

# SUPREME COURT COPY

**In the Supreme Court of the State of California**

**THE PEOPLE OF THE STATE OF  
CALIFORNIA,**

**Plaintiff and Respondent,**

v.

**BAILEY JACKSON,**

**Defendant and Appellant.**

**CAPITAL CASE**

Case No. S139103

**SUPREME COURT  
FILED**

**JUN 19 2015**

**Frank A. McGuire Clerk**

Riverside Superior Court Case No. RIF97839

The Honorable Patrick F. Magers, Judge

**Deputy**

## **SUPPLEMENTAL RESPONDENT'S BRIEF**

KAMALA D. HARRIS  
Attorney General of California  
GERALD A. ENGLER  
Chief Assistant Attorney General  
JULIE L. GARLAND  
Senior Assistant Attorney General  
HOLLY D. WILKENS  
Supervising Deputy Attorney General  
TAMI FALKENSTEIN HENNICK  
Deputy Attorney General  
State Bar No. 222542  
600 West Broadway, Suite 1800  
San Diego, CA 92101  
P.O. Box 85266  
San Diego, CA 92186-5266  
Telephone: (619) 645-2274  
Fax: (619) 645-2012  
Email: Tami.Hennick@doj.ca.gov  
*Attorneys for Respondent*

**DEATH PENALTY**



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Respondent submits this supplemental brief pursuant to this Court's May 20, 2015, order, addressing "the significance, if any, of Evidence Code section 1108 with respect to the cross-admissibility of evidence of the sexual assault on Myrna Mason." As explained in Respondent's Brief, the trial court properly denied Jackson's motion to sever because the evidence of the sexual assault of Mason was cross-admissible under Evidence Code section 1101(b). In addition, as set forth below, the court properly denied Jackson's motion because the evidence was also cross-admissible under Evidence Code section 1108.

Evidence Code section 1108 provides that "[i]n a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense is not made inadmissible by section 1101 if the evidence is not inadmissible pursuant to section 352." As this Court has explained,

In enacting Evidence Code section 1108, the Legislature decided evidence of uncharged sexual offenses is so uniquely probative in sex crimes prosecutions it is presumed admissible without regard to the limitations of Evidence Code section 1101. Or, as another court put it, the charged and uncharged crimes need not be sufficiently similar that evidence of the latter would be admissible under Evidence Code section 1101, otherwise Evidence Code section 1108 would serve no purpose. It is enough the charged and uncharged offenses are sex offenses as defined in section 1108.

(*People v. Loy* (2011) 52 Cal.4th 46, 63, internal quotation marks and citations omitted.)

**A. Jackson was Accused of a Sexual Offense Against Geraldine Myers Within the Meaning of Evidence Code Section 1108.**

Evidence Code section 1108, subdivision (d)(1)(A), defines "sexual offense" as "a crime under the law of a state or of the United States that involved any of the following: Any conduct proscribed by Section

261...286 . . . [or] 288a(2)(A) of the Penal Code.” Two of the three charged offenses pertaining to Myers were sexual offenses within the meaning of Evidence Code section 1108. Specifically, while the burglary special circumstance alleged as to count 1 does not specify an underlying felony, the burglary charged in count 2 references “intent to commit theft and a felony.” (2 CT 713-714.) The jury was instructed that in order to find Jackson guilty of burglary in count 2, it must find that at the time of entry, Jackson had the “specific intent to commit a felony, such as Robbery, Rape, Sodomy, or Forcible Oral Copulation.” (15 CT 4138.) Accordingly, the unspecified felony referenced in the burglary count included as underlying felonies the crimes of rape, sodomy, and forcible oral copulation, and thus “involved” a sexual offense. (See Evid. Code § 1108, subd. (d)(1)(A); Pen. Code §§ 261, 286, 288a, subd. (2)(A).) This Court has expressly “conclude[d] that section 1108 applies at least when the prosecution accuses the defendant of first degree felony murder with rape (or another crime specified in §1108, subd. (d)(1)), or with burglary based on the intent to commit rape (or other sex crime), the underlying felony.” (*People v. Story* (2009) 45 Cal.4th 1282, 1294.) Accordingly, the two sets of offenses involving Myers and Mason were cross-admissible in hypothetical separate trials. (*People v. Loy, supra*, 52 Cal.4th at p. 63.)

**B. Evidence Independent of the Sexual Assault of Mason Shows Jackson Entered Myers’s Home with the Intent to Commit a Sexual Offense**

The evidence showed that Jackson entered Myers’s home with the intent to commit sexual offenses. Evidence of intent “is seldom established with direct evidence but instead is usually inferred from all the facts and circumstances surrounding the crime. [Citations.]” (*People v. Lewis* (2001) 25 Cal.4th 610, 643.) Jackson entered Myers’s home uninvited late



at night. The dress and stockings Myer's wore the day she was killed were found on the floor of the guest bedroom. This was out of character for Myers, who was a tidy person, suggesting that her clothing had been forcibly removed and dumped on the floor of the guest bedroom. In addition, money and valuables were left in Myers's home, including her purse and wallet. Myers's home was not ransacked as one would expect if the intruder's primary intent was theft. This evidence supports the conclusion that Jackson's primary motivation was the sexual assault of Myers. (*People v. Nye* (1951) 38 Cal.2d 34, 37.)

**C. The Trial Court Would Not Be Required to Exclude Evidence of the Sexual Offenses Committed Against Mason Pursuant to Section 352 in a Separate Trial on the Charges Involving Myers**

The trial court would not have been required to exclude the evidence of the sexual offenses against Mason under Evidence Code section 352 in a separate trial of the Myers charges as the probative value of the evidence was not outweighed by undue prejudice.<sup>1</sup> In making this determination, a court would consider factors such as its

nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but

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<sup>1</sup> Evidence Code section 352 provides:

The court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

*(People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

The probative value of the sexual assault evidence was substantial. The similarities between the sexual assault on Mason and the murder and sexual assault of Myers were relatively similar. Specifically, both Mason and Myers were petite women in their eighties living alone. The women lived just three blocks apart from each other in the same neighborhood where Jackson lived. (6 RT 1584-1585; 7 RT 1761, 1683; 16 RT 1913.) Jackson's attacks on Mason and Myers occurred just six weeks apart. Leading up to the attacks inside their homes, both women had briefly gone outside of their home late at night. (13 CT 3683-3688; 8 RT 1926-1927, 1933.) Jackson took some personal property from both of his victims, although neither of the victims' homes had been ransacked. He left behind no fingerprints or DNA, and very little of the victims' blood.

Moreover, while the evidence of the sexual assault of Mason would have benefitted the prosecution in a separate trial of Myers's sexual assault and murder, it would not have been prejudicial within the meaning of section 352. (*People v. Alexander* (2010) 49 Cal.4th 848, 905 [prejudicial not synonymous with damaging]; and *People v. Doolin* (2009) 49 Cal.4th 390, 438-439.) The evidence of the attack against Mason was no more inflammatory than the evidence of the attack on Myers. By Jackson's own admission he was in Myers's home when she "surprised" him, and stabbed her in the back with a large knife with such force that the knife exited her chest. He claimed that he put her into her own car, then grabbed her by the hair, and threw her body in a remote location.

Finally, there was no doubt that Jackson committed the crimes against Mason. He did not even contest his guilt at trial. (22 RT 4122-4123.) Hence, admission of this evidence would not increase the likelihood of

confusing, misleading, or distracting the jurors from their main inquiry in a hypothetical separate trial.

In the face of this evidence, Jackson cannot overcome the presumption favoring the admissibility of sexual offense evidence under Evidence Code section 1108, or the preference for a single trial of properly joined counts. (*People v. Loy, supra*, 52 Cal.4th at p. 62.)

The Legislature's principal justification for adopting section 1108 was a practical one: By their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. The ensuing trial often presents conflicting versions of the event and requires the trier of fact to make difficult credibility determinations.

(*People v. Falsetta* (1999) 21 Cal.4th 903, 915.) “The need for such evidence is especially compelling when the sexual assault victim was killed and cannot testify.” (*People v. Avila* (2014) 59 Cal.4th 496, 515; *People v. Story* (2009) 45 Cal.4th 1282, 1293.)

**D. The Provisions of Evidence Code Section 1108 Provide a Basis to Uphold the Trial Court’s Denial of Jackson’s Motion to Sever**

As set forth above, evidence of the sexual assault of Mason would have been cross-admissible in separate trials under Evidence Code section 1108. While the prosecution did not advance this theory of admissibility at trial, this Court can rely upon this additional basis to uphold the denial of Jackson’s severance motion on appeal.

““No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in law, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.””

(*People v. Geier* (2007) 41 Cal.4th 555, 582, citing *People v. Zapien* (1993) 4 Cal.4th 929, 976.)

“[A] respondent may assert a new theory [on appeal] to establish that an order was correct on that theory "unless doing so would unfairly prejudice appellant by depriving him or her of the opportunity to litigate an issue of fact." (*Bailon v. Appellate Div.* (2002) 98 Cal.App.4th 1331, 1339.) No further factual development is required in order to determine the admissibility of the evidence of Jackson’s sexual assault upon Mason, and all requirements of section 1108 for admissibility were satisfied including the disclosure requirement in subdivision (b). Moreover, Jackson has a full opportunity to litigate the applicability of section 1108 in this supplemental briefing and at oral argument. Accordingly, section 1108 is a proper basis for finding the evidence of the sexual assault of Mason cross-admissible for purposes of upholding the denial of Jackson’s motion.

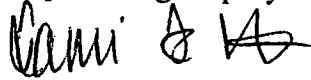
As explained in Respondent’s Brief, in addition to the evidence being cross-admissible, the benefits of joinder outweighed the likelihood of

spillover effect, the evidence supporting the crimes against both women was strong, and joinder did not convert the case into a capital case. (RB at pp. 24-26.) Thus, the trial court properly denied Jackson's motion to sever.

Dated: June 18, 2015

Respectfully submitted,

KAMALA D. HARRIS  
Attorney General of California  
GERALD A. ENGLER  
Chief Assistant Attorney General  
JULIE L. GARLAND  
Senior Assistant Attorney General  
HOLLY D. WILKENS  
Supervising Deputy Attorney General



TAMI FALKENSTEIN HENNICK  
Deputy Attorney General  
*Attorneys for Respondent*

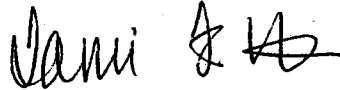


**CERTIFICATE OF COMPLIANCE**

I certify that the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 1714 words.

Dated: June 18, 2015

KAMALA D. HARRIS  
Attorney General of California

A handwritten signature in black ink, appearing to read "Tami" followed by a stylized flourish.

TAMI FALKENSTEIN HENNICK  
Deputy Attorney General  
Attorneys for Respondent





**DECLARATION OF SERVICE BY U.S. MAIL**

Case Name: **People v. Bailey Jackson**

No.: **S139103**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 600 West Broadway, Suite 1800, P.O. Box 85266, San Diego, CA 92186-5266.

On June 18, 2015, I served the attached **SUPPLEMENTAL RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

Richard I. Targow, Esq.  
Attorney at Law  
P.O. Box 1143  
Sebastopol, CA 95473-1143  
Attorney for Appellant  
Two Copies

California Appellate Project  
101 Second Street, Suite 600  
San Francisco, CA 94105

Riverside County Superior Court Clerk  
For: The Honorable Patrick F. Magers  
4100 Main Street  
Riverside, CA 92501-3662

Paul Zellerbach  
Riverside County District Attorney  
3960 Orange Street  
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 18, 2015, at San Diego, California.

Carole McGraw

Declarant



Signature