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July 6, 2015

SUPREME COURT COPY

Frank A. McGuire
Court Administrator and Clerk
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102

SUPREME COURT
FILED

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Frank A. McGuire Clerk

Deputy

S139103

Re: *PEOPLE V. BAILEY JACKSON*, No. ~~S193103~~
Appellant's Supplemental Reply Brief

Dear Mr. McGuire:

In reply to respondent's supplemental brief, filed June 19, 2015, appellant replies as follows:

Appellant's initial supplemental brief asserted the following factual premises, which also underlie this brief:

1. That there were no counts in the Amended Information regarding Geraldine Myers which referred in any way to sexual assault or crimes;

2. That there was no evidence of sexual crimes having been committed against Ms. Myers; and,

3. That the first time in the entire record that the prosecution made such charges against appellant were in his closing arguments to the jury; indeed, in his opening statement, the prosecutor specifically mentioned the sexual charges against appellant in the Mason case, but made so such mention in the Myers case.

DEATH PENALTY

While respondent does assert that there was evidence of a sexual assault against Ms. Myers, the asserted evidence, as explained below, cannot sustain such a charge.

The legal arguments follow.

A. The Answer to the Court's First Question Remains "No," Because There Were No Underlying Sexual Charges in the Mason Case

In his initial supplemental brief, appellant argued that the charging document contains no mention of sexual crimes in the Myers counts (Counts 1-3); that *People v. Story* (2009) 45 Ca1.4th 1282 is distinguishable because in that case, the murder conviction at issue was sought explicitly on the theory of rape and burglary as the underlying felonies, and the evidence in *Story* was substantial enough to support the sexual assault charges; and that the *dicta* in *Story* suggesting that any defendant charged with felony murder was thereby put on notice he faces charges of sexual felonies violated the notice requirement inherent in due process. Nor did the recitation of the sexual crimes against Mason in CALJIC No. 14.50 change the calculus, precisely because those crimes clearly related to the Mason crimes. (Appellant's Supplemental Letter Brief (ASLB) 1-4.)

Respondent, on pages 1-2 of her brief, argues that Evidence Code section 1108 applies to Count 2 because the jury instruction included, among the specific felonies underlying the burglary charge, rape, sodomy, and forcible oral copulation. But this is a circular argument – a bootstrap relying on the trial court's very failure to sever the cases, which allowed the sexual crimes to be included in CALJIC 14.50. Thus, respondent

relies on the very failure of the court to sever the cases to justify the failure to sever. In a separate trial on the Myers counts, the sexual crimes could not have been included because the charging document makes no reference to sexual crimes, and, as discussed further below, the evidence asserted by respondent as sufficient to show a sexual crime against Myers simply was not.

Insofar as respondent relies on the language of the statute itself, on page 1 of her brief, that too is unavailing. Thus, one not even need to read the whole quotation from the section: "[i]n a criminal action *in which the defendant is accused of a sexual offense*, evidence" of the prior such offense is admissible. (Ev. Code sec. 1108, subd. (a).) But despite respondent's best efforts to the contrary, he was *not* accused of sexual offenses in the Myers case. Counts 1-3 of the Amended Information, in contrast to the Mason counts, make no mention of a sex crime. For that reason alone, the case upon which respondent relies, *People v. Loy* (2011) 52 Cal.4th 46, is inapplicable, for in *Loy*, the defendant was accused of murder with the special circumstance of a murder committed while engaged in the commission of a lewd and lascivious act of a child under the age of 14. (*Id.*, at p. 50.) "The evidence showed that . . . defendant [Loy] entered the bedroom of his 12-year-old niece . . . while she was sleeping. He assaulted her sexually, killed her, and dumped her body in a nearby vacant lot, where it was discovered four days later." (*Id.*, at p. 51.) In this case, the evidence, *including* appellant's so-called confession, includes only the barest suggestion – the placement of the victim's clothes – that there

was a sexual assault, and points instead to Ms. Myers having surprised him in the hallway, and he having killed her there. (See, for further discussion, *post*, in Section B.) So when the *Loy* court later speaks of the Legislature deciding that evidence of uncharged sexual offenses is so uniquely probative "in sex crimes prosecutions" (52 Cal.4th at p. 63), the answer is simply that the Myers case was not a sex-crime prosecution.

As set forth in appellant's initial supplemental brief, also unavailing is respondent's reliance on *People v. Story* (2009) 45 Cal.4th 1282, 1294: "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.'" (Respondent's Supp. Brf. 2.) The prosecution in this case *did not* accuse the defendant of felony murder with an underlying sexual crime, nor with burglary based on the intent to commit rape. It bears repeating that until the prosecutor's closing argument, there was not even the slightest hint to the defense that the case was being tried on the basis of a sexual assault against Ms. Myers. (See ASLB at pp. 6-7, discussing the prosecutor's distinctly different opening-statement remarks regarding Ms. Myers and Ms. Mason.) Appellant is unaware of any legal principle under which an accusation in a prosecutor's closing argument can constitute an accusation as that term is used in *Story*. Indeed, a Lexis review of the annotations

accompanying section 1108 reveal that in every case in which section 1108 was held to apply, there were in fact specific charges of sexual crimes in the prosecution under appeal, either as the primary crime or as a murder special circumstance.

Finally, respondent's argument in her second section (discussed below) tries to convert an inapplicable precedent and slight evidence of what might have happened in Myers' house, into a *de facto* charge of entry with intent to commit sexual crimes. Such *post-hoc* reasoning cannot take the place of a charging document, substantial evidence, or any *hint* during the course of the trial (until the closing arguments) that the prosecutor was charging appellant with a sexual assault on Ms. Myers.

B. There Was No Substantial Evidence, Other than the Mason Sexual Offenses, to Support a Jury Finding that Defendant Entered Myers' Home with the Intent to Commit a Sexual Offense

In his initial supplemental brief, appellant stated repeatedly that there was no evidence whatsoever of a sexual crime against Ms. Myers, and therefore there could be no evidence that he entered her house with an intent to commit such a crime. (ASLB 2, *passim*.) Appellant maintains here that the thin tissue of evidence respondent asserts as sufficient to show that there was a sex crime committed there still cannot show that appellant entered Myers' house with sexual intent.

Respondent would have us believe that it was sufficient to show a sexual intent upon entry into Ms. Myers house that (1) both crimes took place late at night; (2) money and valuables were left in Myers' home, and (3) her dress and stockings were found on

the floor of the guest bedroom. (Resp. Supp. Brf. 3) First, the fact that it was late at night tells us nothing regarding his intent upon entering. Second, the argument that he did not enter to take money is belied by the State's entire theory of the dog-scent evidence, that appellant had removed money from the envelope found on her bed. And the fact that the house was not ransacked, if we are to credit anything he told the police (which respondent consistently relies upon), is explainable by the fact that Myers apparently surprised him in the hallway, leading to his killing her and needing to dispose of the body. (14 CT 3926.) Third, appellant maintains, the location of a dress and stockings in a bedroom – guest or otherwise - in no way suggests a sexual assault, particularly where there was no forensic evidence (DNA, semen, or the like), recovered from the bedroom. This is especially true in the complete absence of any forensic or direct evidence that such an attack took place. But even if it could so suggest that a sexual attack took place, it cannot rise to the level of explaining appellant's intent upon entering Myers' house, especially in light of respondent's reliance on the fact that both crimes occurred on nights when his neighbor refused him a loan.

But it is the case that respondent cites, *People v. Nye* (1951) 38 Cal.2d 34, which provides the best argument for appellant, because in *Nye*, the evidence at issue concerned a *prior* almost-identical entry and further nearly identical facts. In *Nye*, the defendant was charged and convicted of two counts of assault with intent to commit rape. With respect to Miss W., his first victim, he entered a house trailer early in the morning, tore

the covers off the bed, ripped her nightgown down to her knees, threatened to kill her if she screamed, exposed his genitals, and attempted to accomplish sexual intercourse. With respect to the second victim, Miss P, he entered her motel bedroom early in the morning, came to her bed, placed his hand over her mouth and grasped her wrist. She screamed and kicked and bit her hand, and he fled. (*Id.*, at pp. 36-37.)

On appeal, Nye contended that his admission that he had entered Miss P's motel bedroom with the intent to have sexual intercourse with her was inadmissible, and without it, there was insufficient evidence by only his conduct to show his intent. Here is what the court said that respondent herein relies upon, interspersed with further-indented and italicized comments by appellant:

> [*Nye:*] (2) When a strange man enters a woman's bedroom, covers her mouth with his hand, grasps her wrist while she screams and kicks, releases her when she bites his hand, and makes no effort to take any property, it is reasonable to infer that he intended to commit rape, particularly when such an intent is shown by his attempt to rape another woman under similar circumstances. (*Id.*, at p. 37.)
>
> > [Comment:] *But in this case, he did take property – the money from the envelope so relied-upon by the State – and the fact that he did not find all the money is equally explainable by the probable necessity to deal with her dead body than by any sexual intent, or that he found all the money he needed (See 8 RT 2006 [he asked neighbor for $40 that night].) In another context, respondent relies heavily on appellant's so-called "confession," but to the extent that it could be said to apply to Myers, it suggests only facts about the struggle with and killing of her. (See, e.g., 14 CT 3926.)*

> [*Nye:*] (3) The evidence of the attempt to rape Miss W. was clearly admissible to show that defendant's acts against Mrs. P. were committed with the intent to commit rape. "In such cases, *former acts* of the same kind are relevant to negative the intent as being of any other kind than to commit rape. Where the charge is of assault with intent, the propriety of such evidence cannot be doubted." (2 Wigmore, Evidence, 3d ed., § 357; *People v. Westek*, 31 Cal.2d 469, 480; *People v. Coltrin*, 5 Cal.2d 649; see *People v. Clapp*, 67 Cal.App.2d 197; *People v. Cosby*, 137 Cal.App. 332; 1 Wharton, Evidence in Criminal Cases, § 252, 167 A.L.R. 565, 600.) (*Id.*, at pp. 37-38; emphasis added; parallel citations omitted.)
>
> > [Comment:] *The stark difference between Nye and the instant case is that in Nye, the incident in which the attempted rape was clear was the former* case, *and what Nye did in the second case tracks almost exactly what he did in the first case – entered and accosted the women on their beds in the early mornings – and both women identified him as her attacker. This is far different from the instant case, where there is no evidence of what occurred in Ms. Myers house, other then appellant's "confession," which excludes and in logic precludes any sexual misconduct. (e.g., 14 CT 3926.)*

Nye simply does not support the contention that respondent makes. The analogy is false. Nye entered the bedrooms of both women; approached the bed; and then physically attacked the women, who both testified. (38 Cal.2d at pp. 36-37.) In addition, having clearly attempted rape in the first incident, it logically followed that his intent in entering the second woman's motel room was the same. In contrast, the only evidence in the instant case of an actual sexual assault came in the second incident, against Miss Mason, which may well have been *sui generis*. It is one thing to infer the intent of a prior rapist in an almost identical subsequent entry; it is entirely

different to infer backwards from the Mason crimes appellant's intent upon earlier entering the Myers house when there was no evidence of a sexual assault and no prior history of sexual assault. This is especially true where, as here, both crimes appear to have been crimes of opportunity, in which the women left their houses briefly, leaving them open for entry during appellant's late-night perambulations. Appellant is not saying that in a proper case, under this Court's jurisprudence, later uncharged crimes would not be admissible under section 1108; rather, that it is a logical fallacy in this case to infer intent to commit a sexual crime in the earlier incident when there is no substantial evidence of it, and no temporally prior sexual offenses to indicate a propensity. It is simply a bridge too far.

Even if we assume, *arguendo,* and in the absence of actual evidence of a sexual assault, that one occurred against Ms. Myers, that says nothing about appellant's intent *upon entry* of the house. Indeed, if there were evidence of a sexual assault on Ms. Myers, the prosecutor would surely have charged it. It is a bizarre extension of logic to claim, merely on the basis of the location of a dress and stockings and other at-best-ambiguous evidence, that a later sexual assault can provide sufficient evidence of a suspect's intent upon entry of another house in an earlier crime.

The fact that both incidents occurred at night means nothing, especially in light of the fact that this is consistent with the idea of these being crimes of opportunity. To weave the late night entries into an intent upon entry to sexually assault Ms.

Myers is nothing more than a chimera of speculation.

Reference to the language in the jury instruction – occasioned as it was by the very error of which appellant complains – is equally unavailing, for by what evidence other than speculation could the jury possibly infer what appellant's *intent* was, other than an intent to steal by the fact he had been trying to get a loan and took money from the house? Especially when the language in the instruction was so obviously drawn from the actual crimes against Mason.

Respondent's ambiguous traces of evidence cannot possibly rise to the level of evidence sufficient to show an intent to commit a sexual crime upon entry into Ms. Myers' house.

C. Assuming A Separate Myers Trial and a Sexual Charge, It is Likely That Some Evidence of the Mason Charges Would Survive a Section 352 Challenge, Especially Because of the Distorting Effect of Section 1108

Appellant conceded in his initial brief that assuming a separate Myers trial that included unknown sexual charges, evidence from the Mason case might survive a section 352 challenge. Appellant also noted the difficulties in answering the question in this setting, that is, in the absence of such a challenge, arguments, and ruling below. (ASLB 7-8.) Appellant also referred to the impossibility of answering the question in the abstract, without knowing what the assumed sexual charges would be

– for example, their similarity to the Mason sexual offenses, as that is one of the factors to be considered in a trial court's section 352 analysis. (*People v. Falsetta* (1999) 21 Cal.4th 903, 917.)

But that is not the whole story, for, as appellant explained in his opening brief, the very error in failing to sever the Myers and Mason trials was the extreme nature of the evidence of the sexual crimes against Mason. Thus, appellant argued that the facts of the Mason sex crimes would "uniquely tend to evoke and emotional bias" against the defendant or "would cause the jury to prejudg[e]" him. (AOB at 138, quoting *People v. Foster* (2010) 50 Cal.4th 1301, 1331.) Given this, and a hypothetical sexual charge in a separate trial of much less severity, perhaps the Mason sexual crimes would be excluded. Again, without more information, the Court's question is difficult to answer.

It is especially difficult to answer because section 1108 alters the traditional balancing process of section 352 by establishing a presumption in favor of admissibility of prior sex offenses to prove disposition. The result is that a review of the annotations accompanying section1108 on Lexis yields only two cases which went to trial in which the appellate court ruled the evidence inadmissible. In *People v. Harris* (1998) 60 Cal.App.4th 727, a prosecution of a mental health nurse for sexual offenses against two patients, the prior sexual offenses were ruled extremely inflammatory compared to the charged breach-of-trust offenses, involved a risk of

confusion, involved a prior that occurred 23 years before the charged offenses, was remote, and there were no intervening similar offenses, and were not sufficiently probative. (*Id.*, at pp. 738-741.) In the second case, *People v. Earle* (2009) 172 Cal.App.4th 372, the court reversed a trial court's failure to sever charges of indecent exposure from charges of sexual assault, because the charges of indecent exposure would not have been admissible in a separate trial of the sexual assault charge. Commission of indecent exposure, the court held, did not rationally support an inference that the defendant had a propensity or predisposition to commit rape, at least without some sort of expert testimony to that effect. (*Id.*, at pp. 389-390, 393.)

The fact that, since the passage 20 years ago of section 1108, there have been only two reversals for misapplication of section 352 suggests that the Court might revisit its assumption, expressed in *People v. Falsetta*, *supra*, 21 Cal.4th at page 919, that there was "no reason to assume . . . that 'the prejudicial effect of a sex prior will rarely if even outweigh its probative value to show disposition.'" Nevertheless, that was not the question asked by the Court here.

Replying more directly to respondent's brief, her chimerical factual basis for such non-existent charges is belied by one of the bases upon which she has consistently relied – appellant's so called "confession." According to respondent, at page 4 of her supplemental brief, "By Jackson's own admission he was in Myer's [sic] home when she 'surprised' him, and stabbed her in the back 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." If, *arguendo*, we accept that this was a confession about the Myers killing, both the knifing and that he threw her "body" out the window suggest that no sexual activity would have occurred against Myers, since, according to what respondent relies upon, she was dead, or at least nearly so, soon after she surprised him.

D. As There Were No Sexual Misconduct Charges in the Myers Case, and None Were Possible, Whether in the Case as Tried or in a Separate Case, Section 1108 Cannot Provide the Basis to Uphold the Trial Court's Failure to Sever

The Court's fourth question reads: "Do the provisions of Evidence Code section 1108 provide a basis to uphold the trial court's denial of defendant's motion to sever the Mason charges from the Myers charges?" There are two possible answers, depending on whether the question presupposes a separate Myers trial or the use of section 1108 to uphold the denial of the motion to sever on appeal. Appellant believes he has answered the former question in answering the first three of the Courts questions. The latter question – whether section 1108 can justify affirmance when it is raised initially on appeal, raises troubling questions of due process.

The first of these is that section 1108, subdivision (b) requires pretrial notice to the defendant of the state's intent to introduce other-sexual-crime evidence. (See

ASLB at p. 9.) This presupposes factors not present in the appellate setting. First, it presupposes a separate trial of the Myers charges, which would now include some unnamed sexual charge. Second, there would be a full hearing on the matter in the trial court, and presumably both written and oral argument, and a section 352 determination against which appellant could argue. Third, it would involve an opportunity for the defendant to oppose the evidence showing the uncharged crimes. This is particular important in this case, because in a separate trial of Myers crimes, the defense would have had a very strong motive to mount a more effective defense to the Mason crimes than it did below. From the defense opening statement to the evidence to the closing statements, the record below would have been entirely different, and appellant would have had a much broader record upon to base his arguments.

Respondent cites two rules of appellate decision-making that apply here. The first is that if a trial court's ruling is correct on the basis of any reason, though the wrong reason was given below, it shall be affirmed. (Resp. Supp. Brf. at 5-6, citing *People v. Geier* (2007) 41 Cal.4th 555, 582, and *People v. Zapien* (1993) 4 Cal.4th 929, 976.) The second rule respondent cites is the more important here: "'[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)" (Resp. Supp. Brf. 6.) That is precisely the problem here. The litigation presupposed by section 1108 – litigation at trial – is entirely absent. Contrary to respondent's assertion that "Jackson has a full opportunity to litigate the applicability of section 108 in this supplemental briefing and at oral argument" (*ibid.),* litigation in a reviewing court presupposes a complete record from below, not one truncated by the failure to litigate the matter at all, and the resulting absence from the trial record of how the defense would have responded.

Section 1108 is a statute regarding the evidence which is admissible at trial, requiring notice under the discovery statute. (Sec. 1108, subd. (b) If it had been raised at trial, there would have been a whole panoply of issues trial counsel might have raised below and that appellant would have been able to raise on appeal, issue which are beyond the scope of the Court's questions and permitted briefing.[1] But applying section 1108 for the first time on appeal implicates appellant's rights to fundamental fairness (*Lankford v. Idaho* (1991) 500 U.S. 110, 126 [notice of issues to be resolved *by adversary process* is fundamental to fair procedure]; *People v. Silva* (2001) 25 Cal..4th 345, 368 [information charging murder without elaboration may not provide notice sufficient to afford due process under 14th Amendment]; to present

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[1]One of those issues would have been the unconstitutionality of section 1108, notwithstanding the decision to the contrary in *People v. Falsetta* (1999) 21 Ca1.4th 903. Given the questions asked by the Court, appellant feels constrained not to make that argument.

a defense (U.S. Const., Amend. XIV; *Faretta v. California* (1975) 422 U.S. 806, 819); his right to effective assistance of counsel at trial (U.S. Const., Amends. VI, XIV; Cal. Const., art. I, sec. 15); his right to effective assistance of counsel on appeal, given the lack of an inadequate trial record (*Douglas v. California* (1963) 372 U.S. 353; *Griffin v. Illinois* (1956) 351 U.S. 12, 20; *People v. Barton* (1978) 21 Cal.3d 513, 518; *People v. Young* (1978) 85 Cal.App.3d 595, 608 [reviewing court will not consider matters outside the appellate record]); and the right to a reliable determination under the Eighth Amendment (*Beck v. Alabama* (1980) 447 U.S. 625, 637-38 [heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense].)

CONCLUSION

Respondent, at the invitation of the Court, has manufactured almost out of thin air sexual charges in the Myers case which violate the notice provisions both of the due process clause and section 1108. The cases upon which she relies, *Story*, *Falsetta*, *Loy*, and *Nye*, are all inapplicable to this case because each of them involved actual sex-crime charges in the case under appeal, which are absent in the Myers portion of this case. Despite respondent's best efforts, saying so does not make it so.

Respectfully submitted,

RICHARD I. TARGOW

Attorney for Appellant

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 SUPPLEMENTAL LETTER BRIEF on each of the following, by placing same in an envelope or envelopes addressed, respectively, as follows:

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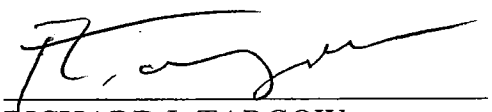
Hon. Patrick F. Magers,
c/o Clerk of the Superior Court
P.O. Box 431,
Riverside, CA 92501

Bailey Jackson, Appellant

Each said envelope was then, on July 6, 2015, 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 6th day of July, 2015, at Sebastopol, California



RICHARD I. TARGOW
Attorney at Law