he made in his opening brief. (AOB 237-239, 239-252.) Once again, however, appellant does take issue with a factual assertion in respondent's brief. Respondent states that Dr. Harvey's colloquy with the jury took place following her testimony. (RB 60.) This suggests that Dr. Harvey's testimony was complete, finished. Rather, it took place *during* her testimony, during an in-chambers evidentiary discussion. (18 RT 3437 [comments of clerk and prosecutor Mitchell]; see also 18 RT 3421 [the court's comment to the jury during the morning session, upon a defense request to be heard, "All right. Ladies and gentlemen, we will be right back].) In other words, this chummy interlude took place in the midst of Dr. Harvey's testimony.

Regarding the photographs of Deputy Webb's dog, respondent is correct that this court will not disturb a trial court's ruling regarding photographs unless their probative value is clearly outweighed by their

prejudicial effect. (RB 58, citing *People v. Hughes* (2006) 27 Cal.4th 287, 336.) *Hughes*, however, concerned crime-scene photographs. The case it cites, *People v. Crittenden* (1994) 9 Cal.4th 83, 133-135, concerned photographs of the victims, relevant "to establish the manner in which the victims were killed . . . ." (*Id. at p. 134.*) *Crittendon*, however, also makes the argument for appellant:

> Only relevant evidence is admissible (Evid. Code, § 350; *People v. Garceau* [(1993] 6 Cal.4th 140, 176-177; *People v. Babbitt* (1988) 45 Cal.3d 660, 681), ... Relevant evidence, defined in Evidence Code section 210 as evidence " 'having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action,' " tends " 'logically, naturally, and by reasonable inference' to establish material facts such as identity, intent, or motive. [Citations.]" (*People v. Garceau, supra*, 6 Cal.4th 140, 177.) The trial court has broad discretion in determining the relevance of evidence (*ibid.*; *People v. Babbitt, supra*, 45 Cal.3d 660, 681), *but lacks discretion to admit irrelevant evidence.* (*Ibid.*; *People v. Burgener* (1986) 41 Cal.3d 505, 527.) (9 Cal.4th at p. 132; emph. added; parallel citations omitted.)

Contrary to respondent's assertions and the trial court's rulings, the pictures of Maggie in Exhibit 133 had no tendency in reason to prove or disprove any disputed fact, *or* to tend logically to establish any material fact such as identity, intent or motive. Thus, in drawing a balance between prejudicial effect and relevance, the scales here show a "balance" between prejudicial effect and no relevance whatsoever.

The prejudice can be understood when discussed in tandem with the juror and witness misconduct which occurred between Dr. Harvey and several of the jurors, a far more serious matter. It was this: The dog-scent identification, as evidenced by the quotations from the prosecutor's closing arguments set forth above (*ante*, at p. 41; 22 RT 4060), was the centerpiece of the identity portion of the state's case. Dr. Harvey was the prosecution's main expert witness regarding the validity of that identification. Because of the court's failure to hold either a *Kelly* or a section 402 hearing, the jury was forced to choose between the opinions of two experts, only one of which they took the opportunity to communicate with directly. She engaged with them, and tainted the trial thereby.[13] The presumption of prejudice cannot be and was not rebutted.

B. ALLOWING DEPUTY WEBB TO TESTIFY IN AN AREA NOT OF HER EXPERTISE CONTRIBUTED TO THE PATTERN OF PREJUDICE

No matter how respondent parses the law and Deputy Webb's experience (RB 63-64), there is nothing – absent some foundational questions

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[13] It should also be noted that respondent's assertion that the exchange between the jurors and Dr. Harvey was "entirely innocuous and unrelated to the case" (RB 62) is not entirely accurate. The exchange apparently included some mention – at least by jurors – of this dog or this kind of dog being used by six thousand agencies, or in six thousand searches. (18 RT 3437, 3439) – information suggesting the reliability of blood hounds, an issue important to this case.

that might have established it so – that indicates that her experience as a dog-handler gave her any expertise regarding whether or not dogs are color blind. Respondent is not helped, of course, by the fact, shown in appellant's opening brief, that they are not. (AOB 254.) Thus, respondent's conclusory claim that, had the court required a foundation, Deputy Webb "no doubt could have done so," (RB 64) is itself without foundation.

Respondent also states that "Maggie followed Jackson's trail through the police station and located him before she ever saw his orange jumpsuit." This, respondent asserts, precludes appellant's argument that Maggie may have alerted on appellant because of his orange jumpsuit. (*Ibid.*) We know, however, that Maggie had already sniffed Jackson three days earlier at the Spruce Street Station. (19 RT 3552-3553.) Thus, she could have been trailing the scent she was familiar with, or the strongest scent in the hallway, or the freshest. Respondent is repeating Deputy Webb's and Lisa Harvey's self-validation fallacy – it the dog trails, it *must* be because the suspect's scent is present. But Deputy Webb did not begin with a negative trail, which would have least provided a gloss of validity. (See *ante* at pp. 86-87.)

While the trial court's admission of Deputy Webb's erroneous opinion regarding canine color blindness was a small matter, it is important as part of the overall pattern of the trial court's rulings – anything dog-related offered

by the prosecution was admissible; anything challenging their admission was a waste of time.

C. CALJIC 2.16 IS NOT SUFFICIENT IN DOG-SCENT-IDENTIFICATION CASES

Respondent's entire argument with regard to the adequacy of CALJIC 2.16 is premised on an insistence that this dog-scent identification was no different than the dog-trailing cases, *Craig, Gonzales,* and *Malgren*. (all discussed *ante* at pp. 21-22), and that the inherent reliability of the identification procedure was determined when the trial court, without a *Kelly* hearing, decided to allow it into evidence. (RB 70.) If this Court agrees with respondent, then the instruction was correct. Appellant believes otherwise: dog-scent identifications are qualitatively different. Maggie sniffed an item which may or may not have still contained the perpetrator's scent, and followed a trail down a hallway, into the locker room and past the two detectives, and alerted on appellant. But the research suggests many reasons *other* than the scent on the envelope for Maggie's following the trail an alerting on appellant. (See AOB 191-204.) She could have merely been tracking the freshest scent, and once in the locker room could have picked up any number of visual or other cues to pick appellant, including the distinctive clothing – whether she saw it as orange or not – or recognizing appellant or his scent from three days earlier. She could have been tracking the one scent

– appellant's –with which she was familiar. Or she could have been picking up cues from her handler, the detectives, or appellant.

Even if only a portion of the dog-sniff research presented with appellant's brief is credited, it is clear that a higher degree of caution, and of corroboration, is required for dog-scent identifications than for simple trailings or trackings.[14] One does not have to believe all of that research to conclude that, given the many questions present in this case regarding contamination, the degradation of scent after 40 days when stored at room temperature after being soaked in ninhydrin, the possible cuing of the dog by the handler or others present, or the familiarity of the dog with appellant before the trailing, that the degree of corroboration required for a case such as this is just not sufficiently stated in the instruction given.

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[14] It is striking that nowhere in respondent's brief is found any substantive discussion, or refutation, of that research.

IV. THE DETECTIVES VIOLATED APPELLANT'S RIGHT NOT TO SUFFER RENEWED QUESTIONING AFTER HE INVOKED HIS RIGHT TO REMAIN SILENT

As with other issues in this case, the resolution of whether appellant's Fifth Amendment right to remain silent after he invoked it was violated rests on differing views of the facts as much as, or more than, the law. The law, as set forth by respondent at RB pages 71-72 is generally correct, and in particular the quote from *Oregon v. Bradshaw* (1983) 462 U.S. 1039, 1045, indicating that whether the defendant has initiated a re-start of the interview is determine by whether the defendant's actions 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." That this was not so is made exquisitely clear by appellant's termination of questioning and his subsequent discussion with Officer Sutton – which *only* involved his urgent wish to be taken to jail and to get his medications. Nothing which occurred prior to the detectives' re-entry could be said to have shown a desire to speak about the investigation. Respondent, quite naturally, focuses on the fact that the detective's first question, when sent back into the interview room, was seemingly a neutral "Okay what's up." As a matter of fact, the detectives first tried to cover themselves against a constitutional claim such as appellant's. The "what's up" was preceded by:

JOSEPH: I understand you want to talk to us still.

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

JACKSON: Yes, sir.

BARNES: Okay, what's up[?]

(14 CT 3381.)

There is nothing in this exchange which indicates that Jackson wanted to speak about the subject of the investigation, until Jackson admitted the Mason crimes. But the asking of the initial questions themselves, without reminding Jackson of his rights was what violated his already-invoked right to remain silent.

In the case respondent cited, *Oregon v. Bradshaw*, the Supreme Court made clear that the *suspect* must reinitiate the dialogue with authorities; that, in meeting the prosecution's burden to show a valid waiver, such a showing must include " 'the necessary fact that the accuased, not the police, reopened the dialogue with authorities.' " (*Oregon v. Bradshaw, supra,* 462 U.S. at pp. 144-1045, quoting *Edwards v. Arizona* (1981) 451 U.S. 477, 486, fn. 9.) In this case, it was the detectives who did so.

More important to this case is the further discussion in *Bradshaw*. The plurality opinion by Chief Justice Rehnquist acknowledged that while the question Bradshaw asked (Well, what is going to happen to me now?")

certainly could be considered an initiation of further discussion in the ordinary dictionary sense of the word, further analysis was necessary.

> [T]here are undoubtedly situations where a bare inquiry by either a defendant or by a police officer should not be held to "initiate" any conversation or dialogue. There are some inquiries, such as a request for a drink of water or a request to use a telephone, that are so routine that they cannot 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. Such inquiries or statements, by either an accused or a police officer, relating to routine incidents of the custodial relationship, will not generally "initiate" a conversation in the sense in which that word was used in *Edwards*. (*Id.* at p. 1045.)

Chief Justice Rehnquist concludes that Bradshaw's question as to what was going to happen to him evinced a willingness and a desire for a generalized discussion about the investigation. But note two things: First, that the focus was on the suspects expectations, not those of the officer. And second, in this case, Sutton's responses to appellant's questions repeatedly referred to the detectives as knowing the answers to his questions *about getting to jail and obtaining his medications*. In that context, if there is any ambiguity in appellant's words, they must be resolved against the state. He was trying to discuss "incidents of the custodial relationship," and any references to further discussions with the detectives came from the officer. Sutton repeatedly used language referring to appellant's talking further with the detectives and telling them what he had to tell them – language calculated

to encourage further conversations with the detectives. (14 CT 3879-3881.) Thereafter, when the detectives returned, *any* question by Detective Joseph which led to a discussion of the case constituted an invalid re-initiation of interrogation.

It should also be noted that in *Oregon v. Bradshaw*, *supra*, when the suspect spoke the words later interpreted to evince a desire to waive his invocation of the right to counsel – "Well, what is going to happen to me now?" – the response of the police officer was to remind Bradshaw that " '[you] do not have to talk to me.' " (462 U.S. at pp. 1042, 1046.) Indeed, the officer's full response was: " 'You do not have to talk to me. You have requested an attorney and I don't want you talking to me unless you so desire because anything you say -- because -- since you have requested an attorney, you know, it has to be at your own free will.' " (*Id.* at p. 1042.) Thus, when Bradshaw responded that he "understood" (*Ibid.*), it could easily be found by the Court that the circumstances satisfied the test from *Edwards*, "whether the purported waiver was knowing and intelligent and found to be so under the totality of the circumstances, including the necessary fact that the accused, not the police, reopened the dialogue with the authorities." (*Id.* at p. 1046, quoting *Arizona v. Edwards, supra*, 451 U.S. at 486, fn. 9.)

In this case, it was not so. Appellant initiated with Sutton a discussion of the conditions of his incarceration; it was Sutton who steered him to the detectives; and there was no attempt by the detectives to be sure he understood that he was giving up the right to silence he had previously invoked.

Appellant's right to remain silent was violated. His "admissions," while appellant believes them to be unclear in meaning and reference, were argued as direct evidence of guilt by the prosecutor (RT 4046, 4056-4057 [guilt phase closing argument]) and may have been accepted as such by one or more jurors. For jurors with doubts about the reliability of the dog-sniff evidence, the "admissions" could have been what tipped the scales. They were, in that sense, the second most important evidence against him, and thus their admission cannot be shown to be harmless beyond a reasonable doubt under the federal standard applicable to a constitutional violation.

V. THE CRIMINALIST'S BLEACH AND CARPET EXPERIMENTS WERE INADMISSIBLE AND PREJUDICIAL

On this matter, appellant refers the Court to his opening brief arguments. (AOB 280-283.)

VI. THE ROBBERY AND ROBBERY-SPECIAL-CIRCUMSTANCE CONVICTIONS FAIL BECAUSE OF THE LACK OF EVIDENCE OF WHAT HAPPENED, AND THE FAILURE TO INSTRUCT AS TO THE TIMING OF INTENT

Appellant argued in his opening brief, that the lack of evidence of what happened at the Myers' residence, and the court's refusal of the defense instruction regarding the timing of intent, were fatal to the Myers robbery conviction and the robbery special circumstance. (AOB 284-292.) Because both issues depend on one's view of the facts, appellant will treat them together here.

Respondent's argument (RB 81-84) relies, as did earlier arguments in respondent's brief, on assumptions regarding and mischaracterizations of the facts. In order to make its point, respondent has chosen to cherry-pick certain statements from appellant's interview with the police while ignoring others. (See *ante* at pp. 3-6.) While it is one thing to believe, as a matter of credibility, one witness over another, respondent fails to indicate the basis on which the jury might have chosen one part of appellant's statement over another. A prime example of this is discussed below, parsing respondent's conclusions that appellant, responding to questions about Mason, was somehow admitting to what he did to Myers. (*Post,* at pp. 57-58.)

Regarding the question of the failure to give appellant's instruction as to when the intent to steal was formed (AOB 284-289), the cases respondent

cites appear to settle the question of whether the robbery-related instructions that were given rendered nugatory the need for the court to give the requested instruction making specific the requirement that the larcenous intent must have been formed while Myers was still alive. (RB 82-83, citing *People v. Zenudio* (2008) 43 Cal.4th 327, 361; *People v. Hughes* (2002) 27 Cal.4th 287, 360; *People v. Hayes* (1990) 52 Cal.4d 577, 626; *People v. Hendricks* (1988) 44 Ca.3d 635, 643.) They settle the question, that is, *if* the evidence supports their application. And this is where respondent and appellant differ.

In *Zenudio*, for example, defendant's argument failed "for a basic reason: the absence in the record of evidentiary support for a finding that he formed the intent to steal only after killing the Bensons." (43 Cal.4th at page 360.) Indeed, "there was ample evidence here that defendant killed the [victims] and took their property because he needed or wanted money." (*Ibid.*) "Defendant offers *nothing but sheer speculation* to support his theory that the idea of the taking the [victims'] property did not arise until after he killed them. Instead, all of the evidence points to the robbery as the motivating factor for the murders." (*Id.* at p. 361; emphasis added.) In addition, after the jury retired to deliberate, defendant Zenudio had his attorney read into the record a statement that the after-acquired intent theory was "silly." (*Id.* at p. 361, fn. 18.)

In this case, the speculation is respondent's. First, it should be noted, the prosecutor argued that the Mason crime showed that appellant's primary intent was sexual, not monetary, but now the state would eschew that theory. Second, respondent relies on ambiguous and mischaracterized facts to construct their argument. Thus, parsing the first two sentences in the last paragraph on page 83 of respondent's brief:

–"Jackson admitted to detectives that he was inside Ms. Myers' home late at night – uninvited . . . ." (RB 83.) Jackson admitted no such thing. He described being in *someone*'s house – but he was still being asked about Mason.

–" . . . and that he eventually stabbed her, killing her." (*Ibid.*) No. Jackson was responding to Detective Barnes' question as to what he was doing "inside the house" – Mason's house. (14 CT 3881.) The reference to stabbing her was again in response to a question about Mason:

> BARNES: This woman bled uncontrollably in her vagina . . . . [¶] You remember putting something in her, other than you, . . . like some type of . . . foreign object? You remember like trying to stick a, I don't know, something?
>
> JACKSON: I remember stabbing her in the back. You know what I'm saying, all these I remember doing, I don't wanna keep saying, man, cause I don't know.
>
> BARNES: What you stab her with?

> JACKSON: A knife, I had a knife and I stabbed her . . . . [¶] Probably in the hallway. (14 CT 3923-3924; some intervening material omitted.)

–"Ms. Myers' money and jewelry were missing." (RB 83.) Well, not exactly: there was a "large sum" of money found in a bedroom closet, as well as an envelope containing money left in her purse. (7 RT 1786-1787; 8 RT 2028; 9 RT 2071.) More important, this says nothing about *when* an intent to deprive her of her money and jewelry arose: When he entered the house? After she surprised him in the hallway – oh, wait, that was Mason. After he stabbed her? It is all speculation, and thus, the opposite of *People v. Zenudio*, *supra*, where it was the defendant's alternate theory that was found to be "sheer speculation." (43 Cal.4th at p. 361.) Moreover, CALJIC 9.40.2, which was given to the jury and is one of the instructions upon which respondent relies (RB 82), actually confused the issue. As given, that instructions reads as follows:

> To constitute the crime of robbery, the perpetrator must have formed the specific intent to permanently deprive an owner of his property before or at the time that the act of taking the property occurred. If this intent was not formed until after the property was taken from the person or immediate presence of the victim, the crime of robbery has not been committed. (21 RT 4017.)

By focusing the jury's attention on the temporal relationship between the forming of the intent and the actual taking of the property, CALJIC 9.40.2

had the effect of diverting their attention from the temporal relationship between the forming of the intent to steal and the killing of Myers.

Legal niceties aside, what this comes down to is the utter lack of substantial evidence of what actually happened that night at Geraldine Myers' house. Respondent has leapt to the assumption that, while the detectives questions and many of the answers clearly related to Mason, appellant's statements somehow formed not only a confession about Myers but constituted "sufficient evidence that Jackson was in Ms. Myers' home with the intent to take her property."[15] (RB 83-84.)

Other than the mention of red hair, everything that followed the re-initiation of questioning was either consistent with the description of being in Mason's house, or, if it was not, never corroborated by real evidence.[16]

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[15] It should also be remembered that Jackson's later statements to the detectives, made in their car, and which more clearly referred to Myers, were not before the jury in the guilt phase. (See, *e.g.*, Detective Barnes' penalty-phase testimony, at 33 RT 5779, regarding appellant's suggestion that he might throw down bleach to get rid of bloodstains, which was the first time the jury had heard of this portion of his interrogation.

[16] For example, appellant describes not being able to get out the door: "I don't know if she had a type of locks on her doors where she can lock the key from inside . . . ." (14 CT 3885.) This is a description of Mason's front door. (16 RT 3086-3087.) And that he took from her – Mason, not Myers – her TV and checkbook. (14 CT 3885.) Neither was taken from Myers.

So, according to the state, appellant attacked Ms. Myers for sexual gratification, or for money, though neither her money nor her jewelry was ever linked to appellant; and that she was killed by stabbing, or by being thrown out of car on the freeway, though her body was never found on or near any freeway. And that her missing body was left or buried in any one of several locations, though it was never found at any of them.

And this is not a matter of choosing one more credible witness over another, less credible. The only witness who even arguably spoke of these things was Jackson, and it is only by cherry picking some and rejecting other parts of what he said that the state can claim that he confessed and that he intended to rob Myers when he entered her house. That confused state of things is exactly what the jury faced, and is exactly why the refused instruction should have been given and, more important, why any finding by the jury that the intent to steal was formed before Myers' death – if such a finding was ever made – could not have been based upon anything but "sheer speculation." (*People v. Zenudio, supra*, 43 Cal.4th at p. 361.)

VII. APPELLANT RENEWS HIS EIGHTH AMENDMENT ARGUMENT AS IT RELATES TO THE LACK OF EVIDENCE REGARDING INTENT

Regarding this issue, appellant relies upon the argument in his opening brief, at pages 293-303.

VIII. THE PROSECUTOR'S ARGUMENT WENT FAR BEYOND THE PARAMETERS OF THOSE IN THE CASES RESPONDENT CITES

Appellant demonstrated that the prosecutor, in his closing argument, committed misconduct in multiple ways. In his opening remarks, he sought to arouse the passions of the jurors by comparing this case with several involving the sexual assault and murder of a child. He then, more seriously, relying upon an improper propensity theory, imported the sexual assault on Mason into the Myers case, for which there was no evidence of a sexual assault. Having turned the Myers case into a homicidal sexual assault case, the prosecutor went further, and, relying upon the unsupported assertions about the rarity of such crimes against elderly women – in effect, acting as his own expert witness – asserted that appellant's sexual assault on Mason assured his guilt in the Myers murder. (AOB 304-307.)

Respondent argues that the violent sex crimes against children were properly mentioned by the prosecutor in the course of "pointing out how rare such violent crimes against elderly women were, and therefore the same person - Jackson - must have committed the crimes against Ms. Jackson and Ms. Mason here." (RB 88) Respondent ignores that there was no evidence as to the rarity of such crimes against elderly women,[17] and no evidence of a

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[17] The only evidence which could be considered indicative of (continued...)

sexual assault against Ms. Meyers. Respondent argues further that the prosecutor "was properly arguing inferences from the evidence presented at trial." (RB 89.) Respondent presents no support for that assertion – for there was no evidence of a sexual assault against Myers – and ignores the prosecutor's improper reliance on appellant's alleged propensity to commit such crimes.

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[17] (...continued)
rarity introduced at the guilt phase was as follows: Officer Johnson was asked:

> Q The evidence in this case, a statement from the defendant, indicated that he recalled stabbing an elderly woman inside her home, taking her in her car and dumping her body. Are you aware of anyone or any case in the year 2000, 2001 matching that description other than Gerry Myers who went missing on May 13th, 2001?
>
> A No, sir. There were none. (20 RT 3747.)

Right after that, there was this exchange with DA's Investigator Silva:

> Q In this case the evidence indicates that -- according to the defendant's statement, that he recalled stabbing and killing an elderly woman in her home and taking her in her own car and dumping her body somewhere off of the freeway. Have you done a search of Riverside County, Southern California area, and other than Gerry Myers, do any cases match that description?
>
> A No, sir. (20 RT 3748.)

These questions and answers were so fact-specific that they provide no basis for a broad supposition that violent sexual assaults against elderly women are a rarity.

Respondent's claim that there was no misconduct (RB 86-91) is supported by citation to four cases, the facts of which are so distant from what the prosecutor did here as to seem from a different universe.

Respondent quotes language from *People v. Clark* (2011) 52 Cal.4th 856, 960, that a prosecutor's conduct violates California law if it includes the use of "deceptive or reprehensible methods to attempt to persuade either the court or the jury." (RB 86.) But in *Clark,* the prosecutor merely remarked upon the addition of a third lawyer near the end of the trial to question the defense's mental-state experts. This, *Clark* said, was intended to "dissuade the jury from being dazzled or impressed by the 'dramatic' midtrial arrival of a third defense attorney and the results of this recently retained expert witnesses. We conclude the complained-of remarks were little more than a reminder to the jury to consider the substance of the experts' testimony rather than the spectacle surrounding its presentation, and thus amounted to fair comment on the defense mental-state evidence. (Citation.)" (*Id.* at pp. 961-962.) In this case, the prosecutor was commenting on, and conflating, the evidence in the Myers case with the evidence in the Mason case, by speculating – and this was sheer speculation – that what happened to Mason happened to Myers.

The other cases cited by respondent yield similar contrasts: In *People v. Brown* (2003) 31 Cal.4th 518, 553-554, the asserted prosecutorial misconduct, contained in his closing argument, warned the jury that a failure to convict might result in the defendant's being set free to walk among them. It did not narrate the facts of unrelated cases involving sexual assaults on children; and it did not import that sexual assault and related facts of one set of the charges into the joined separate case, in which there was no evidence of sexual assault.

Contrast, too, the other cases cited by respondent: In *People v. Frye* (1998) 18 Cal.4th 894, 970-972, the alleged misconduct was vouching for a witness by reading her immunity agreement and, in closing argument, suggesting that all of the evidence pointed to her truth-telling. In *People v. Crew* (2003) 31 Cal.4th 822. 839, the prosecutor assertedly violated an *in limine* ruling by referring to the victim's fear of defendant.

In *People v. Abel* (2010) 53 Cal. 4th 891, cited at RB 90, the asserted misconduct was arguing that defendant's ex-girlfriend, to whom he had admitted the murder, had testified at great risk to her and her sons, while the trial court had earlier stricken a portion of that testimony. But, "[o]ther evidence also tended to show [the witness] had reason to fear retaliation[.]" (*Id.* at p. 926.) Respondent quotes *Abel*: "Whether the inferences the

prosecutor draws are reasonable is for the jury to decide." (RB 90.) But the inferences the prosecutor could suggest in *Abel* and the jury could decide upon were inferences from actual evidence presented at the trial, not speculation drawn from another case – or, in the instant case, from an entirely separate incident. The inferences the jury was permitted to draw in the other case cited by respondent, *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 170 was evidence adduced about *that* case, *that* set of facts.

People v. Lee (2011) 51 Cal.4th 620, 647 (cited at RB 88) is also distinguishable. In that case, counsel objected to the prosecutor's argument in describing a sexual assault in which the victim, the prosecutor claimed, "starts to scream and struggle." But there was testimonial evidence in *Lee* that the victim was in fact "protesting loudly" while appearing to be angry and disgusted. (*Id.* at pp. 647-648.) Thus, the prosecutor's "wide latitude" to "comment fairly on the evidence" was based on actual evidence regarding the actions of the victim and defendant. (*Id.* at p. 647; RB 88.) Appellant is unaware, however, of any case that suggests that this wide latitude goes so far as to comment on non-existent evidence, which is what the prosecutor did when pressing the jury to view what happened to Myers as including a sexual assault.

None of these cases comes close to what occurred here.

Now, it is true that defense counsel did not object, and normally that would preclude raising the issue on appeal. (RB 88.) Respondent claims that objecting here would have been "frivolous," to which appellant can only refer the Court back to the prosecutor's inflammatory and improper language. If, however, the court agrees with appellant that the misconduct was indeed egregious, then the failure to object did constitute ineffective assistance.

Respondent has repeatedly relied on appellant's statements to the police – his so-called "confession" – to support his conviction. There is nothing in his statements, however, that suggests a sexual assault on Myers. Indeed, not even the prosecutor adopted them whole-hog, substituting appellant's reference to stabbing someone (and we still do not know who, if anyone, he might have stabbed) for a scenario in which he both choked and sexually assaulted Myers as he did to Mason. "[It] 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.) So the question becomes, when does "wide latitude" go over the line into speculation, beyond reasonable inferences to matters not in evidence, and intended to inflame the passions of the jury. (*See, People v. Young* (2005) 34 Cal. 4th 1149, 1195; *People v. Pinsinger*

(1991) 52 Cal.3d 1210; *People v. Benson* (1990) 52 Cal. 3d 754, 794; and other cases cited at AOB 307-309.)

In *People v. Williams* (1998) 17 Cal.4th 146, this Court explained that the forfeiture rule bars a party from presenting a claim of error on appeal, but it does not prevent an appellate court from reaching such a question. (*Id.* at 161, fn. 6, and cases there cited.) There must be a line that the prosecutor cannot cross, even when defense counsel, either from inattention, or simply from having been beaten down by the court's persistent rulings against them, fails to object.

There is no conceivable tactical reason for counsel not to have objected; this constituted ineffective assistance of counsel. Blatantly bringing the sexual assault from the Mason case into the Myers case, as well as telling the jury directly that if appellant did the Mason assault, he must be guilty of the Myers killing, rendered the trial fundamentally unfair. That is reason enough for this Court to review the matter on the merits.

IX. GIVEN THE DENIAL OF THE MOTION TO SEVER, THE PROSECUTOR'S IMPROPER CONFLATION OF THE MASON FACTS AND THE ABSENCE OF EVIDENCE REGARDING MYERS, THE TRIAL COURT HAD A *SUA SPONTE* DUTY TO GIVE A MODIFIED VERSION OF CALJIC 2.50

Respondent is correct in arguing that this case is not a clean fit for the "Other Crimes" instructions, CALJIC 2.50. (RB 91-93.) On the surface, of course, other crimes usually refer to crimes outside the parameters of the case at trial. And appellant has certainly asked this Court to delve beneath the surface. (AOB 316-321.) But the "other crimes" here were the sexual assault against and choking of Mason, which the prosecutor most assuredly "imported" into the Myers case no less improperly than if the cases had been severed, as they should have been. Thus, the original sin of the court's denial of the severance motion was made manifest by the prosecutor's closing arguments, which both improperly suggested that appellant committed a sexual assault against Myers[18] *and* specifically invited the jury to convict

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[18] Why do you think the defendant had to dispose of Gerry Myers' 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.)

[It] 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

(continued...)

appellant of the Myers murder based on his guilt of the Mason assault.[19] It is in *that* context that there arose a duty for the trial court to instruct the jury to limit their consideration of the Mason facts while deliberating the Myers case.

Beyond these comments, appellant will rely on his opening brief argument on this issue. (AOB 316-321.)

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[18] (...continued)
Mason during the vicious, violent sexual assault that was his primary motivation. (22 RT 4056.)

[19] Because it's the details of the commission of [the Mason] crimes, the defendant's conduct in the commission of those crimes and afterwards, the evidence that was collected during the investigation of 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 4046.)

X. THE PROSECUTOR INVITED THE JURY TO CONVICT APPELLANT ON COUNT 10 UNDER A FALSE THEORY OF LAW

Appellant urged reversal of Count 10, which involved the sexual penetration of Mason's vagina with the rake handle, because the prosecutor reminded the jury that appellant might have believed her dead. (AOB 322-325.) Appellant's argument focused on the prosecutor's comments that (1) "The evidence indicates, and it's undisputed, he left her for dead." And (2) "Except Myrna Mason was still alive, and the defendant got caught by surprise." (22 RT 4139.) If appellant believed her dead, that would remove the necessary intent to "injure, hurt, cause pain or cause discomfort" (CALJIC 10.33, 15 CT 4154)

Respondent complains that appellant has pulled two phrases out of a much longer argument, "taking the prosecutor's statement entirely out of context." (RB 96.) Appellant disagrees. There is nothing in the fuller closing argument excerpts quoted by respondent (RB 95-96) suggesting that appellant, at the time of the act in question, believed Ms. Mason was alive or would ever regain consciousness. Further, setting the quoted excerpts in a still larger context, the prosecutor, it must be remembered, had previously directly connected the two crimes when he stated that the details of the commission of the Mason crimes, along with other evidence, proved beyond

a reasonable doubt that appellant murdered Myers. (22 RT 4046, quoted at AOB 149.) So it is not beyond imagining that jurors may well have taken the prosecutor's "left for dead" comment regarding Mason quite literally. And this, in turn, makes it reasonably likely that the jury convicted him of Count 10 on a mistaken theory (that one can commit sexual penetration on a person believed to be dead), in violation of his Sixth and Fourteenth Amendment rights. (*United States v. Caldwell* (1993) 989 F.2d 1056, 1060; *In re Winship* (1970) 397 U.S. 358, 364; *People v. Cummings* (1993) 4 Cal.4th 1233, 1313-1314,)

On a final note, respondent's reliance CALJIC No. 1.00, regarding the jury accepting and following the law as the judge states it, is misplaced. The crucial portion of the instruction says, "If anything concerning *the law* said by the attorneys in the arguments . . . conflicts with my instructions on the law, you must follow my instructions." (15 CT 4085, emph. added; RB 97.) The problem was not with following the judge's instructions; the problem was that the jurors were misled as to the meaning of the instruction, to the extent that they could have convicted him whether they found he believed she was dead or merely unconscious.

XI. THERE WAS CUMULATIVE ERROR IN THE GUILT PHASE OF THE FIRST TRIAL

As must be clear by now, appellant and respondent agree little on the presence of error and prejudice. Accordingly, appellant rejects respondent's conclusion that there were few, if any, errors, and no prejudice. (RB 97.) Respondent's calling what occurred in the Orange Street Station basement a simple tracking does not make it so. And respondent's calling what appellant told the detectives a confession – after they illegally reinitiated questioning – does not make it so. Beyond that, rather than repeat the litany of errors already spoken of in this brief and his opening brief, appellant will merely refer the Court to what has been said above, and in his opening brief at pages 325-328.

Appellant's conviction on the Myers counts should be reversed.

XII. THE CALCULATION OF THE DETERMINATE SENTENCE DEPENDS IN PART ON ONE'S VIEW OF THE FACTS

As with most of the other issues arising from the guilt determination, one's view of the facts, more than the law, is determinative of two of the issues raised by appellant regarding his determinate sentence. (AOB 329-331.)

There are three separate contentions. The first depends on whether or not this Court agrees with appellant that the conviction on Count 10 cannot stand. (AOB 322-325.) If so, the sentence will be reversed along with the conviction.

Second, appellant made the two-part argument that if (1) this Court agrees with him that the evidence was insufficient to support the Count 3 robbery conviction as to Myers, then (2) the Count 2 burglary conviction merged with the Count 1 murder conviction as part of a single course of action under Penal Code section 654. (AOB 329-335.) Respondent naturally disagrees with the first point, and then claims that "Jackson committed the burglary well before he decided to murder her. It was not a single course of conduct." (RB 98, 99.) To support this contention, respondent relies once again on appellant's so-called "confession:" "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." (RB 99.) This view, however, as

has been shown above, relies on uncorroborated facts from a statement which is for the most part consistent with, and corroborated by, known facts related to the Mason case, not the Myers case. (See *ante* at pp. 3-6) Accordingly, appellant's opening brief argument stands.

Finally, respondent agrees with appellant that the three consecutive 25-years-to-life prison terms imposed for Counts 8-10 should have been imposed concurrently. (RB 99-100, AOB 335-338.) Accordingly, at minimum, the parties agree that the determinate sentence must be reduced by 50 years.

PENALTY PHASE

XIII. APPELLANT CHALLENGES THE CONSTITUTIONALITY OF A PENALTY PHASE RETRIAL WHEN THE FIRST-TRIAL JURY SHOWS LINGERING DOUBT AND THE PROSECUTION IS ALLOWED TO MANUFACTURE ADDITIONAL EVIDENCE

Appellant sought in his opening brief to suggest that, in cases in which a penalty jury hangs, at least in part on a clear expression by one or more of the jurors of lingering doubt as to the defendant's guilt, a penalty retrial is inappropriate, and unconstitutional. (AOB 341-347.) Respondent's argument states what appellant has already conceded: that current law appears as a general matter to permit penalty retrials after an initial jury's inability to reach a verdict. (RB 100-102.)

What respondent fails to do, however, is to answer the second part of appellant's argument, regarding the additional factor of newly-created evidence in the second trial designed to overcome the initial jury's lingering doubt as to guilt. (AOB 345-347.) In this case, the prosecution was not only to have a second bite at the apple; it was allowed between trials to create – not find, create – additional evidence to overcome the lingering doubt that led one or more members of the first jury to vote for life. Appellant is at a loss to understand how this comports with the principles of due process and the Double Jeopardy Clause, as argued in his opening brief. As suggested

therein, if the second penalty jury had again hung with lingering doubt, would the state have been allowed to run still more dog trails, with the increasingly-aging scent items, until a death sentence was finally obtained? Appellant thinks not.

XIV. RESPONDENT HAS NOT REFUTED ANY OF THE RESEARCH PRESENTED IN APPELLANT'S OPENING BRIEF TO CHALLENGE THE EFFECTIVENESS OF GROUP VOIR DIRE

Appellant made three arguments regarding the second-jury selection, (although the first two point also apply to the guilt phase jury selection): (1) that while the law in California accepts group voir dire even for death-qualification, recent social science research makes clear the fallacies underlying the procedure (AOB 351-356); (2) that the lack of a group voir dire was made worse in this case by the judge's leading questions – a point which depends in large part upon acceptance of the aforementioned research (AOB 356-360); and (3) that the trial court erred in preventing case-fact-specific questions during the death qualification *voir dire*. (AOB 360-365.)

First, regarding the law, appellant and respondent pretty much agree: current California law allows for non-sequestered voir dire. (AOB 350-351; RB 103-105.) Appellant premises his argument, however, on social science research that suggests that the assumptions underlying those cases about prospective juror behavior are flawed. Respondent has not presented any research to the contrary, concluding only that, "There is simply no basis for Jackson's claim." (RB 105.) There is not much one can say in response, other than to refer the Court back to the opening brief, which, appellant believes, provides ample basis.

Regarding the court's leading questions, that again relies on this Court's willingness to reconsider its reliance on non-social-science-based assumptions and instead begin to base its jurisprudence on what was not previously studied but is now known, as set forth in appellant's opening brief. (AOB 352-356.) Absent that, appellant can only say that the two examples of leading questions set forth in appellant's opening brief are particularly egregious examples of judge-created answers by the prospective jurors, and are not worthy of a system that seeks to exclude those who might be biased. While appellant may not have objected during trial to the form of the court's questions (RB 105), as the research shows, it exacerbated the effects of the Court's unwillingness to conduct sequestered *voir dire*, by allowing the prospective jurors to repeatedly hear the acceptable answers.

Finally, respondent makes a multi-part challenge to appellant's third issue – the preclusion of fact-specific questions in the voir dire.

Respondent first appears to be make a forfeiture argument: "Defense counsel did not object to the questions asked, and did not request specific questions be asked." (RB 111.) The trial court, however, had already informed the jurors that it would not allow such questions to be asked (29 RT 5330), rendering such objections or requests an empty gesture.

Respondent does correctly point out that 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. Carisi* (2008) 44 Cal.4th 1263, 1287.)" (RB 111.) It is, of course, appellant's contention that this is precisely what the court did in announcing to the jurors that they would not be asked such questions.

Beyond this, the dispute boils down to whether what the court did tell the jurors of the case-specific facts, by reading the bare-bones description of the guilt findings at the first trial, was sufficient to the task. But telling them merely that the prior jury "found the defendant guilty of the sexual assault" of Mason (28 RT 5189) does not come close to informing them of facts underlying that assault. Similarly insufficient, the questionnaire stated only that Mason was "robbed and sexually assaulted." (See, *e.g.* 23 CT 6558.)

It is not a little ironic that the respondent has argued, with respect to the severance issue, that there was no problem in presenting all the sordid details of the Mason case to the jury that was to hear the Myers guilt phase; yet now, when the issue is whether some of those details might have been asked on *voir dire* of the second penalty jury, those are of no significance.

XV. THE GUILT-PHASE ARGUMENT REGARDING THE RENEWAL OF QUESTIONING AFTER APPELLANT INVOKED HIS RIGHT TO REMAIN SILENT APPLIES ALSO TO THE ADDITIONAL PENALTY PHASE ADMISSIONS

Appellant and respondent are in agreement that the resolution of this issue is entirely tied to the Court's resolution of the guilt-phase issue of whether appellant's constitutional right to remain silent was violated when the detectives returned to question him further after his entreaty, "Man just take me to jail man, I don't wanna talk no more." (14 CT 3878.) Indeed, the prosecutor, responding to the defense objection to the second-penalty-phase admission of appellant's police-car comments, argued that it was one continuing transaction, meaning continuous with the post-take-me-to-jail-resumption of questioning after he invoked his right to stop talking. (33 RT 5777; see also RB 114 ["There was no break in the interview. (14 CT 3928.)"].)

Accordingly, if the Court agrees with appellant that the entire post-request interview was constitutionally tainted, that must include the appellant's reference to bleach in the detectives' car. And, as explained in the opening brief, the reference to the bleach gave sufficient additional corroboration to render it separately prejudicial, especially under the stricter federal standard which applies to constitutional violations. (*Chapman v. California*, *supra*, 386 U.S. at p. 24.) Given the central role of lingering

doubt at the penalty retrial (see 43 RT 7347-7374 [defense penalty phase closing argument]), the admission of appellant's station house interrogation and the subsequent statement in the car requires that the judgment of death be set aside.

XVI. AN EVEN GREATER ARRAY OF INADMISSIBLE DOG-SNIFF EVIDENCE WAS ADMITTED IN THE PENALTY PHASE THAN IN THE GUILT PHASE, BECAUSE OF THE ADDITIONAL BETWEEN-TRIALS PURPORTED SCENT-IDENTIFICATIONS

A. DR. HARVEY'S TESTIMONY WAS INADMISSIBLE FOR THE SAME REASONS AS AT THE GUILT PHASE

As with the previous issue, the Court's response to appellant's guilt-phase arguments with regard to the dog-scent identifications will in large part govern whether it was error to admit such evidence in the second penalty trial.

Respondent has again failed to present any response to the substantial research presented with the opening brief and applicable to the admission of any of the dog-scent identification evidence, and has presented no new law regarding its penalty phase use. Respondent does make the surprising argument that even lacking Dr. Harvey's penalty trial testimony, the jury would have returned a verdict of death. Respondent presents the non-sequitur that since Dr. Harvey's testimony was the same at the second penalty trial which resulted in death as it was in the first trial which resulted in a hung jury, it's admission in the second penalty trial was harmless. (RB 117.) Appellant will not dignify this with any further response, other than to note that with the admission at the second penalty trial of still additional purported dog scent identification evidence, anything purporting to confirm the

reliability of such identification evidence took on additional significance. Respondent also relies on the fact that the second jury "saw and heard Maggie identify Jackson multiple times, and it was able to assess her reliability independently of Dr. Harvey's research." (*Ibid.*) Well, no. With regard to Ms. Myers, Maggie identified him only once, and the validity of that identification was amply refuted by the testimony of the defense expert, Dr. Lawrence Myers. (42 RT 7119 *et seq.*) As has been repeatedly demonstrated above, the remaining evidence fell far short of having "left no reasonable doubt" (RB 117) sufficient to insure the imposition of death. Indeed, even with the scent-identification evidence, members of the first jury were left with lingering doubt too substantial to permit a vote for a death sentence.

Regarding the denial of appellant's motion to exclude Dr. Harvey's testimony regarding her experimental findings based on the use of the STU, appellant refers the court to arguments in the opening brief (AOB 373-379) and *ante* at pages 35-38.

B. THE BETWEEN-TRIALS CANINE IDENTIFICA-TIONS WERE SO UNRELIABLE AS TO BE IRRELEVANT AND INADMISSIBLE

For the reasons set forth in appellant's opening brief, Arguments II and XVI(A)(2), as well as Argument II of this brief, all of the dog-scent identifications were subject to a *Kelly* hearing or at least a section 402 hearing. Moreover, the between-trials use of Dr. Harvey's dogs at the San Bernardino police station were even further marred by the failures of the dogs to clearly alert on appellant.

Dr. Harvey did not start either of the purported identification procedures with a negative trail, and yet in her research, she always preceded a test trail with a negative trail: "In the present study the bloodhounds were each presented with a blank scent pad. Once presented with the blank, they all demonstrated a strong negative trail." (Harvey and Harvey, *The Reliability of Bloodhounds in Criminal Investigations* (2003) 48 J. Forens. Sci. 811, 816.) "If the dog performs the negative correctly he or she will not trail. . . . During the current study, if any dog trailed off of the negative scent, that dog was later eliminated from the data." (Harvey, et al., *The Use of Bloodhounds in Determining the Impact of Genetics and the Environment on the Expression of Human Odortype* (2006) 51 J. Forens. Sci. 1109, 1110.) It is extraordinary

that Harvey is careful to use a negative trail in her research, but not in her field work, in which a persons liberty, or in this case his life, is at stake.

Moreover, there are all sorts of questions raised by Dr. Myers about these trails: the dogs had done earlier trails into the holding cells before; it appeared from the videotape that Dr. Harvey was inadvertently cuing the dogs by shortening the leash and by other means (42 RT 7151-7154)); most of Dakota's training records show a positive, jump-up, alert (42 RT 7142); and Dakota's "alert" was no alert at all, except by Dr. Harvey's self-serving assessment. (42 RT 7141-7142.)

Respondent minimizes the possible cuing mentioned by Dr. Myers by misinterpreting certain of his comments to mean that, "Given that Dr. Harvey did not know Jackson's location, Dr. Myers did not believe the queuing (*sic*) had any effect." (RB 119.) The relevant exchange, on cross-examination, was as follows:

> Q. So you're assuming for purposes of indicating there was queuing that Dr. Harvey knew which cell the defendant was in?
>
> A. I assumed so, yes.
>
> Q. And if she did not know what cell he was in and there was individuals in every cell, that would tend to take away a little bit from your opinion that there was queuing; wouldn't it?

A. Well, no, not that there was queuing, but that the queuing had effect. There was queuing. (42 RT 7159.)

Thus, to begin with, Dr. Myers never said he believed the cuing did not have any effect. Rather, he said, by agreeing with the prosecutor's premise as to the possible *effect* of the cuing – and there *was* cuing – only that *if* Dr. Harvey did not know what cell Jackson was in, "that would tend to take away a little bit" from his opinion. With respect to the second dog, Dakota, Dr. Harvey of course knew where appellant was, in Cell 7. Even with respect to the first dog, Shelby, the video (Ex. 159) shows that there was a window in the cell door through which appellant could be seen, and while Shelby was sniffing around Call 8, Dr. Harvey's lower body is in front of the Cell 7 door, and she could easily have then determined that he was there.

So, again, for all of these reasons, the between-trials purported identifications by Harvey's dogs should have been excluded, as they would have been if subjected to the requested *Kelly* or foundational hearing.[20]

Finally, regarding appellant's penalty-phase *Crawford* argument, AOB at pages 389-392 (*Crawford v. Washington, supra,* 541 U.S. at p. 36), respondent repeats the argument from the guilt phase that the dog's behavior

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[20] Respondent complains of appellant's use of a separate appendix to present the research articles accompanying his opening brief, citing Cal. Rules of Ct., rule 8.204(d). (RB 119, fn. 18.) Respondent is apparently unaware (though sent copies) of appellant's application to do so, and the Court's granting of that request, on March 26, 2012.

was not testimonial. And appellant repeats: Behavior that signifies that appellant is the perpetrator is *at minimum* testimonial. According to its handler, the dog had been asked to identify the source of the human scent on the scent article, and, to the extent that it did so, it answered its handler's request for that information. Given that, unlike a machine that can be calibrated and checked, the dog is a sentient being whose behavior can be subject to any number of non-scent-related influences, the inability to cross-examine the dog is if anything more subject to *Crawford* analysis than the lab analysts in *Crawford* and its progeny.

XVII. OFFICER JOHNSON'S AWARENESS OF ANY OTHER SIMILAR CASES WAS IRRELEVANT

Officer Johnson was allowed to testify, over objection, that he was aware of no other case in the City or County of Riverside that fit the facts of the Myers case. (34 RT 6127-6128.) Respondent argues that appellant's lack-of-foundation argument regarding Officer Johnson's testimony (AOB 394-396) is precluded because trial counsel did not specify that as a ground for his objection. (RB 120-121.)

Appellant suggests, first, that the objections that were stated – relevance, 352 and due process (34 RT 6127) – were sufficient to include a lack of foundation. The lack of a foundational showing – that if such other cases existed Johnson would have known about them – was why his lack of awareness had little if any tendency to show anything about appellant's guilt or innocence, and hence why the testimony was irrelevant. Alternately, if the officer's awareness had any relevance, its probative value was slight and hence, given its danger to unfairly prejudice appellant, it should have been excluded under section 352 and as a matter of due process. The lack of foundation, as a basis for exclusion, was fully preserved.

It is well to remember the form of the question: "You aware of any homicide cases, abduction cases, in the city and county of Riverside matching those facts other than the Gerry Myers case?" (34 RT 6127.) The officers

awareness or lack thereof proves nothing. This is especially true because Riverside is a very large county, encompassing 28 cities spread over 7,206 square miles. (<http://www.countyofriverside.us/livinghere/cities.html>; <http://quickfacts.census.gov/qfd/states/06/06065. html> (as of September 30, 2013).)

The prosecutor's question to Johnson was so broad – whether he "was aware" of any such cases in the "city and county" of Riverside (34 RT 6127) – that absent a foundation, that is, merely standing alone, the answer "no" was irrelevant, because the detective's "awareness" could not have encompassed, without more information, the entire 28 cities and 7,206 square miles of Riverside County. Did Johnson undertake some comprehensive county-wide effort to discover whether there were any similar cases? Was there some other reason for confidence that he would have known of such other cases had they occurred? There's simply no evidence on the question.

This is also an answer to respondent's argument (RB 121) citing Evidence Code section 702, subdivision (a), concerning the inadmissibility of testimony of which the witness has no personal knowledge.

Further, it should be borne in mind that the probative value of the prosecutor's unsupported effort to show that there were no "other" cases matching appellant's interrogation statements – the apparent purpose of the

prosecutor's inquiry – is further undermined by the fact that the Myers case facts did not match up with appellant's statements either. (See, *ante*, pp. 3-6; 57-58.)

XVIII. THE PROSECUTOR'S CLOSING ARGUMENT TRANSGRESSIONS WERE MISCONDUCT FOR THE SAME REASONS THAT THEY WERE IN THE GUILT PHASE, AND COUNSEL WAS INEFFECTIVE IN NOT OBJECTING

While a few of the specifics are different, appellant's objections to prosecutor's closing argument to the second penalty jury very closely tracks his similar guilt phase argument. (See AOB 397-414, 304-325, and *ante* at pp. 62-66.)

A. THE PROSECUTOR WENT BEYOND VIGOROUS ARGUMENT

Respondent cites a number of cases to support the proposition that the prosecutor engaged in no more than vigorous argument, including "opprobrious epithets" reasonably warranted by the evidence. (RB 123.) Thus, respondent cites *People v. Garcia*, (2011) 52 Cal.4th 706, 759-760, where the prosecutor spoke of defendant's "animalistic action" and "referred a few more times to defendant as an 'animal' and a 'predator' who pursued 'sadistic passions.' " In *People v. Dykes* (2009) 46 Cal.4th 731, 744, the "opprobrious epithets" included argument that the defendant's statements were "lies" and that he "lied under oath 'at will.'" (*Id.* at p. 773.) *Dykes* explained that referring to a defendant's testimony and out of court statements as "lies" is an acceptable practice " 'so long as the prosecutor argues inferences based on evidence rather than the prosecutor's personal

belief resulting from personal experience or from evidence outside the record.' " (*Id.* at p. 773, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1030.)

In *People v. Zambrano* (2007), 41 Cal.4th 1082, 1173, overruled on other grounds grounds, *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, the prosecutor spoke of defendant as "evil" and as one who "chose evil" and a liar. The court said this:

> Where they are so supported, we have condoned a wide range of epithets to describe the egregious nature of the defendant's conduct. (*E.g.,* [*People v.*] *Farnam* [2002] 28 Cal.4th 107, 168 [defendant is "monstrous," "cold-blooded," vicious, and a "predator"; evidence is "horrifying" and " 'more horrifying than your worst nightmare' "]; *People v. Thomas* (1992) 2 Cal.4th 489, 537 [defendant is " 'mass murderer, rapist,' " " 'perverted murderous cancer,' " and " 'walking depraved cancer' "]; [*People v.*] *Sully* [1991] 53 Cal.3d 1195, 1249 [based on facts of crime, defendant is [a] 'human monster' " and "mutation"].)
>
> . . . . .
>
> Nor did the prosecutor mischaracterize the evidence by saying that defendant told nothing but lies, and was a sociopath. When a defendant's testimony contradicts the strong evidence of his guilt, it is not improper to call him a liar. (*People v. Edelbacher* (1989) 47 Cal.3d 983, 1030[" 'snake in the jungle,' " "slick," "tricky," a " 'pathological liar,' " and " 'one of the greatest liars in the history of Fresno County' "]; *People v. Reyes* (1974) 12 Cal.3d 486, 505.) And the label of sociopath—someone who acts without conscience or remorse—certainly fit defendant, based on the facts of his crimes. No misconduct occurred. (41 Cal.4th at pp. 1173, 1174, parallel citations omitted.)

The prosecutor in this case went much further than calling appellant names. Remember what this Court said in *Edelbacher* and *Dykes*: "so long as the prosecutor argues inferences based on evidence *rather than* the prosecutor's personal belief resulting from personal experience *or from evidence outside the record.*' " (*Dykes, supra,* 46 Cal.4th. at p. 773, quoting *Edelbacher, supra,* 47 Cal.3d at p. 1030, emphasis added.) The prosecutor's references to the several other child-related cases was clearly outside the record of this case, and was clearly intended to inflame the passion or prejudice of the jury. (*People v. Young*, (2005) 34 Cal. 4th 1149, 1195; *People v. Pinsinger* (1991) 52 Cal.3d 1210, 1251.)

Respondent is correct that for purposes of penalty argument, some appeal to the jury's passions may be acceptable, to the extent counsel's argument is limited to " ' relevant subjects that could provide legitimate reasons to sway the jury mercy or to impose the ultimate sanction. On the other hand, irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role or invites an irrational, purely subjective response should be curtailed.' " (*People v. Jackson* (2009) 45 Cal. 4th 662, 692, quoting *People v. Haskett* (1982) 30 Cal.3d 841, 863-864.) All of the cases cited by the *Jackson* court, however, and the other cases cited by respondent, involved matters and inferences within the records of those cases.

(*People v. Gonzales* (2011, 51 Cal.4th 894, 946 [commenting on victim's mother's testimony]; *People v. Jackson, supra*, 45 Cal.4th at p. 691 [asking jurors to consider their own reactions to the murder of a loved one, arguably outside the record but rooted in the facts of the case]; *People v. Leonard* (2007) 40 Cal.4th 1370, 1417-1418 [various statements, all related to the facts of that case].) Respondent has cited no case which involved the importation of child abuse cases outside and irrelevant to the record in the case being tried. Such references are unacceptable.

Similarly, and even more seriously, respondent, despite her argument to the contrary (RB 126) has not cited any cases suggesting that it was appropriate for the prosecutor to import the sexual assault evidence relating to Mason into the Myers case, where there was no evidence whatsoever that Myers was sexually assaulted. This was beyond reasonable inference. This was just beyond the pale.[21]

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[21] Respondent does assert that the crimes "against Ms. Mason and Ms. Meyers had very distinct similarities . . . [which] were circumstantial evidence that Jackson also sexually assaulted Ms. Myers" and that the "prosecutor's argument went no further than arguing reasonable inferences from the evidence." (RB 126.) Respondent does not, however, identify the "very distinct similarities" which allegedly support a reasonable inference of sexual assault or attempt to explain how they do so.

Regarding the remaining sub-issues (at RB 125-130), appellant will rely on his opening brief arguments, at AOB pages 400-408, and his prejudice argument at pages 411-414.

B. COUNSEL'S FAILURES TO OBJECT TO THE PROSECUTOR'S MISCONDUCT SHOULD NOT BE FATAL TO APPELLANT'S ARGUMENT

Appellant has already argued, twice in his opening brief (AOB 309-311, 408-411) and once in this brief (*ante* at pages 67-68), that counsel's failures to object should not in this case operate as a forfeiture. There seems little point in repeating those arguments here. Appellant would simply add that there is something odious about condoning such prosecutorial misconduct where the defense counsel was so beaten down, or inured to such misconduct, or simply not paying attention, that he failed to object. Perhaps this is a matter better left for appellant's habeas corpus petition; but this Court's disapproval on appeal of the prosecutor's misconduct is more than justified. .

XIX. IN REJECTING APPELLANT'S PROPOSED INSTRUCTIONS, THE COURT UNFAIRLY UNDERCUT HIS LINGERING DOUBT THEORY

Respondent argues that the three substantive-law instructions that the trial court refused were unnecessary because guilt had already been determined. (RB 131-136.) The instructions in issue were CALJIC No. 2.16, relating to dog-tracking evidence; CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence – Generally); and a defense-proposed special instruction regarding the lack of acceptance by any state appellate court of the Scent Transfer Unit. (See *Ibid.* and AOB 416-426.) Appellant also argued that, upon appellant's request, CALJIC 2.71 (Admission – Defined) should have been given. (AOB 423-425.) The latter issue will be treated separately, below.

With regard to the first three instructions mentioned above, the trial court's comments and respondent's arguments are the same: that guilt had been determined, and there was therefore no reason to suggest to the jury that they should relitigate guilt. It was the prosecution, however, that in fact relitigated guilt, in order to overcome the lingering doubt expressed by one or more members of the first jury. Indeed, the second penalty trial nearly duplicated fact-by-fact, opinion-by-opinion, the first guilt trial. So the State wishes to have it both ways – on the one hand, to present all of the evidence

at the first trial (and additional evidence created after that trial[22]), but the defense does not get the benefit of instructions to guide the jury's consideration of that evidence.

The fact is that this idea of re-litigating guilt is a strawman. The jury was not given the opportunity to find the defendant not guilty, but only to determine the appropriate penalty based on all the aggravating and mitigating circumstances, including lingering doubt. Moreover, with regard the prosecutor's misconduct, respondent is all too willing to allow free reign, because, with regarding to appealing to the passions of the jury:

> "Unlike the guilt determination . . . in making the penalty decision, the jury must make a *moral assessment of all the relevant facts* as they reflect on its decision." (Citations.) "Emotion must not reign over reason . . . ." (Citations.) (RB 125; emphasis added.)

If, in fact, emotion must not reign over reason, and the jury must make a moral assessment of "all of the relevant facts" (*People v. Leonard, supra,* 40 Cal.4th at p. 1418), then appellant was entitled to have the jury guided in their assessment of those facts.

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[22] The new evidence relating to the question of guilt which the prosecution introduced at the penalty retrial – circumstantial evidence involving dog-identification procedures and an additional "admission" – was precisely the kind of evidence that should have been evaluated in light of the defense instructions refused by the court.

That is particularly true with respect to the two dog-scent related instructions sought by the defense. Appellant has presented more than enough evidence of the questionable nature of this evidence, and it formed a major part of the prosecution's second-penalty-trial evidence. To prevent the giving of an instruction alerting the jury to view it with at least some (though, appellant contends, not enough) caution was to put a heavy prosecution thumb on one side of the scale.

This is even more true with regard to the proposed defense instruction regarding the STU. The court permitted the prosecution, over objection, to run the additional San Bernardino trials, and allowed Harvey, over further objections, to describe them to the jury. This was new evidence created for the penalty trial, and Harvey in fact used a scent pad collected by the STU as the scent object presented to her dogs Shelby and Dakota. (37 RT 6512.) In that sense, this is distinguishable from the guilt phase, where Harvey "only" used it for her research.

The second penalty phase was tried explicitly with lingering doubt the underlying issue. In that setting, to have prevented the guidance of these three instructions was effectively to undercut the defense, by failing to give any guidance to the jury on how to view these matters. The State is in essence saying "we'll throw everything at you that we threw before – plus

additional evidence – but this time you have to defend it with one hand tied behind your back, and what is at stake is your life."

With regard to CALJIC 2.71, appellant argued that it must be given in a penalty phase when requested, citing *People v. Livaditis* (1992) 2 Cal. 4th 759, 782-783. (AOB 424.) Respondent contends – and it might appear true on its face – that this is not a case where the *fact* of the admission is in issue. (RB 137, citing *Lividatis, supra*, at p. 783, and *People v. Beagle* (1972) 6 Cal.3d. 441, 456.) In this case, however, the so-called admissions were not simple statements of fact: "I did it," or, "I was there." They are instead statements alleged by the prosecution to relate to Myers but given in response to questions about Mason, and in fact corroborated for the most part by facts related to what occurred at Mason's house the night before the statements were made. In this context, the failure to give the instruction was error.

With respect to all of these errors, appellant disagrees with respondent that they were harmless, and refers the Court to his prejudice argument at AOB 426-428.

XX. ABSENT THE ROBBERY AND ROBBERY SPECIAL CIRCUMSTANCE AGGRAVATION, THE JURY WOULD NOT HAVE VOTED FOR DEATH

Appellant argued that, if the Court agreed that the robbery and, therefore, the robbery special circumstance did not survive appeal, the second penalty jury may well have voted for life. (AOB 429-430.) Respondent is correct that this Court has often held to the contrary – that when one of two special circumstances is stricken, there was enough to otherwise find an absence of prejudice. (RB 138, citing *People Halversen* (2007) 42 Cal.4th 379, 422.)

Respondent again, however, supports the legal point with an overstatement of the case against Jackson: "The overwhelming evidence in aggravation remains the same." (RB 138.) In fact, the evidence against him, even with, but especially without the dog-scent evidence, is far from how respondent has characterized it. Second, respondent's statement assumes a complete absence of mitigating evidence worth considering. It includes no mention of the description by Jackson's siblings of the absolute horror of his childhood (*see,* AOB 116-123), nor any mention of the description by his ex-girlfriend's mother and sister, Francetta Mays and Venus Blankenship, of how well he treated Ms. Mays and her grand-children, including his own

child, and how he helped Ms. Blankenship. (40 RT 6983 *et seq.*; AOB 113-115.)

This was not a case in which the first jury voted 11-1 or 10-2 for death. This was a case in which eight of the first-trial jurors voted against death. In that context, it is simply too glib to suggest, as does respondent, that there was no reasonable possibility that the jury would have reached a different result. (RT 138.)

CONCLUSION

Appellant will not specifically reply to respondent's arguments regarding the constitutionality of the California death penalty statute (RB 138-146), but only request that the Court reconsider its prior rulings for the reasons set forth in appellant's opening brief. (AOB 431-446.)

Regarding cumulative error (RB 146; AOB 447-448), appellant will conclude as follows: This was a trial and separate penalty trial that was fatally infected with over-reliance on questionable subject of dog-scent identification evidence. The over-reliance continued and was made worse in the second penalty trial, and the trial court at no time bothered to hold either a *Kelly* or a foundational hearing. Moreover, the trial was flawed *ab initio* by the failure to sever the Myers case from the Mason case. And there were any number of additional errors by the trial court and the prosecutor.

Neither the conviction nor the death penalty verdict were valid, and both should be reversed.

DATED: October 16, 2013

Respectively submitted,

RICHARD I. TARGOW
Attorney for Appellant

CERTIFICATE OF LENGTH OF BRIEF

I, Richard I. Targow, attorney for appellant herein, hereby certify under California Rule of Court 8.630(b)(2), that the length of this brief is 21,480 words, well within the limits for the reply brief set forth in rule 8.630(b)(1)(C).

RICHARD I. TARGOW

DECLARATION OF SERVICE BY MAIL

Re: People v. Bailey Lamar Jackson No. S139103

I, RICHARD I. TARGOW, certify:

I am, and at all time mentioned herein was, an active member of the State Bar of California and not a party to the above-entitled cause. My business address is Post Office Box 1143, Sebastopol, California 95473.

I served a true copy of the attached APPELLANT'S REPLY BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

Tami F. Hennick, Dep. Atty. Gen
Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

Steven Parnes, Staff Attorney
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California Appellate Project
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San Francisco, CA 94105

Hon. Patrick F. Magers,
c/o Clerk of the Superior Court
P.O. Box 431,
Riverside, CA 92501

Bailey L. Jackson, Jr. (Appellant)

Each said envelope was then, on October 16, 2013, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed this 16th day of October, 2013.

RICHARD I. TARGOW
Attorney at Law