No. [redacted] 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 OPENING BRIEF

RICHARD I. TARGOW
Attorney at Law (SBN 87045)
Post Office Box 1143
Sebastopol, California 95473
Telephone: (707) 829-5190

Attorney for Appellant

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IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Appellee, vs. BAILEY LAMAR JACKSON, Defendant and Appellant.	)	No. S139103 Riverside County Superior Court Case No. RIF097839

APPELLANT'S OPENING BRIEF

INTRODUCTION

This is a case involving ill-joined counts relating to two separate criminal incidents, and improperly admitted dog-scent identification evidence without which the state's case in the case involving murder, in which the death penalty was imposed, was extremely weak.

On June 22, 2001, appellant Bailey Lamar Jackson, Jr. was found to be in the possession of a television set, stamps, and a checkbook belonging to Myrna Mason, an 84-year old woman who had been brutally assaulted the previous night. Ms. Mason's home, the site of the assault, was across the street and down the block from Jackson's girlfriend's mother's house, in

which Jackson and his girlfriend had been staying. A shoeprint matching Jackson's brand and size of shoes was found outside Ms. Mason's house. A police dog tracked the smell from that shoeprint to a garbage can located between the house where Jackson was staying and the neighbor's house. Inside that can, an officer found Mason's discarded purse.

About six week earlier, on May 13, 2001, during the late-night hours of Mother's Day, Geraldine Myers, 82, disappeared from her home, in the same neighborhood and a few blocks away.[1] A drop of Myers' blood was on a heater vent in her hallway; there was what appeared to be a bleach stain on her hallway rug; a Clorox bottle was found out of place in her bathroom; and a footprint in her bathroom was traced to a brand of shoes, never found, that appellant was purported to own. Myers' body was never found, though her car did turn up in Las Vegas on the following Friday when police there stopped a young man who said that he had stolen it from a parking lot in North Las Vegas on the previous Monday, the day after Mother's Day. No direct evidence tied Jackson to Myers' disappearance. Instead, the prosecution relied on the asserted similarity to the attack on Mason (old women, late at night, in same neighborhood); a rambling,

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[1] Myers lived at 3756 San Simeon Way, Mason at 6616 Lassen Court. Appellant was staying at his girl-friend's mother's house across and down the street from Mason, at 6651 Lassen Court.

ambiguous statement to police concerning a similar crime, that may well have been taken in violation of appellant's right to remain silent, and an erroneously-admitted dog-sniff identification in a station house using an envelope alleged to have contained Myers' money and found crumpled on her bed, but which had been treated with the fingerprint-enhancing chemical ninhydrin and left for 40 days before the dog-trailing.

Despite the fact that Myers' body was never found, nor any of her missing items tied to appellant, and on the basis principally of a dog-sniff identification admitted without a foundational hearing and incapable of either the repetitive certitude of a machine or the truth-finding benefits of cross-examination of the sentient being that performed the identification, appellant was convicted of murder with burglary and robbery special circumstances, and sentenced to death.

The questionable admissibility of such a dog-sniff identification, appellant will argue below, along with a plethora of other errors, resulted in a conviction which violated appellant's Fifth and Fourteenth Amendment rights to due process, his Sixth Amendment rights to confrontation and a fair trial, and his rights under the analogous provisions in article 1, sections 7, 15, and 16 of the California Constitution.

STATEMENT OF THE CASE

On June 26, 2001, appellant Bailey L. Jackson was arraigned on a felony complaint charging a series of felonies involving an attack upon, and theft from, Myrna Mason[2] in her home in Riverside, on June 22, 2001. (1 CT 1-3.)[3]

At appellant's arraignment on June 29, 2001, his then-counsel expressed doubts as to Jackson's competence, and the criminal proceedings were adjourned to determine his competence under Penal Code section 1368, *et seq.*[4] (1 CT 14.)

On March 25, 2001, the felony complaint was amended to include charges of murder, with robbery and burglary special circumstances, of Geraldine Myers on or about May 15, 2001. (1 CT 28-30.)

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[2] In the early pleadings and police reports, Mason was identified as a Jane Doe. Note also that many of the documents which do identify her by name misspell it as "Masson."

[3] Matters of form: Appellant will use the familiar abbreviations for the Clerks' Transcript (CT) and Reporter's Transcript (RT). Other transcripts and their abbreviations include several volumes of Pretrial Reporter's Transcripts (PRT), Confidential Clerk's and Reporter's Transcripts (CCT and CRT, respectively), and Supplemental Clerks' and Reporter's Transcripts (SCT and SRT, respectively). Citations to Appendix are to the documents in the Appendix filed with this brief.

[4] The section 1368 proceeding took place under case number M 19662. All further statutory references will be to the Penal Code, unless otherwise specified.

Appellant was found competent to stand trial following a hearing on February 27, 2002. (Confidential Reporter's Transcript [CRT] 38.)

On April 4, 2003, a bifurcated preliminary hearing was commenced, with the crimes against Myrna Mason separated from the murder count regarding Geraldine Myers. (1 CT 111; 2 CT 206.) The court held appellant to answer on all counts. (2 CT 362.)

An Information was filed April 17, 2003 (2 CT 375-379), and an amended information filed on September 17, 2004 (3 CT 713-718), which was further amended by the prosecution at the conclusion of the guilt phase. (22 RT 4038.) The amended information, in its final form, charged as follows:

> 1. The willful murder of Geraldine Myers on or about May 13, 2001, with premeditation and malice aforethought (Pen. Code § 187), with special circumstances of robbery (§ 190.2, subd. (a)(17)(A)) and burglary (§ 190.2, subd. (a)(17)(G));
>
> 2. Burglary of the Myers residence (§ 459);
>
> 3. Robbery of Myers in an inhabited dwelling (§§ 211, 212.5(a));
>
> 4. Attempted first-degree murder of Myrna Mason on June 22, 2001 (§§ 664/187, subd. (a));
>
> 5. Burglary of the residence of Mason (§ 459);
>
> 6. Robbery of Mason in an inhabited dwelling (§§ 211, 212.5(a));
>
> 7. Torture of Mason (§ 206);

8. Rape of Mason (§ 261, subd. (a)(2));

9. Forcible oral copulation of Mason (§ 288a, subd. (c)(2));

10. Penetration of Mason with a foreign object when she was unconscious (§289, subd. (d)).

The Amended Information also alleged two prior offenses pursuant to section 667.5, subdivisions (a) and (b); two serious prior offenses (§667, subd. (a)); and two special prior offenses (one pursuant to §667, subds. (c), (d)(2), (e)(2)(A), and §1170.12, subd. (c)(2)(A), the other pursuant to §667, subds. (c) and (e.(2)(A) and §1170.12, subd. (c)(2)(A) . (3 CT 713-718.)

Jury voir dire commenced and concluded, and the jury was sworn, in the span of a single day, on October 20, 2004. (13 CT 3651.) The jury returned guilt verdicts on all ten counts, with true findings on all the count-related enhancements, on December 9, 2004. (15 CT 4291-4292.)

The first penalty trial commenced on December 13, 2004. (15 CT 4296). On December 16, the jury reported itself unable to agree on the penalty, although they made true findings on all six of the prior-offense allegations. (16 CT 4429-4434). The trial court granted a defense motion for a mistrial. (16 CT 4443-4444.)

Voir dire for a second penalty phase commenced and concluded, and the jury was sworn on September 13, 2005. (23 CT 6653-6654.) The jury returned it's death penalty verdict on October 11, 2005. (24 CT 6831.)

The trial court considered and rejected the automatic motion to reduce the judgment of death (§ 190.4, subd. (e)), and pronounced judgment, on October 11, 2005. The court imposed the death sentence for Count 1, and 212 years to life on the remaining counts.[5] (24 CT 6896-6897.)

This appeal is automatic. (Cal. Rules of Ct., rule 8.600(a).)

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[5] The court may have made an arithmetical error. See *post* at pages 330-331..

STATEMENT OF THE FACTS

I. INTRODUCTION

As this case involved two penalty phase trials, the statement of penalty-phase facts set forth below will relate only to the second penalty phase trial. That trial, however, re-litigated much of the guilt-phase trial, and to the extent that the evidence presented in the second penalty phase shed light on, or expanded on, the guilt-phase evidence, those facts will be included in the second-penalty-phase factual description.

The prosecution began its case-in-chief with the facts related to the chronologically later crime, the attack on Myrna Mason for which appellant was initially arrested, and regarding which the evidence against him was significantly stronger. In this brief, appellant will begin with the earlier crime, the disappearance (and alleged killing) of Geraldine (Gerri) Myers, and will present all of the evidence related to that crime first. As will be seen, without the allegedly bolstering facts of the Mason incident and the erroneously-admitted dog-sniff evidence, the evidence against appellant for the Myers disappearance was very weak and unlikely to have persuaded any jury to convict appellant of the capital – or any – offense against Ms. Myers.

II. THE MYERS CASE

The prosecution's case regarding the disappearance and alleged murder of Geraldine Myers consisted of: (1) evidence from her family members about discovering her disappearance; (2) evidence from those family members about Myers' habitual behaviors, including how and where she kept her money; (3) evidence regarding her car showing up in Las Vegas, and the non-culpability of Donald Rogers, who was found driving it; (4) evidence of appellant's statements to the police; (5) evidence of a shoeprint in Myers bathroom which may or may not have come from a pair of appellant's shoes which were never found; (6) evidence regarding whether appellant had, or could have, abandoned the car in Las Vegas; and finally, (7) the highly suggestive but bogus dog-sniff evidence.

A. THE PROSECUTION EVIDENCE REGARDING THE DISAPPEARANCE OF GERALDINE MYERS

1. The Family Discovers Her Disappearance

On Mothers Day, May 13, 2001, Geraldine Myers, age 81, spent time with members of her family, including sons William and Douglas, William's wife Roberta, and her daughter-in-law, Monique Myers (widow of another of Geraldine's sons). (8 RT 1923,, 1925-1927, 1941-1942, 1874.) William, the last to see her after he went out to dinner with her, left her house at about 8.45 p.m. (8 RT 1926-1927.) Another son, Richard,

was sick on Mother's Day. He tried to call her at about 10 p.m. that night, but there was no answer. (8 RT 1912.) He also tried to reach her several times the following day, with no success. (8 RT 1913-1914.)

Monique tried several times the next day (Monday) to reach Geraldine by phone, but got no response. (8 RT 1875.) On Monday night, Monique went over to Geraldine's house and, finding it locked, obtained the key from the manager, Mr. Mazolla, who lived in the front house on the property. (8 RT 1884-1885.) She went in through the back door, "just kind of looked around to see if anything was there. And I didn't really see anything, so I just went home." (8 RT 1887.) Monique did not notice anything unusual. (8 RT 1889.) Only one light was on, in the living room, and Monique didn't notice any discoloration of the hall rug (a "bleach" stain found the next day, *post*), or any odd smells. (8 RT 1889-1890). The front door was latched and locked. (8 RT 1891.) She was there about 10 minutes, after which she went home and called her brother-in-law Richard. (8 RT 1892.)

The next day, Tuesday, Monique called her daughter Robin at about 8 a.m. (8 RT 1894-1895.) Robin and her sister Deanna went over to Geraldine's house. Mr. Mazolla let them in the service-porch door, and Robin immediately saw the cleaning-liquid bottles in disarray, shoes

scattered about, and the door-window curtain in the sink. (8 RT 2023.) Robin found her grandmother's purse in the kitchen, noticed what appeared to be a bleach stain in the hallway, which hadn't been there when she was at the house on Saturday, and noticed what she thought was a money envelope ripped open on the bed.[6] (8 RT 2024-2025.)

Robin called her mother, and then called 911. (8 RT 2030.)

Riverside Police Officer Robert Arnold had initially gone to the Myers residence at about 12:30 p.m. on May 15, after taking a missing-persons report from Douglas Myers. (10 RT 2947-2949.) He saw no sign of forced entry. (10 RT 2149.) He obtained the key from Mr. Mazolla, went inside the house to be sure that Ms. Myers was not there, and saw her

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[6] Questioned further about the envelope on the bed, Robin testified that she couldn't be totally positive, but "knows" that the manila envelope was the one she saw in Geraldine's purse on Saturday, now looking like it had been ripped open and discarded on the bed. (8 RT 2027). Earlier in her testimony, Robin said her grandmother kept two envelopes in her purse, a white one for smaller-denomination bills, and a manila one for $50's and $100's. (8 RT 2019-2020.)

Richard Myers also testified that Geraldine kept her money in envelopes in her purse and in the house. When they went out to lunch together, he would see a large number of $20 and $50 bills in her purse, usually in a white envelope. (8 RT 1917-1918.) And daughter-in-law Monique Myers said that, when they went out to lunch together, she would see up to $3-4,000 in cash in white and manila envelopes in Geraldine's purse. (8 RT 1900.)

purse in the kitchen and obtained her identification from her drivers license in the purse. He also noticed a stain on the hallway carpet, but saw no obvious signs of a struggle. (10 RT 2150-2154.) Officer Arnold was called back to the house about 2:30 p.m., and Douglas explained the suspicious circumstances, so Arnold asked the family members to leave the house, secured it, and requested investigators. (10 RT 2159-2161)

One of those investigators was then-Officer Victor Williams. (9 RT 2083.) He found two newspapers in the front yard, dated the 14th and 15th of May (Monday and Tuesday). (9 RT 2084.) As soon as he entered the house and then the hallway, he noticed what was referred to as the "bleach" stain in the hallway rug, though it gave off no smell. (9 RT 2085, 2088.) He saw two empty beer bottles in a trash bag in the service porch/utility room area (9 RT 2087), and strike marks about three feet from the floor on the door from the hall to the living room. (9 RT 2089-2091.) The marks appeared to have been recently cleaned or wiped, as they appeared white, as did other marks on the door from the hall into the laundry room. (9 RT 2092-2093.) Williams also found some $8,000 in cash as well as coins in a closet, but no sign of ransacking, although a file drawer was open. (9 RT 2095, 2098.)

2. Myers' Car is Found in Las Vegas

A few days later, in the early morning hours of Friday, May 18, Las Vegas Police Officer Steven Perry stopped a Toyota Corolla, which turned out to be Geraldine Myers' car, for a lane violation. (10 RT 2165-2167.) The driver, a juvenile later identified as Donald Rogers, told him that he had found the car the day before, parked with keys in the ignition. (10 RT 2172-2173.) Rogers' signed statement, admitting that he took the car, was read to the jury. "I was walking on Searles and 23rd at around 2:30 and saw a Toyota Corolla with keys inside and took it. It was hot, and I was dumb, and I apologize." (10 RT 2175.) Perry's partner, in an inventory search, found little in the car, but saw in the trunk a shopping bag with what appeared to be blood on it. (10 RT 2169-2170.)

At the request of the Riverside office of the FBI, Las Vegas FBI Special Agent Lawrence Wenko processed the vehicle. (10 RT 2182.) He lifted 21 fingerprints from the car, none of them appellant's.[7] (10 RT 2187.) He collected a plastic Macy's bag, an aqua-colored wallet, and a white plastic garbage bag with, in the prosecutor's words, "shoes and

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[7] Yolanda Perez, a fingerprint analyst from the Riverside County District Attorney's office, identified several of the prints on the car as those of Donald Rogers, and confirmed that none belonged to appellant or his girlfriend, Angielina Fortson, whom, the prosecutor suggested, may have gone to Las Vegas with him. (17 RT 3155-3158.)

contents" (prosecutor's words). He also ran three trace evidence filters and collected soil and debris from the passenger side rear bumper. (10 RT 2192). Other than the blood on the Macy's bag there was no other visual blood-stain evidence. (10 RT 2192-93.) Finally, Wenko obtained video surveillance tapes from the Food-4-Less store in North Las Vegas, but because of re-use of tapes, they only had tape from May 16 and 17, Wednesday and Thursday. (10 RT 2194.)

The tapes from Monday or Tuesday would have served to buttress the testimony of Donald Rogers, who said he actually stole the car from the store parking lot on Tuesday (May 15). (10 RT 2223.) That comported with the testimony of his girlfriend, Stephanie Lopez, who testified that he picked her up after school in the Corolla about two or three days before he was arrested (in the early morning hours of Friday.) (10 RT 2205, 2208.)

Rogers testified that he stole the car from the west corner of what is now Food 4 Less, but used to be Price Right, around mid-day. (10 RT 2216). He was looking to steal a car to make money, saw the keys in the ignition, jumped in, started it, and took off. (10 RT 2217.) He was not sure what day of the week it was, but he initially told the police Wednesday so as not to involve his girlfriend, so maybe it was Tuesday. (10 RT 2218). Tuesday was also consistent with his memory that he had the car for three days. (10 RT 2223.)

When Rogers took the car, the inside was "real empty," and there was nothing in the glove box, not even a registration slip. (10 RT 2224.) Although he did not remember anything in the back seat, when told there had been a little blue cushion, he claimed he did not put it or move it there. (10 RT 2225.) When he opened the trunk, there were a lot of shoes and crayons there and a bloody bag. (10 RT 2225). He and his friend took crayons for his friend's sisters, but he did not remember taking anything else from the trunk. (10 RT 2226.) Rogers said first that he did not touch the bloody bag, and that there was nothing else in the trunk that was bloody. (10 RT (2227). He admitted, however, that he may have pushed the bag playfully toward his friend, and in the ensuing play, he may have taken it out of the trunk and then put it back in. (10 RT 2227-2228). Later, on cross-examination, Rogers described the trunk as full of stuff and messy, with old-persons' clothes and shoes, and the Macy's bag. (10 RT 2283.)

Rogers denied that he had ever been in Riverside prior to the preliminary hearing in this case. (10 RT 2241.) On cross-examination, however, he admitted that he told a public defender or probation officer that

his local "park" gang was affiliated with a Los Angeles gang.[8] (10 RT 2250.)

On cross-examination, Rogers admitted that he lied to the Las Vegas police the night he was stopped, and lied to Riverside detectives a month later. (10 RT 2242.) He even lied about when the car was stolen after the police informed him that he might be a suspect in a Riverside homicide, to keep his girlfriend out of it. (10 RT 2257-2258.) He also admitted to a series of crimes, mostly involving theft, as a juvenile. (10 RT 2244-2247.)

Regarding the day he stole the car, Rogers wavered between Monday, May 14 and Tuesday, May 15. In June, 2001, he told Attorney General's Investigator Jeannie Overall that he stole the car the day after Mother's Day, Monday, May 14.[9] (10 RT 2259-2260.) He also told Riverside Police Detective Bill Barnes, in a second interview in June, that

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[8] Rogers' gang testimony was inconsistent. He first said his gang was just a group of friends who hung together at a local park. They called themselves EPG-213. The "213" referenced Los Angeles, but had no connection with an L.A. gang. (10 RT 2247-2248.) Thereafter, he admitted making a reference, to a public defender or probation officer, to his gang being affiliated with the El Park Gang 213 from Los Angeles (10 RT 2250.)

[9] Jeannie (Overall) Brandon confirmed, in penalty-phase testimony, that after she led him through his Mother's Day activities, Rogers described what he did the following day, including stealing the Corolla. (19 RT 3618-3620, 2621-3622.) The interview took place on June 13, 2001. (19 RT 3626.)

he stole the car on Monday. He testified, however, that it was Tuesday, but he was no more than 50 percent sure of this.[10] (10 RT 2265.) Indeed, by the time he spoke with District Attorney's Investigator Martin Silva in March, 2003, the day he stole the car might have been as early as the Friday before Mother's Day, or Saturday, or on Mother's Day. (10 RT 2269-2270.) Finally, on re-direct, he indicated that he did not pick Stephanie up at the bus-stop after school on the same day he stole the car. (10 RT 2296-2297.) This appears, along with Stephanie's testimony, to place the car theft on Monday, not Tuesday, and indeed Rogers completed his testimony by saying again that he was evenly divided between Monday and Tuesday, but was sure it did not occur on Wednesday. (10 RT 2308-2309.)

Detective Barnes, the lead detective on the Myers case, and Detective Kelvington, drove to Las Vegas on Friday, May 18, where they viewed Myers' car and interviewed Rogers at the juvenile detention center. (10 RT 2315-2317, 2319 2324-2325.) Rogers told them he took the car from the Food 4 Less parking lot on Wednesday, May 16, and that before he

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[10] The importance of which day Rogers stole the car is related to the defense contention that appellant was with Angie Fortson on Monday morning, the 14th, rendering nearly impossible the prosecution theory that appellant killed Myers late Sunday night, disposed of her body, drove her car to Las Vegas, left the car, and was somehow back in Riverside Monday morning.

did, he stole a candy bar and orange soda from the store. (10 RT 2310, 2320.) Rogers had no idea that the car had been used in a possible murder and kidnaping. (10 RT 2322.)

Barnes described Rogers' demeanor as calm, controlled, and not hesitant in his answers. Rogers conveyed genuine shock and surprise that they were there from California to interview him. (10 RT 2322-2323.) When they interviewed him again a month later, on June 13, Rogers changed the day he stole the car to Monday, May 14, the day after Mother's Day, one day before his anniversary with Stephanie. (10 RT 2323-2324.) The day he stole the car, Rogers said, was the only lie he had told Barnes in the first interview; it was Monday, not Wednesday, and Tuesday was never mentioned. (11 RT 2342-2344.) Barnes put it more strongly on redirect: Rogers, in the second interview, was insistent that he had stolen the car on Monday, May 14. (RT 2350.)

Rogers also told Barnes that he had heard of Riverside because there were gangs from Riverside in Las Vegas. Rogers had been jumped in (i.e., initiated) into a gang in Las Vegas, and all of his fellow gang members were from Los Angeles. (11 RT 2346.) This was inconsistent with Rogers' testimony denying a gang link to Los Angeles. Also inconsistent was a statement by Stephanie Lopez to Barnes that she had ridden in the

stolen Corolla three or four times, not just once as Rogers testified. (11 RT 2346-2347.)

Rogers denied that there was a body in the car, and Barnes felt there was no indication that Rogers was involved in the disappearance of Myers. (11 RT 2351.)

3. Testimony by Prosecution Criminalists and Fingerprint Analyst

Linda Senteney, a fingerprint analyst with the state Department of Justice, did the analysis of prints on the plastic Macy's bag found in the trunk of Myers' car. (11 RT 2353-2354.) There were no bloody fingerprint impressions. Of the 14 remaining latent prints, 4 were usable, and were not matched with anyone connected to the case, or to any database. (11 RT 2357-2358.) There were no usable prints on most of the remaining items in the trunk. (11 RT 2363-2365.) The two exceptions were an empty plastic bag (not the Macy's bag), which had a print matched to Rogers' friend Jose Davila, and a torn white plastic bag, which contained prints matched to Rogers. (11 RT 2366, 2368-2369.) Similarly, Riverside County Sheriff's fingerprint examiner James Edmonston analyzed 12 latent-fingerprint cards lifted from Myers' car, and the only identifiable prints came from Davila and Steve Perry, the Las Vegas patrol officer who initially stopped the car. (14 RT 2873, 2880-2881.) Surprisingly, Edmonston did not have a rolled

impression of Donald Rogers' prints for comparison (14 RT 2882); presumably he had appellant's, which were not found on the car.

Senteney also sought prints on the crumpled manila envelope found on Myers' bed, but no latent prints were obtainable. (11 RT 2378-2379.)

Another Department of Justice criminalist, Michelle Merritt, examined shoe imprints from inside Myers' house, but found no matches with the shoes of defendant's that she had been given. (11 RT 2396-2404.)

Mark Traughber, a Senior Criminalist with the state Department of Justice laboratory in Riverside, examined a pair of Tommy Hilfiger jeans (Ex. 19) which were among appellant's effects. (11 RT 2483-2485.) He noticed a possible blood stain by the front left-hand pocket opening (11 RT 2487), and a few small white spots on the bottom of the left front pant leg, which he suspected was from the bleach the prosecution theorized was used on Myer's hallway rug. (11 RT 2489.) He also examined a blue T-shirt, Exhibit 18, which did not have any blood on it, but had "all these obvious holes in it. And around the ringed perimeter of many of these holes it had a lighter-colored discoloration of the shirt." (11 RT 2491; photo, Ex. 88.) The holes were consistent with chemical oxidation, followed by a washing, and the shirt smelled freshly-laundered. (11 RT 2492.)

Traughber also lifted the hall rug in Myer's residence near the big stain on the rug near the bathroom. He found that the wood surface and rug pad were negative for blood, but there was a musty smell and the carpet, carpet pad and plywood floor were moist. (12 RT 2566-2567). After testing, a portion of the rug and carpet pad were negative for presumptive blood. (12 RT 2628.)

What looked like a bloodstain was collected from the hallway heater grate (shown in photo, Ex. 58). (12 RT 2569.) Initial DNA analysis of a swab of that bloodstain by the Department of Justice DNA lab was unsuccessful; however, after obtaining permission from the prosecutor to use the entire remainder of the swab of that stain, and amplifying the results, Traughber was able to conclude that it was Myers' blood. (12 RT 2610-2618.) He admitted, however, that there was no way to determine when that blood was deposited on the heater grate. (13 RT 2687.)

Using Hemastix to find other presumptive blood in the hallway and bathroom areas of Myers' house, Traughber was unable to find any. (13 RT 2686-2687.)

Later in the trial, over objection,[11] Traughber was allowed to describe experiments he performed after his initial testimony. In those experiments, using some carpet not from Myers' house, he poured some undiluted bleach onto it to see what color changes would occur, and whether it would test positive or negative with hemastix. (16 RT 3119-3119.) He showed the color changes to the jury, and said that it still smelled of bleach when he returned to it the day after he poured the bleach on, but not the second day. (16 RT 3120.) Regarding the hemastix, when he poured bleach directly on it, it changed color, though a different color than with blood. After the first day there was a slightly positive reaction, but no reaction after the second day. (16 RT 3121-3122.)

Traughber also experimented with the effect of bleach on blood, by putting one drop of his own blood on butcher paper, and mixing it with two drops of bleach. The blood initially turned black, but then disappeared altogether. (16 RT 3123.) He concluded from this that bleach destroys bodily fluids such as blood. (16 RT 3124.)

Finally, he tested whether sodium hypochlorite (the principle ingredient in bleach) decomposed on its own, by pouring some on an

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[11] The defense objected to these "experiments" on Evidence Code sections 201, 353, due process and compulsory process grounds. The trial court's error in admitting them is discussed, *infra,* at pp. 280-283.

unreactive plastic surface. After two days of drying off, the crystals that were left reacted strongly with the hemastix, but after four days he got only a weak reaction, leading him to conclude that sodium hypochlorite does in fact decompose on its own.[12] (16 RT 3125.)

4. Evidence Regarding Whether Appellant Took Myers' Car to Las Vegas

In the absence of direct evidence that it was appellant who drove Myers' car to Las Vegas and left it there, the prosecution relied on the testimony of girlfriend Angie Fortson and her daughter Sheena, and appellant's friend Joe Taufaao, as well as the fact, conveyed by appellant's father, that the family lived in Las Vegas in 1991 and 1992. (13 RT 2724.)

(a) Angie Fortson

Angielina Fortson had been appellant's girlfriend for about a year, up to the time of his arrest in late June, 2001 as the suspect in the Mason case.[13] (14 RT 2739, 2763-2764.) She had known him for years, but they

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[12] On cross-examination, the defense brought out that Traughber's lab was not as warm as the 80 degrees found in Myers' house, and that the lab is very well ventilated. (16 RT 3126.) In addition, the carpet sample was not the same carpet as that taken from Myers' residence. (16 RT 3127.)

[13] The Reporter's Transcript mis-spells Fortson's first name in the guilt-phase transcripts as Angilina. (14 RT 2738.) During the second penalty phase trial, she spells out her name is it appears herein, "Angielina." (35 RT 6140.) Hereinafter, however, she will be referred to by her

(continued...)

became closer after he had gotten out of prison.[14] (14 RT 2763.) He had been living with her at her mother's residence, at 6651 Lassen Court, for what she first said was a month-and-a-half and then said was about a month prior to his arrest. (14 RT 2740.) Appellant began to stay at her mother's house because his mother would not allow Angie to stay at the Jackson's apartment. (14 RT 2747-2748.)

Fortson testified that sometimes appellant would go outside at night and disappear for a number of hours. (14 RT 2756.) On Mother's Day night, May 13, 2001, he went out to lift weights, and about a half hour later she realized she couldn't hear the weights clanging anymore, and he was gone for over two hours. He told her when he returned that he had been with their neighbor and they went to have some beers. (14 RT 2756-2758.) When he came in, he looked sweaty, like he'd been running. (14 RT 2759.) She was angry with him, and went to sleep at about 11:00, and when she woke up at about 9:00 the next morning, appellant was not there. (14 RT 2761.) He came back at about 10 p.m. that (Monday) night. (14 RT 2761.)

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[13] (...continued)
nickname, "Angie."

[14] The defense objected to this mention of appellant's prison record, which the court had excluded, and the court admonished the jury to disregard. (14 RT 2763.) Later, the defense sought a mistrial for the cumulative effect of this and Detective Shumway's reference to appellant's parole, but the court refused to grant it. (14 RT 2772-2773.)

He told her he had been working with his Samoan friend Joe, with whom he would on occasion do construction work.[15] (14 RT 2762.) On cross-examination, however, Fortson admitted that in her first interview with the detectives, she told them that appellant, if he ever left, would leave in the morning and not come home until late at night. (14 RT 2786-2787.) She also told the detectives that he had never been out of town for any length of time. (14 RT 6788.) Moreover, she never went to Las Vegas with appellant, and never saw him with a large amount of cash or jewelry, and never saw him with Myers' car. (14 RT 2775.)

There were some further inconsistencies with what she had initially told the detectives, brought out on cross-examination. In her initial statement to the detectives, she stated that the night before, Mother's Day night, appellant had gone out at about 7:30-7:45, and been out for about 90 minutes. (14 RT 2813-2814.) She was upset that night because her ex-husband had not brought her son to see her, as promised, and when she and appellant went to bed that night, after 11:30, Bailey comforted her, and they had sex, for about four or five hours. (14 RT 2804-2805.) She told the detectives they made love almost all night until daylight. (14 RT 2806.) When she got up, Bailey was already gone. (14 RT 2807.)

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[15] "Joe" Taufaao's testimony is described *post*, at pp. 28-32.

In 2003, Fortson was interviewed by District Attorney's investigator Martin Silva, who told her that he did not believe her, and she might be prosecuted for Myers' murder. (14 RT 2837-2838.) Under that threat, Fortson told Silva that on Mother's Day, Bailey did not go anywhere. They went outside together about midnight, smoked some cigarettes, drank beer, she came in, Bailey came in after her, and they made love all night. When she woke up the first time, at about 9:00 the next morning, appellant was still there. When she woke up again, he was gone. Appellant spent the night with her on Mother's Day. (14 RT 2833-2835.)

When Silva accused her of going to Las Vegas with appellant on Mother's Day, she said that he was with her on Mother's Day. (14 RT 2839.) After more accusations from Silva, who told her Bailey was implicating her, she told Silva that the day she made love to Bailey was the day before Mother's Day, not on Mother's Day. In court, however, she disputed that: "No. We made love on Mother's day. We made love the day before also. That's when they tried to mix me up." (14 CT 2842.)

On redirect examination, the prosecutor brought out Fortson's changing stories about Bailey's going out Mother's Day night. In her June 26, 2001 interview with Detective Barnes, she said it was on Mother's Day that Bailey went out to lift weights and then the clanging stopped; he was

gone about one- to one-and-a-half hours, and told her had been lifting weights next door, though he smelled a little like he had been drinking. (14 RT 2857-2860.) She looked outside about 15 minutes after the weights stopped clinking together, and he came back a couple hours after that. (14 RT 2861.)

On further re-cross-examination, the defense had Fortson explain that when she told Barnes that Bailey had said he had been at Joe Taufaao's, "kickin' it," that was not inconsistent with doing some work on Joe's backyard project, sharing some beers, and the like. (14 RT 2869.) In response to defense counsel's request that she confirm that it was on Mother's Day that Bailey said he had been next-door weight lifting, she responded "Oh, boy, please, I don't know," because, she said on the stand, "They questioned me and interviewed me so much and mixed me up so much, I don't know." (14 RT 2869-2870.)

The defense also highlighted the portion of the interview transcript in which the police were clearly trying to get her to change her story that she and Bailey were together watching movies and making love on Mother's Day night. Detective Stanton: "You didn't make love to him for five hours on Mother's Day. It was some other day, wasn't it." Fortson answered (quoting from the interview transcript): "'But I think it was

Mother's Day. We did make love, and we made love for a long time.'" (14 RT 2871.)

(b) Joe "Junior" Taufaao

Appellant's friend Junior Taufaao testified regarding an interview with the police on June 22, 2001. (16 RT 2975-2976.) The police sent six officers in two to three patrol cars to pick him up, to talk to him at the station. (16 RT 2986.) The police told him it was about a murder case, and about Bailey raping an older woman, and Taufaoo "believed they was trying to get me involved in something, that I had something to do with it." (16 RT 2987.) The situation made him uncomfortable and somewhat scared. (16 RT 2987-2988.) He also said he has had memory problems for some time. (16 RT 2988.)

Taufaao could not remember what he told the police then, but it was the truth. (16 RT 2975-2976.) Taufaao testified that he did not quite remember that he told the detectives that Bailey had told him that he and Angie had gone to or just come back from Las Vegas. In court, he clarified that they had just been talking about how much fun it would be to go to Vegas. (16 RT 2979). But he did say in the June interview that they had said they had just been to Las Vegas about a month earlier. (16 RT 2979.) He did not remember what the prosecution was now quoting from his

interview: "Angie was telling me they just got back from Vegas." (16 RT 2980.)

Taufaao did not, though, ever drive to Las Vegas to pick up appellant, and was never there with him. (16 RT 2985.)

As for Mother's Day, over a month before he was interviewed by the police, he remembered going out to dinner with his family, but not whether he had seen appellant that day, or the day after. (16 RT 2989.)

On the subject of appellant's purported trip to Las Vegas, he told the police that appellant never went out of town; rather, it was the police who brought up Bailey and Angie's going there. (16 RT 2989-2990.) Angie had said she wanted to go, but never said "Bailey and I just came back from Las Vegas." (16 RT 2990.) This took place sometime in May, but he was not sure whether it was before or after Mother's Day. (16 RT 2991.) In response to a whole series of questions about a trip they made to Las Vegas, he could only answer, "I don't know." (16 RT 2990-2991.)

Taufaao also testified that he never saw Bailey with a large amount of money. (16 RT 2992.)

The prosecution, on re-direct, quoted from his interview: "I know I heard something about Vegas. They was talking about how they went to Vegas, and that was it." (16 RT 2993-2994.)

The following day, the tape of Taufaao's interview was played for the jury. (17 RT 3201; 14 CT 3935 *et seq.*) The portion concerning the alleged trip to Vegas actually began with Taufaao denying that "Snake," (appellant) ever went out of town:

JOHNSON: Does he ever go on vacations or anything?

JOE [Taufaao]: Who?

JOHNSON: Snake.

BARNES: Take trips out of town?

JOE: Nah.

JOHNSON: No?

JOE: Not that I know, not that I know of.

(14 CT 3939.) This was followed by Detective Johnson's lie: "Cause he's telling us and Angie is telling us that they made a trip to Vegas and state line [sic] . . ." (14 CT 3939.) Having clearly told him what they wanted to hear, the detectives elicited what they wanted, over the space of several transcript pages during which the story changes and there is no clear indication of when "Snake," or Angie, supposedly told him they had just come back from Vegas. (14 CT 3939-3943.) Despite the detective's best efforts to pin him down as to time, he just did not remember, and the

interview ended with Taufaao indicating that he did not remember because he didn't care, followed by this:

> JOHNSON: I know you don't care, just try and remember what they said because it's pretty important for us.
>
> JOE: Yea, that's all, I don't, no, I don't remember.
>
> JOHNSON: You said a minute ago that they were kind of, kind of into it. That you . . .
>
> JOE: Yea, they, they seemed into it but it's _____ (unintelligible) I kind of heard Vegas, Vegas. I guess I, I think it was Snake got into another subject to another subject was talking _____(unintelligible) about somebody, and the whole Vegas thing just _____(unintelligible) that prob, I'm not remembering anything about Vegas, but I heard something, them telling me about Vegas though.
>
> JOHNSON: Are you sure that they told you that they went to Vegas?
>
> JOE: Yea, I'm pretty sure.
>
> (14 CT 3945.)

On cross-examination, defense counsel brought out a number of statements the police made to Taufaao which were not played for the jury: that they told him they were "'investigating the rape of a woman that occurred last night where Mr. Jackson nearly killed her.'" And they described it as a "'brutal, brutal thing,'" and, "'Real old lady. Defenseless, lucky to be alive,'" and, "'Lie and wait, you know, club her in the head type shit.'" (17 RT 3218.) Crucially, and disingenuously, they also told him that

Jackson had admitted everything. (*Id.*) They merely wanted Taufaao to confirm Jackson's story. Moreover, in the portions of the tape not played for the jury, Taufaao repeatedly talks about not being able to remember too far back, and that includes Mother's Day. (17 RT 3219.) Taufaao told them: "Mother's Day, I'm being put on the spot, man. I can't – Yeah, I can't. I don't know man." (17 RT 3220.) Taufaao repeated a number of times that he couldn't remember, and when Johnson asked him if he could have gone to Bailey's house on Mother's Day, he said, "Yes," and then "Yeah, I could have," and then "I can't remember." (17 RT 3220.)

Defense counsel also elicited an admission from Detective Johnson that the first mention of Las Vegas was *his* telling Taufaao that Jackson and Angie were telling the detectives about a trip to "Vegas and Stateline." (17 RT 3221.) And when Johnson asked Taufaao if Bailey had recently come into some money, he answered no, he hadn't. (17 RT 3222.)

(c) Sheena Fortson

The only other evidence that appellant might have been in Las Vegas around Mother's Day came from a 2003 interview that Investigator Silva conducted with Angie Fortson's daughter Sheena at her school. (The transcript of the Silva interview, Ex. 142-B, commences at 14 CT 2964.)

Sheena was still in high school in May and June 2001. She testified that she was pretty much raised by her grandmother, Billie Harris, and lived at Harris's house at the time appellant was arrested. (16 RT 3004-3005.) Investigator Silva interviewed her at her high school in April, 2003. During the interview, Silva asked: "Do you remember your mom being gone for a few days right around Mother's Day, like right after Mother's Day, or after that night?" Sheena answered, "Yeah, like a couple of days, she was gone for like two or three days." (16 RT 3011.) She did not remember, however, where her mother went on that trip, and denied on the stand telling Silva, even after seeing it in the transcript, that Bailey was also gone during the same two to three days. (16 RT 3013.)

On cross-examination, the defense brought out that she considered her mother to have been "staying there" at Harris's house rather than "living there," because not all of her possessions were there, and she would be gone for two to three nights in a row. (16 RT 3016.) Sheena would not see her mother and Bailey leave together, but they would return together, and this happened once or twice before appellant's arrest. (16 RT 3017.)

In her testimony, she stated that when she was talking to Silva in 2003, she couldn't remember Mother's Day of 2001, nor if Bailey was there then. (16 RT 3018.) She explained: When Silva showed up unannounced

at her high school in 2003, she was called to the office and told to go talk to this man, and she was thinking "Why do I have to talk to him? I don't know who he is." She was nervous and scared as she went to meet Silva.[16] (16 RT 3022.) In the little room they used, they sat down, and he told her he was looking for her mother and wanted to ask her some questions. (16 RT 3021-3022.) She was still nervous and scared, and when he took off his jacket and she saw he had a gun, she felt even more scared. (16 RT 3022). So, when she said her mother had been gone, she didn't actually remember when this was in relation to Mother's Day. (16 RT 3025.)

Most telling, in Detective Shumway's interview of Sheena in June, 2001 – the morning appellant was arrested – Sheena said that after her mother came to stay at her grandmother's, she was never gone two nights in a row, and in her trial testimony Sheena stated that Angie was only gone once or twice, on separate nights. (16 RT 3028-3029; the transcript of the 2001 interview commences at 14 CT 4010.)

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[16] This was confirmed by her grandmother. Billie Harris testified that when she picked up Sheena from school on the day Silva interviewed her, Sheena was "kind of upset." (20 RT 3842.) A detective, Sheena told Mrs. Harris, had come to see her at school and his gun scared her. (20 RT 3842-43.) Mrs. Harris also testified that she did not know that Sheena was going to be interviewed at school that day, although Silva had interviewed *her* earlier that same day. (20 RT2842, 3843).

Silva testified that in the 2003 interview, Sheena told him that she recalled her mother and Bailey being gone for a period of two to three days around Mother's Day, 2001, and that she was at the house when they returned.[17] She also told him, however, earlier in the interview, that she was having trouble recollecting a lot of the events from that time period. (16 RT 3037.) This was emphasized by the defense in the ensuing cross-examination:

> Q. [by Defense Counsel Aquilina]: "She told you she couldn't remember Mother's Day, correct?
>
> A. [Silva]: When I first asked her, yes, she did.
>
> Q. She said she was trying to think, but she didn't remember whether Bailey was at the house on Mother's Day?
>
> A. Yes.
>
> Q. Correct?
>
> A. Yes, sir.

(16 RT 3037-3038.) Counsel then quoted from Silva's leading questions about Angie and Bailey being away, and then asked if Silva had reviewed Sheena's June 22, 2001 interview with Detective Shumway, in which Sheena stated that her mother was never gone from the house overnight in

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[17] Sheena "told" him this in response to a leading question: "Do you remember your mom being gone for a few days right around Mother's Day, like right after Mother's Day or after that night?" (14 CT 3982.)

2001. Silva did not remember reading that in Shumway's report. (16 RT 3038-3089; the portion of the Shumway/Sheena interview referred to is at 14 CT 4023.)

5. OTHER EVIDENCE REGARDING MYERS

(a) The Newspaper Article

Riverside Police homicide detective Steve Shumway collected paper work from appellant's room in his parents' apartment. (13 RT 2728.) Among the items collected was an article cut from a newspaper announcing a $50,000 reward for information regarding the disappearance of Mrs. Myers. (13 RT 2728-2729; Exhibit 108.) The article, contained in Exhibit 108, related to a reward being offered for information about the disappearance of Geraldine Myers, and was published in The Riverside Press-Enterprise on May 23, 2001. (20 RT 3750)

On cross-examination, Shumway explained that the materials contained in the exhibit were recovered from a locked box found by the parole officer. Appellant's mother supplied the key to the box. (13 RT 2729-2730.)

(b) The Testimony of Debra Shrader

Debra Shrader, who lived with her husband Richard next door to the Harris/Fortson household, testified that at about 9:30 p.m. on

Mother's Day, Jackson tapped on their front window, and her husband went outside for a minute or two. However, he did not go out to lift weights that night, nor to go out for a beer; indeed, as a recovered alcoholic, Richard Shrader did not drink. (15 RT2968-2969.) In addition, to her knowledge, Richard had never lifted weights with Jackson – he barely did anyway – and Jackson had never been in their house or backyard. (15 RT 2970)

(c) The Vans Shoes

There was one other, inconclusive item of physical evidence at Myers' house which suggested that appellant may have been there. None of the seven footprints found there matched any of appellant's shoes found at the Harris residence. (11 RT 2397.) Later, however, Investigator Silva was asked to determine whether the shoe print found in Myers' bathroom was from a pair of Van's shoes. (16 RT 3031.)

When Silva was transporting Sheena Fortson from Atlanta, to appear at trial, he asked her about appellant's shoes. (16 RT 3033.) In listing them, she told him for the first time that, in addition to the other shoes found in their bedroom, he had a pair of Vans Shoes that he used for mowing the lawn. (16 RT 3034.) Silva showed her catalog pictures of Vans shoes (Exhibits 109, 120), and she picked out one of them as resembling appellant's. (16 RT 3034-3035.)

According to Dana Guidice, Vice President for product development for Vans Shoes, the sole pattern of a shoe print found in Myers' bathroom matched two models of Vans shoes sold in 1996. (16 RT 2995-2997; Exhibits 79, 109, 119.) A total of 20-30,000 combined pairs of the two patterns were sold in the United States, primarily in Southern California. (16 RT 3000.)[18]

(d) Myers' Neighbor, Loujean Price

Loujean Price, Myers' neighbor, was hospitalized and ruled unavailable, and so her preliminary-hearing testimony was read to the jury. (17 RT 3143-3144, 3159 *et seq.*) Ms. Price's home was attached to Ms. Myers', separated by a firewall, and on Mother's Day, 2001, at about 10 minutes before the 11 p.m. news began, she heard three taps which sounded like a picture-hanging nail being hammered into a wall. (17 RT 3160-3164.) She heard no other noises before or after. (17 RT 3164.)

Price also testified that, about three times a week, Myers would take her trash out between 10:30 and 11 p.m., to the dumpsters across the alley from their garages. (17 RT 3165-3166.)

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[18] In her testimony in the second penalty trial, Guidice indicated that 75-95,000 shoes had been sold in Southern California alone, making the link to appellant even more tenuous. (39 RT 6801.)

(e) The Absence of Other Similar Crimes After Appellant's Arrest

The prosecution sought to introduce evidence that no other similar crimes had taken place in the neighborhood in the time since appellant had been arrested. The defense objected, but the court, on the basis that appellant had spoken of stabbing, killing, and disposing of the body of an elderly woman, allowed it.[19] (20 RT 3743-3744.)

Homicide Sergeant (formerly Detective) Steven Johnson testified that in 2001, there was no case, other than that of Geraldine Myers, in which an elderly woman was stabbed, her car taken, and her body dumped.[20] (20 RT 3747.) This was followed up by a Investigator Silva, who seemed to testify that he had done a search and found no other cases matching the description, but may have simply said he did not do such a search:

> Q [by Prosecutor] 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

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[19] Appellant's purported admissions on which the court relied are to be found in his interview with the police on the day he was arrested, discussed in the following section.

[20] Except for the statement by appellant allegedly referring to the case of Geraldine Myers, but made in the context of questioning about the Mason case, there was no evidence that Myers had been stabbed, nor any evidence as to what in fact happened to her body or person.

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 3749.) Presumably "no" implies no other such cases, but he never answered in the affirmative the first part of the question, "Have you done a search . . . ?"

6. Appellant's Admissions to the Police

In a succession of interviews on June 22, 2001, appellant was questioned about the Mason case, on which he had just been arrested. In the course of these interviews, he seemed at times to be conflating the Mason case with another, which could have been – but was never clearly – that of Myers. They are included here, in the discussion of the Myers facts, because of the light they shed, however dimly, on the prosecution's case regarding Myers.

The first videotaped interview shown to the jury took place in the station house, with Detectives Barnes and Joseph, on June 22, 2001. (15 RT 2905; 14 CT 3920.) It began with Detective Barnes explaining to appellant that they were investigating the assault that occurred up the street from him, and the items of [Mason's] property that were found in his and his girlfriend's residence. (14 CT 3810.) Jackson denied that Fortson knew

anything about it, and then said that his "homeboys" brought the television set to him and lifted it through the window, and he did not know where it came from. (14 CT 3821-3822.) Suggesting that it must have been the same friends who were responsible for the assault on Mason, appellant named one Mark Johnson, and others who went by the street names "Psycho Bullet" and "Tom Dog." (14 CT 3824-3828.) They came to the garage-bedroom window, after appellant and Fortson had gone to sleep, "pecked" on the window, asked him for the $15 he had earlier borrowed from the neighbor, and then slipped the TV through the window.[21] (14 CT 3829-3833.) He knew it must have been stolen, but the only thing he was guilty of was accepting the stolen TV. He was not involved in what happened to Mason, and cried when he heard about it. (14 CT 3838.)

Asked about the distinctive "And-1" tennis shoes that were found in his bedroom and later matched to a shoeprint outside of Mason's house, appellant said he had lost a toenail and had not worn them in the past three days. (14 CT 38336-3837.)

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[21] Appellant also said initially they had given him a gun along with the TV, and that he had thrown it into the trash, but later said they had come back for it. (14 CT 3822, 3830, 3832.) There is no other mention of a gun connected with either crime or with appellant.

Asked about the victim's checkbook found in Angie's purse, appellant first said it came through the window in a box along with the TV and gun, but asked about where the box was, just said he had taken his medication and was so tired he couldn't focus when his friends came. (14 CT 3841-3842.)

Asked to describe the day before from about noon, appellant said that after he and Angie had walked to get her daughter at a friend's house, he was home all day and night. (14 CT 3844.) Barnes said he found it hard to believe that when there were fresh size 12 And-1 shoe prints in the freshly-raked yard of the victim's house. (14 CT 3845.) Appellant said the only way his shoes could have made that print is if the police had taken them over there and made it. (14 CT 3846.) Barnes noted how little sense that made, but appellant repeated that there was no other way for them to be there. (14 CT 3846-3847.) Asked if either of his friends could wear size 12 And-1's, and if it could have been Tom-Dog, who is six-foot-five, appellant said Tom-Dog usually would wear Chuck Taylor's (another shoe brand) and appellant did not know if he had And-1's. (14 CT 3847-3848.)

Barnes and Joseph confronted appellant with the facts that Mason was alive and could identify him in court, her property was found in his room, and his shoe-print in her garden. (14 CT 3853-3855.) Appellant

then said he mowed lawns for old people on the street, but when asked if he wore his And-1's to mow lawns, he said no, and, Barnes noted, they were back to square one. (14 CT 3856-3857.)

After a series of further exchanges in which the detectives outlined why they did not believe him, detailing the evidence they had (and some they did not have) against him (14 CT 3858-3863), Detective Joseph suggested that perhaps his medication had something to do with it. Appellant claimed the only thing he could remember was carrying the TV, though not where he carried it from. (14 CT 3863-3864.) He did not remember putting the purse in the trash can outside, but, he conceded, he probably did. (14 CT 3865.) The detectives reiterated that if the medication were involved, they would put it in the report, and Jackson said that he took the medication and then went outside and consumed a "two-eleven," which appellant explained was the strongest beer on the market. (14 CT 3866-3867.) The last time he consumed his medication with the two-eleven, he was "arrested at the Galleria for running buck naked, I just, you know, so I don't really remember, I just, you know what I mean, it just, it just uh it just uh . . ." (14 CT 3867.) Asked if he remembered being at that lady's (Mason's) house, he said he didn't, and then rambled on:

> I just, I just mean that um who now, I just knew I did somethin' bad, I just knew, I knew I did but I was like tryin'

to think of a story, I don't know you know what I mean, my, I don't think my, my girl even know I take psyche (sic) meds, she don't even know you know what . . .

(14 CT 3868.) Angie did not know anything about it, but "I always sneak out . . ." (*Id.*) That day, he went out at ten or eleven. Angie was asleep. He started thinking about his son, whose mother wouldn't let Bailey see, about arguing with his own mother, about his brother James getting life in prison:

JACKSON: . . . and I just got so much that's built up in me man and I just you know what I'm sayin', I just . . .

JOSEPH: Did you go for a walk?

JACKSON: Yeah I must uh had, I had to.

JOSEPH: I mean do you remember walkin' off the premises?

JACKSON: No but I must of have, you know what I'm sayin'? I must of have.

(14 CT 3870). He did not, however, remember where he went, or what he did. (14 CT 3871.)

Appellant explained to the detective that he has heard voices since he was 25 (he was 30 now), and he can go off at tiny things, but he never before in his whole life robbed anyone's house, and he did not remember doing so now. (14 CT 3871-3872.)

He was just high and walking,

> "and things was chasing me . . . and I was just trippin' off shit you what I'm sayin'? Shit was just fallin' out of the sky and trippin' and I was . . . tryin' to hid from it and I looked and I seen a garage door open about this much . . . and I was up in there hidin' like this . . . And then you know it, she, I guess she, she, she she shut it, and she shut me in and locked me in, you know what I'm sayin'? I was like scared, you know what I'm saying' and that the only thing I remember and then I remember carrying the T.V. and that's the only thing I remember."

(14 CT 3874-3875.) Though he didn't remember it, another officer told him he had beat the victim to death and broken her fingers, and, he acknowledged, "I can know I did somethin' even though I don't remember but I know I did it, you know what I'm sayin', 'cause who else would of did it and that, you know man?" (14 CT 3876.)

Asked about grabbing a pole or stick or rake, or carrying the purse and putting it in the trash can, appellant again did not remember, but began talking about the voices in his head, noises in his head, hurting his head, along with the "beer and shit," but ended up saying, "Man just take me jail man, I don't wanna talk no more." (14 CT 3878.)

After a four-minute break, Officer Sutton came in and offered appellant a drink. Appellant asked Sutton what was going on, what they are going to do, and whether his girlfriend was still there. (14 CT 3879.) Sutton denied any knowledge of these things, and said he could not dispense any medication to him. (14 CT 3879-3880.) Then, in response to appellant saying "Well they, they need to come on and do what they need to

do man," Sutton turned that into a request to speak to the detectives some more:

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

(14 CT 3880.)

Detectives Barnes and Joseph returned and there ensued a series of admissions by appellant regarding the Mason incident. ". . . I know I did it." (14 CT 3881.) Asked what he remembered, he said he started with eating a sandwich first, and drinking some water at the sink, while there was nobody in the house. (14 CT 3881-3882.) He was running through the house when she just appeared, came out of nowhere, and startled him. She had red hair. (14 CT 3882.)[22] "I just flipped." (*Id.*)

He got into Mason's house, he thought, through the garage. (14 CT 3883.) When she startled him, appellant punched her. (*Id.*) He then tried to leave the house, and tried the door, but he couldn't get out.[23] (14 CT

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[22] It was Myers who had red hair. Richard Myers confirmed the color was as shown in Exhibit 5 (8 RT 1911.) Myers' friend Lilia Alberga confirmed that, and described it as "blondish-reddish." (9 RT 2051.)

[23] This is consistent with Mason's reporting that she used a deadbolt that was keyed on both sides of the door. (16 RT 3086-3087)

3884.) He remembered going out the window by the door.[24] He also remembered taking the TV and the checkbook, but not her purse. (14 CT 3885.) Barnes asked him if their finding the purse in the dumpster in front of his house refreshed his memory. Appellant answered, "No but I probably did it . . . . I just probably grabbed it and just threw it in there." (14 CT 3886.) And the earlier story about his friends, he admitted, was made up. (14 CT 3886-3887.)

The detectives tried to press Jackson on what he did with Mason after he punched her, an eighty-plus-year-old woman, but he said she he did not see past her red hair, and didn't think she was that old. (14 CT 3887-3888.) The hair was clear to him; everything below that a blur. (14 CT 3888.) He didn't know Mason was an old woman until he heard a detective telling his girlfriend that it was an old lady. (14 CT 3889.)

After more prompting from the detectives, and hesitance on appellant's part to say something that did not happen, he said that he thought he put her in her car (again, perhaps, by inference, conflating Mason with what may have been Myers.) (14 CT 3890.) And, he

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[24] This is also consistent with Officer Soto's testimony that there was an open window by the front door. (6 RT 1591.)

remembered driving her car, a gray Audi,[25] on the freeway, and just throwing her out of it on the freeway. (14 CT 3891.) She was in the passenger seat, and he was holding her by the hair, and picked her up by the hair and threw her out the window. "That's what I remember." (14 CT 3891-3892.)

That's all he remembered, and when he woke up he was at home in bed. He forgot the TV was there, forgot everything, but when the police came around, then he knew: "'Damn, I wonder what I did?'" (14 CT 3892.)

Pressed by the detectives for something more, appellant said no, he just remembered hitting her, choking her, grabbing her by her hair and throwing her out of the car. (14 CT 3894.) At this point it did not appear that he was describing what had happened to Mason, and the police went along. When appellant asked if he killed the lady he was in there for when he "threw her out of the car," Barnes answered, "I don't know yet." (14 CT 3895.) The detectives tried to pin down where he threw the lady out of the car, and suggested toward the Eastside, toward the mountains. Appellant asked "Is that where you found her at?" Barnes responded: "Where do you think we found her? Appellant said he didn't know. (14 CT 3896.)

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[25] Myers' car, the one found in Las Vegas, was a Toyota Corolla. (10 RT 2164, 2205; Ex.31, photo D.) The record does not indicate what kind of car, if any, Mason owned.

Barnes wondered out loud whether Jackson was confusing what happened the night before with other situations, and returned to appellant's earlier comment that he often went out late at night. Appellant corrected him to say "every once in a while," and Barnes asked if something like what happened the night before have happened another time. Jackson responded "No, I don't think so." (14 CT 3897.)

Barnes returned to appellant's story about driving on the freeway and throwing the victim out of the car, and asked Jackson how he got home. "I walked," he said.[26] (14 CT 3898.) He just left the car by the side of the road and walked home. (14 CT 3899.) It was an area with "trees and stuff," that he identified as a "V" in the mountains, called "the View." (14 CT 3899-3900.) He further identified it as near the trash dump and close to a church "way up in the mountains," and told the detectives he would try to take them there. (14 CT 3900-3901.)

There was a pause in the story, as Jackson indicated he wanted to die. Barnes responded, and appellant's response to Barnes, set forth in the margin, is worth quoting here because to say that any of the purported admissions could be credited at all would be to ignore the fact that much of

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[26] It seems clear by now that Barnes is seeking information about Myers (since Mason was found at home), and equally clear that appellant would not have walked home from Las Vegas.

what he said – especially when not in response to a leading question – was largely incomprehensible.[27]

Returning to the incident, the detectives asked about the victim's car, which appellant described as an old gray car, an Audi, he thought. He did not have to lift a garage door; rather, he just backed it out. (14 CT 3903.)[28] He backed it out, drove on the freeway, went to The View and threw her

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[27] Appellant indicated he wanted to die, and when Barnes said "You don't wanna die," appellant launched into the following monologue:

> Yeah, I do man. Because I'm telling you when I go to jail, see my homies, they be like, "Damn, Cuzz . . . is crazy, he'll stab you. He'll kill you." You know what I'm saying, when I'm in the jail or out of the jail but little do they know it's not, it's because of my, I have a sickness, that's why I'm like that. But today they think it's hard, and it's hardcore, you know what I'm saying?
>
> [Det. Joseph: You know what you're doing when this is going on but you just can't stop yourself kind of thing?]
>
> Uuh, I don't know. Just like right now, I mean, you can be talking and if I, I just trip out, you know what I'm saying, I just trip out. But it had to be, it had to be where I have to, certain points when I have to take my medication and stuff. But sometimes I take my medication and it still doesn't help.
>
> [Det. Barnes: uh huh (affirmative).]
>
> I hear voices. I feel like something's crawling on me.

(14 CT 3902-3903.)

[28] This fits neither crime: Myer's car was a Toyota Corolla (10 RT 2164, 2205; Ex.31, photo D), and there is nothing on the record to indicate that Mason's car was missing.

out, and walked all the way back. And then he just woke up, already home. And this was all the night before. (14 CT 3904.)

After some further colloquy about getting appellant help for his sickness, the detectives returned to the incident, asking appellant if he remembered ripping the victims clothes off and trying to rape her, or raping her. No, appellant said, he was with his "homegirl," a friend named Cheryl, last night, and they went to the VIP Club. (14 CT 3906.) They were sitting in a car at a club and talking and getting drunk, and then he took his medication and started feeling funny. (14 CT 3907.)

The detectives brought him back to the Mason incident, reminding him that he was taking the TV and feeling trapped, after he slugged her, and again asked if he tried to rape her. And again, appellant answered no, and then: "Is that what she said, is that, is that what I did?" All he remembered was carrying her like a baby to the car. (14 CT 3907.) He just took her the six steps to the garage and put her in the car and they left. (14 CT 3908.)

When appellant averred that she was alive when he pushed her out of the car, Barnes asked if he was confusing some things, because what happened the night before did not go down that way. So, if there is another incident that involved pushing someone out of the car, "then let's talk." (14 CT 3908-3909.) Appellant demurred: "But that's the only thing I

remember. And it's connected to that because I never thought of that. I never thought of that until, you know what I mean, until I wok up from my dream." (14 CT 3909.)

Barnes pressed appellant on the facts of the Myers case a few weeks prior, with appellant denying it, until Barnes asked him if he would hurt someone in anger. (14 CT 3909-3910.) "Yeah," he said, "I would. I have before." (14 CT 3910.) He went on to describe incidents with his mother and father, not that he was angry with them, but hearing stuff and having visions in his head, and that was one of the reasons he moved out of their apartment. (14 CT 3910.)

Barnes returned to the incident appellant had been describing, asking whether, before he carried her to the car, he did anything to cover his tracks. (14 CT 3910-3911.) Appellant denied doing so, saying he did not go in as a burglar, and did not remember taking her TV. (14 CT 3911.) Barnes reminded him that he told them he had draped his jacket over the TV and appellant agreed: "Yeah."[29] (14 CT 3912-3913.)

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[29] This, again, was conflating the Myers case with the Mason case.

After questions about his gun, and how long he had been staying with Fortson at her mother's house, Barnes again tried to steer appellant to an admission regarding Myers:

> BARNES: So it's not out of the question that you, that you could've, that you could've had another, one of these episodes some time, some time in the past last couple of months.
>
> JACKSON: I don't know. Is there --
>
> BARNES: Is that safe to say?
>
> JACKSON: No, I don't think so.
>
> . . . . .
>
> BARNES: What . . . if I told you, what if I told you there was another incident in that neighborhood that is almost identical to the one that you encountered last night? What, what would, uuh, what would you think? And I'm not lying to you, Bailey. I haven't lied to you since I've sat down here, alright? And I don't plan to.
>
> JACKSON: Mu-huh (affirmative)
>
> BARNES: OK. But what if I had told you --
>
> JACKSON: I didn't do it.
>
> BARNES: Huh?
>
> JACKSON: I didn't do it.
>
> (14 CT 3914-3915.)

Appellant was positive he didn't do it, but he remembered hearing about it from his mom and dad.[30] Barnes noted some similarities, and appellant asked if Barnes was going to try to charge him for that, "Cause I'm, I'm telling you the truth, man. I don't remember. I, I don't think, I didn't do that. I'm, I'm positive." (14 CT 3915.) Barnes noted further similarities in the crimes: old ladies, no forced entry, same neighborhood, not a lot taken. Appellant continued to deny any involvement with Myers. (14 CT 3916-3917.) "I'm positive. I'm a hundred percent sure." (14 CT 3917.)

Barnes and Joseph began to recite more details of what happened to Mason the night before, and appellant continued to deny that he had done those things. (14 CT 3918-3921.) He remembered slugging her, and climbing out the window. (14 CT 3921.)

Barnes took a different tack: If Bailey had not showered since last night – he hadn't – evidence is going to show up on his body. Her DNA or blood. So it's better to come clean with them now. (14 CT 3922.)

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[30] Appellant's father testified that either he (in the first trial, 20 RT 3873) or his wife (in the second penalty trial, 39 RT 6850) clipped out and saved a newspaper article about Myers' disappearance. The locked cabinet in which the article was found was located in the room where appellant slept. (20 RT 3873.) The cabinet, however, did not contain anything belonging to appellant; nor did he have a key to it. (20 RT 3876; 30 RT 6849.)

Appellant responded: "I don't remember that, but if, if that really happened to her I must've did it." (14 CT 3923.) Asked further about the specifics of what happened, however, appellant continued to deny. (*Id.*) Then:

> BARNES: You remember putting something in her, other than you, other than something on you, like some type of, uuh, foreign object? You remember like trying to stick a, I don't know, something?
>
> JACKSON: I remember stabbing her in the back.[31] You know what I'm saying, all these things I remember doing, I don't wanna keep saying, man, cause I don't know.
>
> BARNES: What did you stab her with?
>
> JACKSON; A knife, I had a knife and I stabbed her. Like a long machete knife.
>
> JOSEPH: Before you put her in the car or after?
>
> JACKSON: It's before. I just, I just re--, I just kept having bad dreams. Just kept killing this person over and over and over again. ..... I guess I was in, I was--

(14 CT 3923-3924.)

The detectives, apparently believing that appellant was remembering what had been done to Myers rather than Mason, pressed appellant regarding the details of the stabbing. Thus, they kept on asking if she bled a lot, and if he did anything to cover it up, trying to elicit an admission regarding the apparent bleach stain in Myers' carpet. (14 CT 3924-3925.)

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[31] There was no evidence that Mason had been stabbed.

Appellant denied doing so. Neither could he remember where he put the knife. (14 CT 3925-3926.) He did remember stabbing her in the back, through to her chest. (14 CT 3926.) He was hearing sounds, hearing voices. (*Ibid.*)

The detectives asked whether these events triggered a flashback to another event. Appellant answered, consistent with his earlier admission (but not with the facts):

> I don't know, I don't think so, I don't know, but I, I think all this was like the same lady, the same lady I seen in the house is the same, the same lady with the red hair and that's all, that it, that's all I know.

(14 CT 3927.)

The detectives terminated the conversation with appellant, then returned to ask if he'd mind driving with them up towards Victorville to show them, presumably where he shoved the woman out of the car. He requested and was given permission to first use the restroom, and the interview in the station house was terminated. (14 CT 3928-3929.)

7. The Dog-Sniff Evidence

In an effort to directly link appellant to the disappearance of Geraldine Meyers, the prosecution introduced evidence of two dog trails related to Mason and one trail and purported scent identification of

appellant in the Myers case.[32] Absent the dog-sniff evidence – which appellant will argue was erroneously admitted – the prosecution's case as it related to Myers consisted of (1) the possible similarities between Myers disappearance and the assault on Geraldine Mason, (2) statements by appellant regarding the Mason offense that may have applied to Myers, (3) conflicting evidence as to whether appellant might have been gone from Riverside long enough following Mother's Day to take Myers' car to Las Vegas where Donald Rogers claimed to have found and stolen it; (4) possible bleach stains or holes on two items of appellant's clothing; and (5) a footprint in Myers' bathroom consistent with a type of Vans Shoes purported to have been owned by appellant but which were never found or placed in evidence, and which could have come from any of 20-30,000 similarly-soled pairs of Van's shoes.

The Mason-related dog trails are described in Argument II, *post* at pages 156-158. For purposes of the June 25, 2001 Orange-Street Station, Myers-case trail and identification described here, it is important only to know that the canine used, Sheriff Deputy Coby Webb's dog Maggie Mae, had been in the presence of appellant and sniffed his scent at the Spruce

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[32] This evidence came in over defense objections on several grounds. (See Argument III, *post.*)

Street station three days earlier on the morning of his arrest, while being investigated for the Mason-related crimes.. (19 RT 3548, 3552-3553.)

The scent identification described here, involving a June 25, 2001 identification in the basement of the Orange Street police station, was presented in the guilt trial. A second set of identifications, done after the declaration of a mistrial on the penalty and before the second penalty trial, will be described in more detail in the argument section relating to the penalty phase. (*Post*, at pp. 381-388.).

(a) The Orange-Street Station Basement Trail Purporting to Link the Envelope Found on Myers' Bed to Appellant

In this section, appellant will summarize the dog-sniff evidence. Further details of the testimony, and in particular the expert testimony, will be set forth in Argument II, *post.*

The Orange-Street-Station basement identification was described to the jury by officer Tina Banfill Gould, Detective Barnes, and the dog handler, Sheriff's Deputy Coby Webb.

On Webb's instructions, the trail was laid by appellant's being taken from where the street entrance and elevator are close to each other, around at least two corners, and into a former men's locker room. (15 RT 2937.) The scent item presented to Sheriff Deputy Coby Webb's dog Maggie was

the crumpled manila envelope found on Myers' bed and identified by her children as having contained (or at least similar to those which contained) the larger denomination cash she carried in her purse. (15 RT 2923.)

In the locker room, Detectives Barnes and Johnson were in casual attire, and Jackson in an orange jail jumpsuit. (17 RT 3174.) Detective Johnson sat in the first row of benches, and they placed Jackson in the second row. (17 RT 3177.)

After trailing from the starting point to the locker room, the dog Maggie sought entrance to it, and after the door was opened, she went past the row that Barnes and Johnson were in, to and down the row in which appellant was seated, and put her paws on the bench and her head next to his chest. (17 RT 17 RT 3183, 3188-3189.) Deputy Webb said that when she, following Maggie, got to the second row, Maggie was up on appellant's lap. (18 RT 3516-3517.) To Webb, that indicated that appellant's scent was on that envelope (3518).

On cross-examination, Webb was challenged regarding the consistency of Maggie's alerts. Maggie's jumping up on appellant, Webb testified, was an indication that she was happy to have found the subject of the trail. (19 RT 3587.) Later in the cross-examination defense counsel asked Webb if there was something specific that Maggie was supposed to

do. Webb answered that there was no alert as such, it was merely staying with that person; the alert is when Maggie stops trailing, and the jumping up is just something she liked to do.[33] (19 RT 3603.) In the Orange Street station locker room, Maggie made the identification as she does in training. (19 RT 3610.) Defense counsel brought out, however, that appellant was the only one in the locker room who was (1) wearing a jail jumpsuit, (2) handcuffed; and (3) not wearing a weapon.[34] (19 RT 3602.)

Over defense objection, Webb was allowed to answer the ultimate-fact question: "This is a capital murder case. As a law enforcement officer and as an individual, are you confident in your identification of the defendant based upon Maggie's alert and identification of him on June 25th,

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[33] Prosecution expert Douglas Lowry, in response to the question, "A well-trained dog is going to alert in the same fashion every time, correct?" gave this answer: "I think that's important because you have to know what your dog is telling you, yes, sir." (17 RT 3299.) Similarly, Dr. Harvey confirmed the importance of each dog's individual alert, and that what the dog does to distinguish alerting from simple interest in an individual ought not to be subject to the interpretation of the handler. (18 RT 3413-3414.)

[34] He was also the only who had been a prior target in a trailing. As set forth in more detail in the dog-sniff argument, *post*, the dog Maggie was already familiar with appellant's scent. On the day of his arrest, a scent-pad taken from the shoeprint outside of Mason's house was presented to him at the Spruce Street Station and she trailed into an interview room in which appellant and a detective were sitting. The dog did not alert on appellant, but sniffed him and stopped trailing. (19 RT 3548-3553.)

2001, based upon your expertise and your dog's expertise?" She answered, "Yes." (19 RT 3613.)

(b) The Prosecution Experts

(i) Dr. Lisa Harvey

The prosecution introduced the testimony of two "experts." It's principal expert was Dr. Lisa Harvey, who taught forensic pathology and physiology at Victor Valley College. She had trained several bloodhounds, and her principle academic interest was human scent – what it is, exactly, that the bloodhounds are trailing.[35] (17 RT 3318-3319.) She had conducted one peer-reviewed and published study which, she said, verified the unique scent discrimination abilities of bloodhounds. (17 RT 3325 *et seq.*)

While further details of her testimony will be set forth in Argument II, *infra*, here is a summary of her opinions in support of the scent identifications in this case:

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[35] According to Harvey, human scent was initially thought to come from the skin cells falling off as one walks, but more recent research suggests it is from gases emitted by all animals, including humans. (17 RT 3319.) She designed an experiment to vacuum gas while filtering the cells also collected, and dogs were able to trail the scent from just the gasses, but this was inconsistent with what other scientists had found in their experiments with animals. (17 RT 3320.)

1. Bloodhounds, Harvey claimed, can scent discriminate between humans reliability and accurately. (17 RT 3327.)

2. Human scent remains on anything that a human touches, and if that object is placed in paper, the scent will transfer to the paper. (17 RT 3330.)

3. Moreover, the scent can endure over a long period of time. In her experiments, a scented t-shirt kept in an K-pack evidence envelope retained its scent over a 7-1/2 year period. (17 RT 3333.)

4. Contamination, as it is spoken of in the literature, does not deter the abilities of bloodhounds to track or trail to the correct target. (17 RT 3332-3333.) Indeed, on cross-examination, she admitted to no familiarity with the standards regarding contamination of the National Police Bloodhound Association and disagreed with any concern they had about contamination. (18 RT 2284-3385.)

5. The envelope found on Myers' bed had been sprayed with ninhydrin, to bring out possible fingerprints. (7 RT 1812.) To counter the defense theory that the chemicals in the spray contaminated the scent, Harvey conducted an experiment (described *post* at pp. 225-226), which, she said, showed that ninydrin did not contaminate scent. (17 RT 3335-3348.) She also described an experiment by others in which about 80% of

ninydrin-sprayed DNA samples retained sufficient markers to identify who they came from. (18 RT 3350.)

6. On cross-examination, Harvey acknowledged that the research of Dr. Adee Schoon on human scent line-ups (discussed in detail *infra* at pp. 193-198) yielded only a 30-60% success rate (18 RT 3393); and that if a handler knows a trial, he or she can influence where the dog goes, as can a dog's familiarity with the target. (18 RT 3395.) She did not "necessarily" agree, however, with the theory that the dog will follow the strongest or most intense scent. (18 RT 3408.) So, too, she disagreed with the concept of cuing of a dog by the handler, even inadvertently, and had never read the National Police Bloodhound Association's materials warning of the dangers of cuing. (18 RT 3425.)

(ii) Douglas Lowry

In order to counter the suggestion that the envelope left on Myers' bed had been contaminated by the ninhydrin sprayed on it by the criminalist, the prosecution called Maryland State Trooper and dog handler Douglas Lowry. Lowry, at the prosecution's request, conducted an independent test involving an envelope with cash in it and then removed from it, crumpled up and left on a bed, brought to a police station and sprayed with ninydrin, and then presented to his dog, who successfully

trailed the person who handled the envelope. (17 RT 3226-3227, 3241-3261.) More detailed discussion of both Lowry's and Harvey's ninhydrin experiments will be set forth in Argument II, H, 2, *post.*

B. THE DEFENSE TO THE MYERS CASE

1. Dr. Lawrence Myers

To respond to Dr. Harvey's testimony regarding the reliability of dog-scent identification, the defense called Dr. Lawrence Myers, D.V.M, a professor at the Auburn University of Veterinary Medicine, who specialized in veterinary behavior and who researched, primarily, detector dogs. (19 RT 3635.) In addition to his veterinary doctorate, Dr. Myers holds a Ph.D. in the fields of physiology and neurophysiology, involving special functions and behavior.[36] (19 RT 3636.) He had researched detector dogs since 1982 (19 RT 3637) and worked closely with government and law enforcement agencies. (19 RT 3639.) In addition, and unlike Dr. Harvey, he stayed in close contact with the 12 or so other researchers in the field. (19 RT 3640.)

Dr. Myers contradicted much of what Dr. Harvey said about what the research in the field – and her research – had shown. Thus, Dr. Myers made the following points:

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[36] Hereinafter, Dr. Myers will be referred to with the honorific, "Dr.," in order to distinguish him from the victim Geraldine Myers and others in her family.

1. Dr. Myers minimized the distinctions between breeds asserted by Dr. Harvey. He has tested miniature poodles that could smell as well as any pointer or bloodhound. Bloodhounds are a preferred breed, but there is no evidence they can smell in human scent anything that other breeds cannot. ((19 RT 3642.)

2. While early research showed that dogs could track through various contaminations, there has been little research since then to show how well they can do that. (19 RT 3646-3647.)

3. Environmental factors such as toiletries, foods, bathing habits, proximity to smokers, and the like, can affect human scent, and while there is an underlying fundamental scent to each person, other odors laid over that may interfere with detection. (19 RT 3648-3649.)

4. While dogs are able to discriminate between different human scents to some extent, "We just simply don't know that extent." (19 RT 3651.)

5. While he had seen Dr. Harvey's published research asserting a 95% accuracy rate for experienced dogs, he had seen no other study indicating rates that high in terms of discriminating between humans. (19 RT 3651.) And Dr. Harvey's published research lacked sufficient

descriptions of her controls, her blinding systems, and the like, to really judge its reliability. (19 RT 3651-3652.)

6. If there is more than one scent on the article, there is no way of telling whether the dog is simply trailing the freshest, or the strongest, scent, or, if several people had handled it, perhaps it is the scent that is most different from the others. (19 RT 3658-3659.)

7. In terms of cuing, he described a scent lineup where the suspect was the only one wearing a yellow jail jumpsuit and in handcuffs, surrounded by two officers. That's contributing a cue that is hard to ignore. (19 RT 3661.)

8. And if the target and decoys are known to the dog, Dr. Myers would suspect there to be an affect on the results. (19 RT 3661.)

9. Unlike Dr. Harvey, Dr. Myers described several ways in which a handler can cue the dog, including the speed at which they walk, tugging on the lead, the handler's getting excited, verbal cues, changes in voice tone. (19 RT 3672.) In the Orange Street station trail, the two detectives in the locker room could have inadvertently cued the dog, as well as the differences in their clothing from the orange jumpsuit appellant was wearing. (19 RT 3674.)

10. Dr. Myers described much of the research in the field (19 RT 3662-3668), which will be discussed fully in Argument II, *post.* His conclusion from it was that while most researchers accept that dogs can discriminate among human, "we don't know how well it can be done." (19 RT 3668.)

2. Donald Rogers

The defense called Jeanne Brandon (formerly Overall), who was employed by the California Attorney General, and was asked to go to Las Vegas to interview Donald Rogers on behalf of the Riverside Police. (19 RT 3618.) The interview took place June 13, 2001 and was not recorded or memorialized other than in her notes. (19 RT 3625.)

Ms. Overall asked Rogers about his activities on Mother's Day, May 13, 2001. On Sunday, Mothers' Day, morning, he had gotten up and gone to his father's home, and they went to the immigration office, trying to get Donald's naturalization papers. When reminded it was a Sunday, Donald was insistent that they went that day, went inside to talk to the ladies. (19 RT 3619.)

Later that day, Donald and his father went to get lunch at Taco Rio. (19 RT 3619.) Still later, Donald went home, and also at some point went

to the Price Rite store, bought a drink and then went to a nearby park, where he smoked a joint and was trying to sell drugs. (19 RT 3619-3620.)

After the park, he said first that he had gone to pick up his girlfriend from school, but reminded again that this was Sunday, he said he must have gone over to Jesus's house, or gone home. (19 RT 3620.) He was anxious about going home because his mother would be there and he hadn't gotten her a mother's day gift. She did come home, and he told her he was sorry he didn't have a gift for her. (19 RT 3620.)

The next day, Monday, he got up very early, showered, and went over to his girlfriend's house at about 5:00, then walked to the school bus with her. After she caught the bus at 5:50, Donald stayed to talk to some junior high students he knew, and then went home, where he had a bong of marijuana and got "real high." (19 RT 3621.) Later, he went back to the Price Rite and stole some food, toothpaste, and something to drink. (19 RT 3621-3622.) He then left the Price Rite and as he exited, he saw the Toyota Corolla in the lot and stole it. This was Monday, May 14. (19 RT 3622.)

Later that day, Donald and Jose Davila looked in the trunk and saw the bloody bag, though he didn't know if he touched it or if his fingerprints would be on it. (19 RT 3623.) Still later, that night, he went out stealing car stereos, and in fact he stole another car. (19 RT 3623.)

The next day, Tuesday, was Donald's anniversary with Stephanie. He went to get her at 5:30 p.m., brought her back, waited for his mother to leave, had sex with her, and then he took her home and then cruised around some more. (19 RT 3624-25.)

On Wednesday, he took his girlfriend to the bus stop, and saw some friends again – still with the Toyota Corolla. (19 RT 3625.)

He told Overall that he had lied to the police investigators about the day on which he stole the car. He told them Thursday, the day he was arrested, but it was really Monday, June 14. (19 RT 2626-2627.)

Donald readily admitted being a car thief, smoking marijuana, and selling drugs and stereos that he had stolen out of cars; he did not, however, cause Myers' disappearance, and did not know who did. (19 RT 3628.)

Nearly two years later, in an interview with D.A. Investigator Silva on March 26, 2003, Rogers, after first saying that he acquired the car around Mother's Day, maybe Saturday, or Thursday, was reminded by Silva that Mother's Day was on Sunday, and Rogers said, "Then it must have been a Monday." (20 RT 38-7-3808, 3811.)

3. The Search for a Body

The defense called Detective Roger Sutton, who described trips to three locations in a futile attempt to find Myers' body in locations mentioned by appellant.

On June 7, 2001, Sutton participated in a search for Myers' body in a sparsely populated area in Twentynine Palms.[37] (20 RT 3762.) There were six officers in all, and they searched several acres, without success. (20 RT 3763.)

The second, about mid-afternoon on June 22 (after the detectives interviewed appellant) was "The View" outside of Riverside, off of Pigeon Pass Rd. and Box Springs Rd. (20 RT 3758-3759.) It is a mountainous area, with a few houses, ending in dirt roads. (20 RT 2759-3760.) Over a period of several hours, a sheriff's dog handler and cadaver dog searched an area of several acres, including a cavern. (20 RT 3760-3761, 3767.) Appellant was with them and pointed the way to a rock location in a V-shape from which one could look down on Riverside. (20 RT 3768.)

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[37] The Twentynine Palms area was searched, prior to appellant's arrest, in response to an anonymous letter and map the police had received specifying where Myers' body could be found. (4 RT 1372; 13 RT 2879-2680.)

Some days after the June 22 search, on his own hunch, Sutton went alone to an area near Victorville, also known as "The View." (20 RT 3763-3764, 3768.) It is on an alternate, "back way" route to Las Vegas. (20 RT 3768-3769.) He did not find a body. (20 RT 3765.)

1. Detective Barnes

The defense re-called Detective Barnes, who admitted that when he first interviewed Donald Rogers in Las Vegas, he got the names of Rogers' mother and father, but did not talk to the mother until a return trip about four weeks later, and never spoke with the father. (20 RT 3773-3774.)

Neither did he, at any time, go to the Price-Rite store in North Las Vegas or talk to their management or security personnel. (20 RT 3774.)

Regarding a search on May 23 in the Twentynine Palms area, Barnes reported that there were five detectives from the Riverside Police, and approximately 25-30 horse-mounted personnel from the San Bernardino County search and rescue team, as well as dogs. (20 RT 3775.)

At the June 22 search near Box Springs and Pigeon Pass Roads, there were 10-15 law-enforcement personnel involved. (20 RT 3775-3776.) Once they got to the location, they tried to limit their foot-traffic to preserve the area for a dog search. (20 RT 3776.) And he returned to the area on

June 30 with Detective Shumway and a cadaver dog and handler from the FBI. (20 RT 3776.)

5. Angie Fortson

Detective Barnes interviewed Angie Fortson on June 22, 2001, the day of appellant's arrest, at the Spruce Street Station. Fortson told him that on Mother's Day, she was upset because her ex-husband would not cooperate in her seeing her son. She did not leave the residence on that day, and appellant was with her that evening. (20 RT 3778.) They made love for a long time that night, which made her feel better. (20 RT 3779.) The following morning she cooked breakfast for the two of them, and took him, at about 9:45, to an auto auction to apply for a job. (20 RT 3779-3780.)

Detectives Johnson and Shumway re-interviewed Fortson on June 2, 2001. (20 RT 3790.) The transcript given to Johnson on the witness stand, however, appeared to be of the earlier Barnes-Joseph interview, and Johnson denied remembering several things that counsel asked him about. (20 RT 3791-3792.) He did, however, recall Fortson saying that she and appellant watched TV and a movie on Mother's Day night; that they made love through most of the night; and that she did not go to sleep until almost daylight. (20 RT 3792.) And, she repeated to Johnson and Shumway, that appellant did not leave the house that night. (20 RT 3793.) When the

detectives told her that he hadn't been with her the whole night because he had killed someone, she repeated that he was in bed with her and they made love until daylight. "I'm never, ever going to forget that. We made love. We made love, man." (20 RT 3793.) Moreover, when one of the detectives said "Don't try to save him," she responded, "I'm not saving him. I'm not saving him. I'm not saving him." (20 RT 3794.) When they pressed her again, telling her the consequences of trying to save him or cover up for him, she said "I'm not trying to cover up for him," and "he was with me all night Mother's night – Mother's Day." (20 RT 3794.)

6. Sheena Fortson

The defense called Detective Shumway to describe a tape-recorded interview he did with Sheena Fortson, Angie's daughter and Billie Harris's granddaughter, on the day of appellant's arrest, at the Harris residence and in the presence of Mrs. Harris and Detective Johnson. (20 RT 3795-3796.)

Sheena told them that Angie was not gone for a day or two from her grandmother's house, did not go to Las Vegas, and that she, Sheena, would have known if Angie had been gone for a day or two. (20 RT 3799-3801.)

7. District Attorney's Investigator Martin Silva

District Attorney's investigator Martin Silva was also called back to the stand by the defense. He reported that two or three months prior to the

trial, he contacted both Las Vegas and North Las Vegas police to check pawn-shop records to see if there were any showing Angie or Bailey pawning jewelry. Pawn shops, he explained, were required to report to the police, and police departments are required to keep track of, everything that is pawned. (20 RT 3804.) There were, however, no hits on the systems for either Jackson or Fortson. (20 RT 3805.) Similarly, there were no pawn shop hits on Jackson or Fortson for Riverside, or other Southern California records. (20 RT 3813.)

Regarding his May 21, 2003 interview with Angie Fortson in an Atlanta, Georgia county jail, her story differed little from what she initially told the police. On Mother's Day, 2001, Fortson was at home cooking dinner for the family, after which she and Bailey went to his mother's house to visit for a couple of hours, then returned to Lassen Court. (20 RT 3806.) She and Jackson had dinner with her family. (20 RT 3806-3807.) Jackson stayed home the rest of the night with her, and at around midnight, she and Jackson were watching television and engaging in sex, and they made love all night long, and Jackson did not leave the residence. The next morning, Jackson was still there. (20 RT 3807.) Later in the interview, however, Angie changed her story, and now said she remembered that she was cooking the day before Mother's Day, and took off on Mother's Day with

another man, with whom she was cheating on Bailey; so she was gone Mother's Day. (20 RT 3812.) Moreover, Sheena had previously told Silva (in the interview at her school) that her mother was gone for two to three days after Mother's Day, and Silva confronted Angie with that statement. Angie responded that she went with a man named Loc to the Super 8 or Motel 8 in Riverside for the days after Mother's Day, 2001. (20 RT 3812.) Silva checked with the motel, however, and there was no registration for her on that day or any other day. (20 RT 3813.)

Angie did tell Silva in Atlanta that she was now trying to get her life together and would no longer lie, either for Bailey or herself. (20 RT 3814-3815.) Silva, however, also told her she was on the edge of being charged with a serious crime, and the decision of whether or not she would be charged would be based on "'what we believe was the truth.'" (20 RT 3815-3816.) Silva told Angie that she (Angie) knew Jackson had driven Myers' car to Las Vegas and asserted that she knew more about the Mother's Day incident than she was telling them, that Jackson had forced her to be involved, had lied to her, and had admitted assaulting and dumping Myers' body. (20 RT 3816.) Silva also told Fortson that, based on the defendant's admissions, he thought that she was with Jackson in Las Vegas, but she denied it. Indeed, she said, Bailey had moved in with them

after Mother's Day. (20 RT 3817.) She told Silva that early on, when she was contacted by the police, she lied to protect him, that she was in love with him, and when she found out what he did, she told the truth and didn't want to go to jail. (20 RT 3818.) She had never had a record before she met Jackson. "I love my life, and Bailey destroyed it." (20 RT 3819.)

Silva continued the threats, telling Angie she knew the location of the body, because she was there, and "Things are only going to be worse unless we clear this up." (20 RT 3820.) Angie told him she didn't know, and he told her he knew she was lying. (20 RT 3821.) She said, "Bailey was with me on Mother's Day. Bailey was with me on Mother's Day." (20 RT 3821.) Silva told her: "I absolutely do not believe you," and Angie said "Bailey woke up with me the next day." (20 RT 3821-3822.) Then she told him, "Bailey made love with me the day before Mother's Day," and a Mr. Clark, who was also present in the interview, suggested that she had her dates screwed up. (20 RT 3822.) Silva then told her, "You and Bailey were in Las Vegas on Monday night, the day after Mother's Day." Angie did not respond directly, instead stating: "Bailey's messing up my life," and "Lord, please bring back my memory." (20 RT 3822.) Then she said she had sexual relations with Bailey the day before Mother's Day. Bailey had spent the night, and her mother found out, and told her "There will be

no more of that." (20 RT 3822-3823.) So Bailey went home on Mother's Day, and then she said "Oh, thank you Jesus, God." (20 RT 3823). "I'm serious, you guys, I'm not playing with you. . . . I didn't see Bailey for a couple of days after that. . . . I don't know what he did for those couple of days." (20 RT 3823.) Silva then told her what Jackson was doing, that he drove this lady's car to, and spent a lot of money in Las Vegas, and had a female with him. When Angie said "It wasn't me," Silva responded that it points toward her, that Sheena had said she was gone for a couple days. Angie responded, "Yeah, I was gone for one day, not two days. I came back the next morning." And then she told the story about going to the motel with Loc. (20 RT 3824.) Silva threatened her further, and told her to do what was best for her, and not to dig a deeper hole, and she said she was willing to do whatever she needed to do. (20 RT 3825.) She said "I'm thinking about me." (3826).

When he was done interviewing Angie in Atlanta, Silva still felt she was holding back, and still (on the stand) believed that. (20 RT 3826.) When they got back from Atlanta, he booked her for burglary and possession of stolen property, and on the drug warrant that she was detained on in Georgia. (20 RT 3826-3827.)

Finally, it came out, over defense objection, that two Nevada Bell phone cards had been found in her purse that was seized from her mother's house. Asked about them, she first said she got them from someone in Riverside where she normally purchased phone cards; later, she "finally remembered" that she had obtained them from Bailey's father, who had driven a bus route to Las Vegas. (20 RT 3827-3828.) Asked about them again on redirect, Angie first mentioned that she must have gotten them from Nino (her ex-boyfriend) when they were in Las Vegas together. (20 RT 3832-3833.). Then she also said that Bailey had gotten cards from his father.[38] She had two and he had two, though only one was found in Bailey's property. (20 RT 3833.)

8. Billie Harris

Angie Fortson's mother, Billie Harris, was called by the defense. (20 RT 3836.) Angie came to live with Harris in March when Harris had a knee operation; Bailey came thereafter, and he and Angie stayed in the converted garage together. (20 RT 3838.) It was just before Mother's Day, 2001, when she told Angie that Bailey couldn't stay there long, "'Because if you guys are going to stay here, you guys are going to get married.'" (20 RT

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[38] Bailey Jackson, Sr., later denied that he ever gave either Bailey or Angie any prepaid calling cards from Nevada. (20 RT 3873.)

3829.) But Ms. Harris did not remember telling Angie that Jackson couldn't stay there because she found they were sharing a bed. (20 RT 3839.) Indeed, he did live there on Mother's Day, 2001, and for about a month after, until he was taken by the police. (20 RT 3839.)

Mrs. Harris testified that on Mother's Day, Bailey and Angie borrowed her car, the only time they were allowed to do that, and were gone about two hours that day. (20 RT 3841.) She did not recall whether she saw Bailey on the day after Mother's Day, but between the time she got home from the hospital in 2001 and the time Bailey was arrested, neither Angie nor Bailey were ever gone overnight. (20 RT 3841-3842.)

Asked about Sheena's 2003 statement to Silva about Angie and Bailey being gone for a couple of days around Mother's Day 2001, Mrs. Harris did not recall either of them being away. (20 RT 3855.) She later repeated this on redirect – she had no knowledge of Angie being gone overnight at any time before Bailey got arrested. (20 RT 3859.)

9. Zubevi Khalfani

Zubevi Khalfani, the grandson of Billie Harris, testified that he would visit his grandmother about two weekends a month in 2001. (20 RT 3861-3862.) When he was there, he would lift weights in the back patio with Bailey and the neighbor, Richard Shrader. (20 RT 3862-3863.)

Moreover – and this came out on the prosecutor's cross-examination – Khalfani thought that the last time he lifted weights with Bailey and Richard was on Mother's Day. (20 RT 3866.) He did not remember Bailey leaving that afternoon, or during the entire seven hours before Khalfani left at about 5 p.m. (20 RT 3868.) Asked what exercises Shrader engaged in with the weights, Khalfani said that he did bench presses and curls.[39] (*Id.*)

10. Bailey Jackson, Senior

Appellant's father was recalled by the defense. Although he drove Greyhound's route to Las Vegas prior to his retirement, he had last worked on March 30, 2001.[40] (20 RT 3874, 3870.)

He testified that Bailey did not have a key to the locked cabinet that the police searched at the Jackson apartment. (20 RT 3871-3872.) The cabinet contained items belonging to Bailey, Sr. and his wife, but not Bailey, except for letters from Bailey that Bailey Sr's wife might have kept.

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[39] On rebuttal, Richard Shrader testified that he might have lifted weights once or twice with Khalfani – whom he knew as "Bug" – but that he did not do so on Mother's Day, and had never done so on Billie Harris's back patio. (20 RT 3901-3902.)

[40] This was not entirely accurate. The defense called Edward Bauer, Greyhound's district manager, and introduced Exhibit JJ, a May-June, 2001 employment record which showed that Bailey, Sr., did return to Greyhound to drive on June 21 and 24, 2001. (20 RT 3886-3887.) However, those were the only dates in May and June that he drove. (20 RT 3887.)

(20 RT 3876.) In addition, Bailey, Sr. had some newspaper clippings in the cabinet, including the one about the reward offered in this case. (20 RT 3876.) It wasn't unusual for him to cut out such articles, because they might end up coming across information that could help. (20 RT 3879.)

The defense also elicited the information that Bailey, Sr. never gave either Bailey or Angie any prepaid calling cards from Nevada. (20 RT 3873.)

C. THE PROSECUTION REBUTTAL

The prosecution brought Deputy Webb back to the stand to rebut Dr. Myers' defense testimony regarding canine scent identification.

In response to Dr. Myers' concerns about contamination, Deputy Webb described successful trails (1) with a scent item left for over 46 hours in a puddles, with decoys at the end of the trail (20 RT 3908-3910); (2) a double-blind trail off of a bubble-gum wrapper in an urban environment with four turns (20 RT 3910-3912); another in a wooded area with contamination and the subject standing with two others (20 RT 3913); and another trail in 2001 off of one strand of hair (20 RT 3913.) In response to a defense objection that all of these trails took place after the identifications in this case, she described one which occurred prior, in which she was lied

to about the direction of travel but the dog picked the right direction.[41] (20 RT 3914.)

Webb testified that she and the dog Maggie had conducted approximately 12 police-station identifications, of which only two (including the one in this case) involved suspects wearing orange jumpsuits.[42] (20 RT 3915-3916.) She also stated, over defense objection regarding a lack of foundation, that dogs are colorblind.[43] (20 RT 3916.)

On cross-examination, after eliciting testimony that in general she only needs to repeat commands to the dog in urban settings, as when a car passes, the defense played a recording from the June 22, 2001, Spruce Street Station, in which appellant was sitting in an interview room, and Webb is repeating to the dog: "Show me. Where is he? Show me. Show me. Where is he?" (20 RT 3919-2921; quoted material is on p. 3921.)

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[41] Out of the presence of the jury, the court sustained an objection that this was improper rebuttal on the issue of contamination, but did not – and the defense did not request – the striking of what the jury had already heard. (20 RT 3914-3915.)

[42] In her penalty-phase testimony, Coby Webb admitted that the June 25th trail to Jackson at the Orange Street Station house was the first one that Maggie had done, and she had not trained for it. (38 RT 6716.) It was also Maggie's first trail to a jail inmate in an orange jump-suit. (38 RT 6726.)

[43] As explained in the argument regarding the court's erroneous ruling on the objection, Webb was wrong about dogs being colorblind. See *post* at pp. 253-255.

On redirect, Webb explained that this was the trail in which the air-conditioner had been left on. The dog had trailed completely, but at the end, when Webb could feel the air-conditioning on her hair, she was encouraging the dog to finish. "It had nothing to do with the trail." (20 RT 3922.)

As already noted, the foregoing Myers-case evidence was presented at trial after the jury had heard the following evidence regarding the Mason attack.

II. THE ATTACK ON MYRNA MASON

A. THE CRIME AND INVESTIGATION

On June 22, 2001, Riverside Police Officer Raymond Soto was on patrol when he got called, at 3:50 a.m., to the residence of Myrna Mason, who had been attacked in her home at 6616 Lassen Court. (6 RT 1584-1585, 1595) Mason told Soto she had been raped by a man who got into her house when she went outside to turn off the water in her garden. (6 RT 1587.) The man had met her in her hallway, pushed her into her bedroom and onto her bed, choked her and made her orally copulate him, choked her again to the point that she lost consciousness and woke up bleeding from her ears, and with the handle of a rake in her vagina. (6 RT 1587-1588, 1600-1601.)

Soto found the rake in the hallway outside Mason's bedroom, with reddish stains on the first two inches of the handle. He did not go into the bedroom but saw red-stained sheets and bedding. (6 RT 1588-1589.) He went outside, and on a freshly-raked dirt pathway found a very visible footprint. (6 RT 1590.)

At about 4:30 a.m., paramedics took Mason to the hospital, where she gave Soto a further statement about what happened. Soto described what Mason told him:

> When she was forced onto the bed, that he immediately took her clothes off and told her not to look at him or he would kill her. She said that he threatened to rape her vaginally and anally, but she had the presence of mind to tell him that he probably wouldn't enjoy it because she had most of her organs removed.
>
> At that point, he placed her on the bed near the edge on the side of it and he stood at the side of the bed while he forced her to orally copulate him. She remembers him pushing on the back of her head. As he did that, he kept making statements such as, "Suck me harder," and at one point she said that he was choking her. He choked her on two occasions. At first when she was down on the bed and was taking the clothes off, that he had choked her then. She thought she was going to pass out, but she didn't. The second choking occurred during the copulation when he was fondling her breasts and making her orally copulate him, that he was choking her so hard that's when she passed out. At that point, she didn't remember what else happened other than waking up, finding herself laying across the bed on her back with the rake inside of her.

(6 RT 1600-1601.) The attacker, Soto testified, also told Mason he wanted any gold, money, or ATM card she had. (6 RT 1601.) Her description of the suspect, whom she thought was wearing a ski mask and gloves, was that he was five feet, eight inches tall, approximately 160 pounds, and from the complexion on his arms appeared to be black. (6 RT 1588, 1604.)

Patricia Forst, an emergency-room and clinical forensic examination nurse, examined and interviewed Mason at the hospital. (6 RT 1607-1608, 1611.) Mason, she testified, was in a "large amount of pain," but was otherwise cooperative, quiet, and articulate. (6 RT 1615.) Mason reported to Forst that her vagina had been penetrated by a penis and a foreign object, the rake handle, and perhaps by a finger.[44] (6 RT 1617.) Forst also testified that the results of her examination were consistent with the history provided by Mason.[45] (6 RT 1644.) The suspect also threatened Mason, as quoted by

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[44] In her preliminary hearing testimony, Mason, who had died by the time of trial, testified that while appellant had rubbed his penis up and down outside her vagina, he had not penetrated her with it. (16 CT 3054, 3056-3057.)

[45] Forst summarized the findings from her report as follows: "They were petechiae to the face and sclera, are the whites of the eyes, consistent with choking, bilateral elliptical bruises to the neck, bleeding from both ears, bruising and laceration to tongue, lacerations to vaginal vault, two by three centimeters to vagina at 7:00 to 8:00 o'clock in supine position. Unable to examine pelvic structures without general anesthesia." (6 RT 1645.)

Forst: "'I'll kill you if you call the police, or my gang members will.'" (6 RT 1625.)

Officer Derwin Hudson arrived at the scene at about 6:10 a.m. and was assigned to canvass the neighborhood for witnesses or evidence. As it was a trash-pickup morning, he looked in the trash cans; in one can, located between the houses at 6663 and 6651 Lassen Court, he found a women's purse,[46] later identified by Mason's daughter as belonging to Mason.[47] (7 RT 1675-1677, 1679.)

Evidence Technician Timothy Ellis, one of those who processed the scene at Mason's residence, reported that he found the garage door open about one-foot, one-inch. That was enough, he opined, for someone to have crawled under it. (7 RT 1724.)

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[46] Officer Derwin's testimony varies somewhat from that of Deputy Webb, who testified that her dog, Maggie, trailed from a footprint outside of Mason's house to the trash can, and it was she who discovered Mason's purse inside. (19 RT 3542.) Officer Derwin, however, said that he did not remove the purse from trash can; that he stayed by it until ID Supervisor Carlton Fuller removed it. (7 RT 1676-1677.)

[47] Mason's residence was at 6616 Lassen Court (7 RT 1720), so the purse was found down the block and across the street. 6651 Lassen Court was where appellant was staying with his girlfriend, Angie Fortson. (20 RT 3836-3838.)

B. THE MASON INTERVIEW

Detective Jeffrey Joseph interviewed Mason at the hospital at 10:30 a.m. on June 22, and a tape recording of that interview, over the defendant's hearsay and Sixth Amendment objections, was played for the jury. (7 RT 1756; Ex. 38; the transcript, Ex. 38-B, is at 13 CT 3675.) She lived alone and kept both doors locked when she was inside the house. (13 CT 3675.) The night she was attacked, she had turned her television off after the news and fallen asleep, but awoke at about 1:30 a.m. and remembered she had left her drip water system on outside, and went outside to turn it off. (13 CT 3680-3681, 3683.) The water control is not far from her porch, but she cannot see the porch from where she turns off the water. (13 CT 3683.)

Mason returned to the house, locked the door, and headed through the living room toward the hall and bathroom. (13 CT 3685.) She took two steps into the hallway and was knocked down to the floor by a man wearing a black or dark blue knit mask which covered his face. (13 CT 3687-3688.) The man reached down with both hands and began to strangle her and told her not to resist him or he would kill her. (13 CT 3688-3689.) He kept it up until she was very close to passing out, and then picked her up and shoved her into her bedroom. (13 CT 3689.) He then told her that he intended to have oral, rectal, and vaginal sex with her, and she told him she didn't think he would enjoy vaginal sex because she had had a complete

hysterectomy and there was not enough room for him to enjoy himself. (13 CT 3691-3692.) He forced her to fellate him. (13 CT 3692-3693.) He began losing his erection and kept hitting her on her head to push it downward, saying "more suction." (13 CT 3694, 3696-3697.) He began choking her again, and perhaps a third time, and she passed out. (13 CT 3699-3700.) After the oral sex he dragged his "fairly limp" penis back and forth over her vaginal area, not putting any real pressure on to penetrate either her anus or her vagina, but spreading her labia "a little" as it went by. (13 CT 3704-3706.)

After the final time she was choked and passed out, Mason woke up, groggy, with two pools of blood below each ear, blood further down on the bed, and then found the handle of the garden rake shoved into her vagina. (13 CT 3700-3702.) She was bleeding from her vagina, and had two or three bouts of diarrhea. (13 CT 3706.) She cleaned herself up with a wash cloth, standing in the shower, and then called 911. (13 CT 3707-3709.)

Mason's impression was that the suspect was a black man, about six-feet-three-inches, muscular, but she was not allowed to look at his face, although she did see that his head was recently shaved. (13 CT 3712-3713).

The intruder took her television set, and some costume jewelry, as well as the aforementioned purse that the police found. (13 CT 3715, 3718.)[48]

C. OTHER EVIDENCE

The trash can in which Mason's purse was found belonged to Richard Shrader, who lived with his wife next door to appellant's girlfriend Angie Fortson and her mother, Billie Harris. (8 RT 2000-2001.) Angie had introduced him to appellant a couple of months before June 22, about the time that she moved back in with her mother. (8 RT 2002-2003.) Appellant had sought to borrow money from him twice. On Mother's Day, May 13, Shrader declined. (8 RT 2005-2006.) On June 21, appellant asked Shrader for $20; he reluctantly gave him $15. (8 RT 2004-2005, 2008.) Debra Shrader added that she saw appellant in his front yard at about 10:00 on the night of June 21. (16 RT 2971 .)

Department of Justice criminalist Michelle Merritt, a specialist in shoe prints, examined the impression taken from the footprint outside Mason's house. She concluded that although there were no uniquely

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[48] Later in the prosecution's case, Mason's testimony from the preliminary hearing was read to the jury. (16 RT 3042, *et seq.*) As it is for the most part repetitive of the facts just recited from her interview, it will not be set forth in detail again.

identifying marks, it did match one pair of appellant's shoes in sole design, size, and wear. (11 RT 2390-2391.)

A DNA analyst from the San Bernardino Sheriff's Crime Lab, Mehul Anjaria, showed no sperm or seminal fluid on the vaginal swab taken from Mason, so no DNA analysis was performed. (11 RT 2439.) Regarding a bloodstain on Jackson's pants, the results were less than clear using just one analytical process. (11 RT 2447-2450.) Combining the results of two analytical systems, however, the primary contributor of the DNA in the bloodstain on appellant's pants was Myrna Mason, to a high degree of statistical probability. (11 RT 2456, 2464-2465.) The DNA in the bloodstain on appellant's shirt, however, indicated it was male, precluding Mason. (11 RT 2452.)

Mark Traughber, the Senior Criminalist in the Riverside criminalistics laboratory of the state Department of Justice, confirmed Anjaria's finding of no sperm cells on the vaginal swab taken from Mason's rape kit, other than a single sperm cell found on one of the nine swabs. (12 RT 2534, 2536.) There was no seminal fluid on any of the oral swabs, or those from Mason's ear canals, or on any of Mason's bedding. (12 RT 2539, 2554.)

Sergeant Keven Stanton identified photographs of several items which belonged to Mason and were found in appellant's and Angie Fortson's converted-garage bedroom, including her TV set (7 RT 1693-1694), and in a purse which contained Fortson's identification and Mason's checkbook. (7 RT 1697-1699.)

Fortson later testified that she was not the one who put Mason's checkbook in her purse. (14 RT 2745.) In the early morning hours of June 22, between 12 and 5 a.m., she had gotten sick and fallen asleep. Appellant was there when she fell asleep and when she awoke. (14 RT 2753.) Mason's Sony television was not there when she fell asleep, but was when she woke up. (14 RT 2734.)

Toxicologist Maureen Black testified that a blood sample taken from appellant at 7 p.m. on June 22, 2001, but not analyzed until shortly before trial, was negative for blood alcohol and several illegal and prescription drugs (including those for which he had prescriptions).[49] (14 RT 2886-2889.) As Black explained, the prescription drugs do not stay in the blood

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[49] Appellant told the police that he took a "psyche" (sic) medication, Haldol, and an anti-depressant, Cogentin. (14 CT 3827.) Black described Haldol as commonly prescribed for schizophrenia, and Cogentin as a central nervous system suppressant, used for tics, eyelid tremors and the like. (14 RT 2891, 2893.)

for a long time, and may have dissipated further in the years between when the blood was taken in 2001 and analyzed in 2004. (14 RT 2891-2894.)

D. MASON'S PRELIMINARY HEARING TESTIMONY

Myrna Mason's preliminary hearing testimony was also read to the jury.[50] (16 RT 3041-3193.) As it is largely repetitive of what has already been described, *ante*, it will not be set forth in detail here.

III. PENALTY PHASE EVIDENCE

A. INTRODUCTION

In the first penalty-phase trial, the jury made six true findings on prior convictions (16 CT 4429-4434) but hung 8-4 in favor of life without possibility of parole, and the court declared a mistrial. (26 RT 4689.) Sentencing on the non-death counts was held over until a determination could be made on whether the penalty for Count 1 would be death or life without possibility of parole. (27 RT 4693-4694.)

The prosecution sought additional time to decide whether to seek a second penalty trial. During that time, the prosecutor proposed to use Exhibit 63, the scent pad associated with the manila envelope found on Myers' bed, for further testing of whether dogs could trail from the scent

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[50] Ms. Mason passed away on June 30, 2004, prior to the beginning of the first trial. (13 CT 3498, 3505.)

pad to defendant Jackson, with the results to determine whether or not they would proceed. (27 RT 4684-4685.) The defense objected to that, seeking more time to prepare if there were to be a second penalty trial; in addition, the defense objected to Mr. Jackson's having to take part in any such experiments. (27 RT 4695-4697.) The court released Exhibit 63 to the prosecution for the purpose of "conducting any further experiments they feel is necessary." It also denied the defendant's objection to participating, without prejudice. (27 RT 4697.)

The defense filed an application asking the court, on its own motion, to set aside and dismiss the possible death penalty, and sentence defendant to life without parole. (16 CT 4475.) In its pleading, the defense explained that post-trial discussions with jurors indicated that "one or more" of the jury majority who voted for LWOP did so on the basis of lingering doubt.[51] (16 CT 4477.) They also argued (1) that the fact that felony-murder automatically creates a special circumstance made it not capable of

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[51] The defense motion recites that this information was garnered following the court's first-penalty-phase declaration of a mistrial, "during an informal conversation between the prosecution, defense counsel, and almost all of the jurors[.]" (16 CT 4477.) There is no indication in the record that the prosecution disagreed with the defense description of this informal meeting.

constitutionally-mandated narrowing; and (2) the absence of evidence that the killing of Myers was intentional. (16 CT 4488-4489.)

At the hearing on the motion, the defense submitted the motion on the pleadings, with the additional comment that, as Mr. Jackson would undoubtedly die in prison from the length of the determinate sentence on the non-death counts, why not simply impose life without parole in the interest of justice, and to avoid putting everyone through another trial. (27 RT 4749. The court, however, denied the motion. (17 RT 4750.)

At a later hearing, discussing the parameters of the evidence to be allowed in the second penalty trial, the court indicated that the prosecution could not only present the facts and circumstances of the Myers homicide, it could also put before the jury the facts and circumstances of the Mason incident in aggravation. (27 RT 4758-4759.) Lingering doubt is the nub of the matter, the court said, so either side could introduce evidence either to dispel or to support lingering doubt. (27 RT 4759-4760.)

The resulting "penalty" trial, accordingly, included not only the usual penalty phase evidence; it also duplicated most of the Myers-related guilt-phase evidence from the first trial. Thus, as in the guilt phase trial, the prosecutor presented evidence concerning the discovery of Myers' disappearance, the finding of her car in Law Vegas being driven by Donald

Rogers, the question of whether appellant could have (and possibly did) drive the car to Las Vegas, the findings of the criminalists who examined the Myers crime scene and the car, appellant's statements to the police following his arrest for the Mason assault, the police-initiated dog-sniff trails of June 22 and June 25, 2001, and the expert testimony regarding the reliability of the purported dog-sniff "identifications" of appellant. The evidence regarding these matters was not materially different from the evidence presented in the guilt phase, except for new evidence presented in the second penalty phase, which is described in the following sections.

B. PROSECUTION EVIDENCE

1. Evidence Relating to the Myers Homicide and Lingering Doubt

In addition to a repetition of the guilt-phase testimony of Lisa Harvey, Coby Webb (38 RT 6689 *et seq.*), and Douglas Lowry (38 RT 6626 *et seq.*), Harvey was allowed to present the results of further dog trails, conducted since the end of the first trial. The purpose was apparently to counteract the lingering doubt that prevented the first-trial jury from imposing death.

The new trail was set up in the San Bernardino Police Station jail holding section, because appellant had never before been there. (37 RT 6510.) Harvey used two dogs, Shelby and Dakota, and neither one made a

clearly positive identification of appellant. (37 RT 6515, 6517-6518.)

Instead, Shelby sniffed the multiple detainees in cell eight, and then went in and sniffed defendant in cell seven, but came back out without identifying anyone. (37 RT 6515.) Dakota went directly to cell 7, and when admitted, went in and sniffed defendant and then walked back out without making a clear alert. (37 RT 6517.) Nevertheless, the jury was shown a videotape of the trails, with Harvey providing running commentary, both on direct and on cross. (37 RT 6519 *et seq.*, 6596 *et seq.*) The direct testimony describing the trails of Shelby and Dakota are described in more detail in Argument XVI, *post*, at pages 381-388.

Douglas Lowry repeated his guilt-phase testimony about the ninydrin test that he conducted. (38 RT 6626 *et seq.*) On cross-examination, he did admit that if the trail had been run 40 days after the envelope was sprayed with Ninydrin, that would have been pushing it for his dog. In real life, if the burglary had occurred 40 days before, he wouldn't have much hope that his dog could run a good trail. (38 RT 6675.) Later, he clarified that his doubts about a 40-days-later trail assumed a scent article having been left out in the environment for that period. (38 RT 6677.) Nevertheless, while he had run successful trails on items collected at crime scenes and later matched to a suspect, none was anywhere near 40 days later. (38 RT 6678.)

In addition, he had never trained his dogs to do indoor trails, and the National Police Bloodhound Association does not advocate doing station-house identifications. (38 RT 6682.)

In her second-penalty-phase testimony, Coby Webb admitted that the June 25th trail to Jackson at the Orange Street Station house was the first one Maggie had done, and that Maggie had not trained for it. (38 RT 6716.) It was also Maggie's first trail to a jail inmate in an orange jump-suit. (38 RT 6726.)

Investigator Silva, discussing the San Bernardino station house trail conducted between the first and second penalty phase trials, said that he put a decoy, similar in looks to appellant, in cell No. 5. (39 RT 6770.)

2. Additional Evidence of Guilt Not Introduced at the Guilt-Phase Trial

Detective Barnes was allowed to testify, over defense objection,[52] to a conversation with appellant on the day he was arrested and questioned, while they were driving to the supposed scene where Myers' body may have been dumped. (33 RT 5776-5778.) Barnes asked Jackson what he

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[52] The objection was spoken of as a *Miranda* objection (*Miranda v. Arizona* (1966) 384 U.S. 436), but more specifically involved a violation of appellant's right to remain silent. The conversation in question took place *after* he invoked that right and questioning resumed a short time later. (See Argument IV, *post*, commencing at page 267.

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

The prosecution called Angie Fortson to testify to appellant's possession of a pair of Vans shoes. The most she was able to confirm was that appellant did own some shoes that were like the Vans shoes shown in Exhibit 109, though a different color. (35 RT 6153.) In order to suggest that appellant may have had such shoes despite their not having been found, the prosecution showed Fortson a picture of the rear view of the Harris house, showing several shoes (Ex. 126), but Fortson Angie identified them as her mother's and her daughter's shoes, which had been thrown into the dumpster when Billie Harris moved out of the house. (35 RT 6151-6154.)

When Angie awoke at about 6:45 a.m. on the morning after Mother's Day, Bailey was up and gone. (35 RT 6168.) As for when he got back, she first said he got back at around 3 p.m., but the prosecution then reminded her that she had earlier testified that he didn't get back until 10 or 11 that night. (31 RT 6169-6170.)

Angie also remembered being angry the night before – Mother's Day night – because when he got back after being out for two hours or so and said he had been with their neighbor Richard at a bar, she thought he was lying and had been out with a girl. (31 RT 6170-6171.)

On cross-examination, Angie acknowledged not mentioning any Vans shoes until asked about them just before she testified in the guilt-phase trial, a time when she was in custody and still in fear of Investigator Silva's threat to charge her with the Myers murder.[53] (35 RT 6121-6122.) She did not, however, ever see him with either a large amount of cash or women's jewelry. (35 RT 6225.)

Most important, Angie reiterated on cross her story that they made love overnight on Mother's Day night until dawn, and that neither she nor Bailey were gone for two-three days between Mother's Day and when he was arrested. (35 RT 6237-6239, 6241-6243.)

On re-direct, she was asked if she told Silva in Atlanta that Bailey was not living with her on Mother's Day, 2001. She did not remember saying that, and had not heard the tape, but if she said that, she would have been lying. (35 RT 6244-6246.) Asked if pressure from the police had caused her to lie, she said that she had always told the truth, except for the initial lie about where they got Mason's TV. (35 RT 6248.)

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[53] Silva, an investigator for the District Attorney, testified subsequently that when asked about what kind of shoes Jackson had, in the November, 2004 pre-trial interview, she included a pair of Vans shoes in the list. (39 RT 6772.) He showed her a picture of two styles of Vans shoes, which she said were like appellant's, but of a different color. (29 RT 6774.)

The prosecution also called Jose Davila, Donald Rogers' friend who Rogers had said was with him in Myers' car and had looked with him into the trunk, including seeing and playing with the bloody plastic bag. (10 RT 2285; *see also* 11 RT 2366 [Davila's fingerprints on bag].) On the stand, however, Davila testified that he never saw what was in the trunk of the car. (35 RT 6257.) Neither did he see the bloody bag, or toss it back and forth with Rogers. (35 RT 6257.) Nor did he go in the car with Rogers to find other cars to steal, though they may have (he didn't remember whether they had) used it to steal other stuff. (35 RT 6258.)

Davila also minimized the "gang," EPG 213, saying "we weren't actually a gang." He lived across the street from the park where they played football and soccor together, and eventually some "gangsters, hard-core, I guess" from California put the name to the "gang." (35 RT 6258.) Neither he nor Rogers were members of the gang. (35 RT 6274.)

Darlena Mays was the mother of appellant's son, with whom she moved to Las Vegas on May 7, 2001, although she did not tell Jackson about the move. (35 RT 6277-6278, 6292.) They had been boyfriend and girlfriend for a number of years, starting when she was 18 and he was 22. (35 RT 6279-6280.) She broke up with him when their son was 4-5 months old because, though he was the best man she ever had, and she still

misses him, she could not take his going back and forth to jail. (35 RT 6282.) Nevertheless, Jackson always treated her and her family well, and took care of her mom when she was sick and Mays had to work. (35 RT 8282-8283.)

Asked about what medicines appellant took, Mays said that he took medicine for his "psych problems."[54] (35 RT 6283.) She knew he was getting a government check, and she took him to psych appointments, but, asked if he ever told her he played crazy to get the check, she answered, "No. And it wasn't an act. I knew he wasn't playing. Well, at the prison I would hope they would know if he was playing." (35 RT 6285-6286.) Asked if she ever saw him acting abnormally or unusually, she answered "Depressed sometimes," and, after he came out of prison, she saw him talking to himself. (35 RT 6286.)

Department of Justice Criminalist Michele Merritt repeated most of her guilt phase testimony, but, with regard to the shoe-prints in Myers' bathroom, she added that she recommended against trying to determine

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[54] The court sustained a defense objection to the next question, "What kind of psych problems did he have?" (35 RT 6283-6284.) Similarly sustained were objections to questions about what mental illness Mays observed (35 RT 6284-6285) and, later, a question about what he did to make her think he was crazy – although only after she answered that she did not think he was crazy. (35 RT 6286.) One does not, of course, have to be "crazy" to need psychiatric medications.

shoe size from the imprint, because there are so many variables that to do so would be difficult. (35 RT 6302.)

Dana Guidice, the Vans International Vice President, changed her testimony in a way that favored the defense. Whereas she testified in the guilt trial that the two shoe patterns had sold a total of 20-30,000 throughout the United States but mostly in Southern California (16 RT 3000), she now testified that the total was 75-95,000 pairs sold in Southern California alone. (39 RT 6801.) Thus, the incriminating significance of a match between the Vans shoe-print found in Myers' bathroom and a pair of shoes that appellant may or may not have owned was substantially diminished.

3. Victim Impact Evidence

The prosecution introduced victim-impact testimony from Ms. Myers' sons Douglas and William, and her granddaughter Deanna. Douglas, in particular, described the impact on the family. It was difficult for them, he said, in particular on Mother's Day and other holidays since 2001. (31 RT 5575.) He also related the emotional impact of searching for his mother, including lack of sleep, which he described as emotionally horrible. (31 RT 5577.) He raised money with his brothers for a $25,000 reward, which was doubled by the Riverside City Council. (31 RT 5577-

5578.) It remains difficult not knowing, still, where she is; there is no resting place, there has been no funeral. (31 RT 5578-5579.) It has been an open, continuing nightmare, especially not being able to thank her, to pay her back, for all she gave. (31 RT 5579.) It also has separated the family, the three remaining brothers. It destroyed his brother Richard's life – he hasn't worked in years – and Douglas has diabetes and heart disease now, and suffered a heart attack and stroke one year almost to the day after their mother's disappearance. (31 RT 5580.) Richard was ill and couldn't be there on Mother's Day, 2001, and he feels tremendous guilt that he wasn't. (31 RT 5580.) He also doesn't speak at all with their sister-in-law Monique and her child. (31 RT 5581.)

Deanna Myers also described one effect of her grandmother's death as being that the family has never been further apart. (31 RT 5617.) While they used to be very close-knit, getting together on holidays and birthdays and special occasions, they do not do that anymore, and its very rare that they even speak on the telephone. (*Id.*) Her grandmother was the one who always brought them together, the focal point. (31 RT 5618.)

Deanna, who was 22 when her grandmother disappeared, would always see her at church, and would sit with her and chat before and after the service. (31 RT 5616.) And because she lived close by, she often saw

her several times a week, as well as talking to her on the telephone "all the time." (31 RT 5615.) They did many activities together, including going to plays and movies, lunch, or the beach. (*Id.*) They also went to Mexico together every spring break – she and her grandmother, her siblings, and her mother, Monique, and father, Robert Myers (who died about a year before Geraldine disappeared). (31 RT 5615-5617.) After her father's death, she became even closer to her grandmother. (31 RT 5617.)

Deanna also testified that, about seven or eight months after her grandmother's death, her mother, Monique, suffered a stroke which left her unable to work. (31 RT 5633.) The disappearance of Geraldine left Monique distraught, especially since she was already depressed over the loss a year before of her husband, Robert. (31 RT 5634.) Monique and Geraldine were very close: Because Monique's adoptive parents had both died, Geraldine had become like a mom to her. (*Id.*)

As for how specifically Geraldine's death affected her, Deanna stated,

> Things are not the same. Out of touch with my uncles, the uncles that I know. She was the last grandparent that I had alive. I used to talk to her and get her advice on different things, and I can't anymore. I certainly can't get that from my mother anymore. It just isn't the same. (31 RT 5634.)

Another granddaughter, Robin Myers-Wilson, also spoke of the special relationship she had with Myers. They would go to lunch every week, go shopping at least once a month, and "[w]henever I was feeling bad or down about myself, I would easily just call her, talk to her, and she'd make me feel better. (31 RT 5642.) They would also go to special events and to the theater together: "She's the one who got me turned on to the theater." (31 RT 5643.) Similarly, Myers took her on her first train trip, when she was 18 years old. (*Id.*) She was, said Myers-Wilson, "very, very giving." (*Ibid.*)

Douglas Myers' wife, Roberta, knew Geraldine Myers for 19 years, and they were very close. (31 RT 5668-5669.) Geraldine was like a mother to her. (31 RT 5669.)

4. Evidence of Other Violent Criminal Activity

(a) Evidence Relating to the Mason Assault

The prosecution introduced the most gruesome aspects of the guilt-phase evidence relating to Myrna Mason: audiotapes of her 911 call and her interview with Detective Joseph (34 RT 5932-5933; transcripts at 13 CT 3660-3666, and 3675-3720.); her detailed testimony regarding the attack at the preliminary hearing, read to the jury (34 RT 5936 *et seq.*); and the

testimony of Patricia Forst, the nurse who did the rape exam on Mason at the hospital (36 RT 6435 *et seq.*).

(b) Prior Crimes

The first jury heard and found true the prior crime findings in the Information. For penalty phase purposes, the prosecution introduced a series of exhibits through the testimony of District Attorney's Forensic Technician Yolanda Pina-Perez. (36 RT 6455.) Ms. Pina-Perez identified appellant's fingerprints and/or pictures in a series of exhibits. (36 RT 6460-6461.) The Exhibits show the following:

1. Exhibit 146, a package from Arizona showing a February, 1990, conviction for robbery. (15 CT 4308) The prosecutor described it as an aggravated robbery. (36 RT 6460.)

2. Exhibit 148, a booking sheet from Arizona, dated in April, 1989, charging aggravated robbery, possibly related to the conviction described just above. (15 CT 4319.)

3. Exhibit 149, a 1992 Nevada guilty-plea conviction for attempted possession of a stolen vehicle. (15 CT 4325.)

4. Exhibit 155, a Penal Code 969b packet containing, *inter alia*, abstracts of three California prior convictions: one for second-degree burglary in February, 1998 (15 CT 4395); and one from May, 1994,

showing convictions for force inflicting injury and for petty theft with a prior. (15 CT 4396.)[55]

C. DEFENSE EVIDENCE

1. Evidence Related to the Myers Homicide and Lingering Doubt

(a) The Defense Expert's Testimony Regarding the New Dog-Sniff Trails

Dr. Lawrence Myers testified again for the defense, and reiterated much of what he had said at the guilt phase trial, including his critiques of the June 22 and 25, 2001 trails by Maggie Mae and the experiments conducted by Lisa Harvey. (42 RT 7119-7125, 7141-7142.) He also testified concerning Lisa Harvey's between-trials trails at the San Bernardino police station. (42 RT 7151-7152.) Again the focus here will be on the post-first-trial experiments.

Before commenting on the San Bernardino trails, Dr. Myers explained the concepts of blinding and controls, and noted the absence of them in Harvey's experiments. (42 RT 7128-7130.) Without blinding, he said, "people with conscious or unconscious bias can alter the behavior of

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[55] The prosecutor also introduced two Department of Justice fingerprint cards, dated January, 1998 and April, 1994. (Exhibits 152 and 154, described at 36 RT 6460.) These are presumably associated with the 1994 and 1998 convictions, but while listed in the Exhibit List (24 CT 6825), they are not included in the Clerk's Transcript.

the dog and their own behavior . . . There [has] been experimentation done on this sort of thing for a lot of years. It's very easy to cue a dog." (42 RT 7130:12-16; emphasis added)

Dr. Myers also debunked Harvey's claim that if the dog begins to trail, that indicates a scent and, therefore, even if it does not give an unambiguous alert at the end of the trail, it can be said to have reached its target when it stops trailing. To the contrary, Dr. Myers explained, if a well-trained dog scents off an article and begins to trail, that in itself is neither proof that there was a scent on the article, nor that the scent belongs to any particular individual, without an unambiguous positive alert at the end. (42 RT 7133.) Even a well-trained dog might trail when there is no scent. (42 RT 7140.) Moreover, for reliability, you can't simply repeat the same exercise (as Harvey did by sending Dakota on the same trail as Shelby) because either the dog or the handler now has a bias. (42 RT 7136.)

Even with a well-trained dog and well-trained handler with a great record, you can, with respect to a single trail, only consider the result as a probability. For example, there might have been cuing by the handler; or any number of physiological conditions of the dog that will cause alterations in its sense of smell; or environmental effects, including the environment of the individual at the end of the trail. (42 RT 7138-7139.)

Dr. Myers then turned to a discussion of the trails by Dr. Harvey's dogs Shelby and Dakota at the San Bernardino Police Station jail. The details of this testimony are set forth in Argument XVI, *post* at pp. 381-388.

(b) Other Lingering Doubt Evidence

In addition to the testimony of Dr. Myers, the defense presented much of the evidence it had presented at the guilt phase.

The defense began by calling some of the prosecution witnesses to undercut their guilt testimony. For example, Detective Barnes was asked about the Macy's bag regarding which he (and Donald Rogers) had testified, but which had since disappeared, for reasons Barnes could not explain. (39 RT 6618-6619.)

Regarding his initial interview with Donald Rogers on May 18, 2001 (before the Mason assault), Barnes did not remember whether he had asked Rogers about the inconsistencies between his initial statement to police that he found the car at 23rd and Searles, and then that he had found it on the street next to the Price-Rite, and then in the parking lot. (39 RT 6825-6826.) When Rogers told him that he had spent part of Mother's Day with his mother, and gave Barnes his mother's telephone number, Barnes never called her to confirm Rogers' story; nor did he even call or meet with Rogers' father. (39 RT 6828-6829.) Neither did he speak or attempt to

speak with Rogers' neighbor Roberto, whom Rogers said he saw on Mother's Day. (39 RT 6829-6830.) Similarly, he did not ask Rogers' girlfriend Stephanie about the phone call Rogers said he made to her on Mother's Day. (39 RT 6830-6831.) Nor did he go to Jose Davila's residence to look for stolen property, or even to Rogers' residence to look for evidence related to Myers' case.[56] (39 RT 6831-6833.)

Turning to Barnes' interviews with Angie Fortson, in the initial interview on June 22, 2001, Fortson told him she had spent the entire evening of Mother's Day with Jackson, and the next morning Jackson was there at the house and went to a job interview, and that she and Jackson never left overnight in the period around Mother's Day. (39 RT 6839). On June 26, Barnes interviewed her again, and she said on Mother's Day night she was with Jackson in bed watching movies, and then they engaged in sexual relations until about 5 a.m.. When he told Fortson that Jackson had admitted killing this woman, that he had slipped out of the house, Fortson said he could not have slipped out. (39 RT 6840.) Barnes

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[56] Later, in the prosecution rebuttal, the jury heard the tape of the second Barnes interview with Donald Rogers. (43 RT 7284; transcript at 24 CT 6783 *et seq.*) In that interview, Rogers insists that he stole the car on Monday, and that other than having told Barnes he had stolen it on Wednesday in their initial interview, everything else he said was true. (24 CT 6785-6786.)

suggested it was another night; Fortson said, no, it was Mother's Day. (39 RT 6841.) She also said Jackson was there on the day after Mother's Day and never left the house, and when Barnes pointed out the inconsistency with her previous statement, she said the job interview was another day, before Mother's Day. (39 RT 6841.) Fortson also said she was certain of the facts she related in the June 26 interview. (39 RT 6841-6842.)

Fortson had also told Barnes that on Mother's Day night, Jackson was gone for a couple of hours and came back smelling like beer, and told her he had gone to a bar with their neighbor. (39 RT 6842.) Barnes admitted, however, that after she said Jackson had gone out the night before, she also said the detectives, as a group, were confusing her about the dates. (39 RT 6844.)

Regarding the lack of follow-up on Rogers, Barnes said Rogers, from the end of the first interview, was not a suspect in the Myers homicide. (39 RT 6842-6844.)

Appellant's father, Bailey Albert Jackson, Sr., was called by the defense to make two points. The first related to the article about the Myers' disappearance and the $50,000 reward, found in the Jackson apartment. This was not, Bailey Sr., said, appellant's. The file cabinet in the bedroom where appellant would sleep was locked, and he did not have a key to it, nor

keep anything in it. Indeed, Bailey, Sr. did not go into that cabinet, or keep any of his own items in it, except perhaps his Greyhound logbook. (39 RT 6848-6849.) Moreover, the newspaper article was cut out from the newspaper by his wife, "and she keeps stuff like that." (39 RT 6850.) On cross, he testified that when his wife cut out the article, she showed it to him. (39 RT 6834-6835.) When confronted with his guilt phase testimony that he cut out the article, he responded that he probably cut it out, but because he was asked to. (39 RT 6867.)

Second, while he drove the Los Angeles - Las Vegas route for Greyhound, Bailey, Sr., was not working on or around Mother's Day; he never drove his son on that route, on Mother's Day or otherwise; and at no time in May, 2001 did he pick up his son in Las Vegas and bring him back to Riverside. (39 RT 6854-6857.) Later, the Greyhound Station Manager from San Bernardino, Benjamin Barnes, confirmed that Jackson was on vacation and leave from May 1 to June 21, 2001, which included Mother's Day. (39 RT 6906-6907.)

Detective Steve Johnson was called to undercut the prosecution evidence about the interview with Junior Taufaao, from which the jury learned of an alleged conversation with appellant and Angie Fortson about a

trip they made to Las Vegas.[57] Johnson admitted that, contrary to what the police told Taufaao, neither Bailey nor Angie had told them about a conversation they had with Taufaao about Las Vegas. (39 RT 3883-3884.) In addition, during the interview, Taufaao repeatedly told the detectives that he had problems with his memory. And it was one of the detectives, not Taufaao, who brought up the subject of Las Vegas. (39 RT 6885.) It was only at that point that Taufaao told them that Bailey and Angie had said they had gone to and returned from Las Vegas, but when pressed for details, he had none. (39 RT 6885-6886.) And finally, at other times in the interview, he only said they had a discussion about going to Vegas. (39 RT 6886.)

2. Evidence of Life History and Character Mitigation

(a) Jackson as an Adult

The defense called Francetta Mays, who was the mother of appellant's former girlfriend Darlena Mays and the grandmother of their son. (40 RT 6983-6984.) When appellant became Darlena's boyfriend, Francetta liked him right away, and he became a part of her large family,

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[57] Taufaao testified for the prosecution during its second-penalty-phase guilt presentation, as he had done at the guilt phase trial. (39 RT 6752 *et seq.*;) The tape of his interview with the detective was played. (39 RT 6766; transcript at 14 CT 3935 *et seq.*)

and her grandchildren loved him. (39 RT 6984-6095.) The kids called him Uncle Lamar,[58] and he would take them to the store, to the park; he was always there for them. (39 RT 6986.)

After several years of going together, Darlena and Bailey had a child, Isaiah Jackson, on November 3, 1997. (40 RT 6986.) "Lamar" was there at the birth, and was overjoyed, excited. "He was there with us all the way." (40 RT 6987). While Bailey and Darlena lived together, Francetta was there often, and saw that appellant was very good with the baby, took care of the baby, dressed him, bathed him, and the like. (40 RT 6988.) This was for a month and a half after Isaiah was born, until appellant went to jail in December, 1977. When he got out in 1999, he and Darlena became a couple again. (39 RT 6989.) Francetta again saw him often, and he was still the same Bailey Jackson, sweet, nice, a help to her, and he never changed. (40 RT 6990.) She was very sick then, and he did things for her that were like what a nurse would have done, cleaning up her vomit and diarrhea. (40 RT 6990). And he was good with his son, taking him places, playing with him. (40 RT 6991.) After Jackson was taken into custody

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[58] As shown in the case caption, appellant's middle name is Lamar.

again and Darlena split up with him, Francetta never saw him again, and moved to Toledo, Ohio. (40 RT 6993-6994.)

Darlena Mays' sister, Venus Blankenship, met appellant 12 years before the trial, and was immediately impressed with him. He seemed to be a good guy, a nice guy, and she introduced him to her sister. (40 RT 7000.) The impression remained the same over the years. (40 RT 7001) Her six kids all loved Uncle Lamar. (40 RT 7002.) He treated her mother, Francetta, as if she was his mother, and she, Venus, took him as a brother, the brother she never had. (40 RT 7003.)

When appellant got out of prison in 1999, he, Darlena, and Isaiah came to live with Venus's family, and were there for "quite a while." (40 RT 7005.) During that period, she did not observe any changes in appellant, and he continued to be a very loving, caring father. (40 RT 7006.) Venus worked at two jobs, and he would often babysit for the kids, without any complaints from them or problems. (40 RT 7007.) When he returned to prison around July, 2000, however, Darlena was very upset and broke off the relationship. (40 RT 7008.)

(b) Appellant's Horrendous Childhood

Three members of appellant's family were called – his father, a step-sister, and a brother – to describe the horrors, the sheer terror, of growing up with his abusive mother, Cleona Jackson.

Bailey Jackson, Sr., related that appellant was the youngest of three children that his father had with Cleona Jackson, and there were an additional four children between them that they brought home from foster care – there because of Cleona's abuse – after she got out of prison and they were married. (42 RT 7165-7166, 7188-7189.)

After appellant was born the family moved often, mostly in Ohio and West Virginia, sometimes because of changes in Bailey, Sr.'s work – he was a bus driver and worked in the coal mines – but usually because Cleona wanted to move. (42 RT 7190-7193.) Their pretty-much-annual moves were disruptive of the children's education, as they were often unable to complete their school years. (42 RT 7194-7195.)

Cleona's "normal" discipline for the children would be to whip them with a belt, but she would also get sticks or whatever else was available and start hitting on them. (42 RT 7196-7197.) It started as a "regular whipping, but then once you started swinging it might land in the head, wherever part of your body is in the way." (42 RT 7197.) "Once she started swinging,

anything went." The kids did not have to do something wrong to trigger the punishment – she just got angry. He tried to stop it, "Best I could. Whenever I was there it stopped. After I wasn't there, there was no control." (42 RT 7197). One child, Larry, required hospitalization when Cleona threw boiling water on him. (42 RT 7198-7199.)

She got mad a lot. "That is the problem she's having . . . be mad all the time. Any little thing irritates." (42 RT 7199-7200.) And when something irritated her, she would respond by hitting, including Bailey, Jr. It would at times die down, and then escalate again. "[S]he just didn't get along with nobody, anybody." (42 RT 7200.)

Appellant's step-sister, Delores Jackson, testified that she was in foster care when Bailey, Jr. and his older brother James were born. When James and Bailey were about 4 and 3, respectively, and she was about 11 or 12, Delores came back to live in the Jackson household. (42 RT 7210-7211.) The first day she was there started out fine, but then she got scared when James and Bailey, Jr. started crying, which upset her mom, who yelled at them, told them to shut up, picked them up and threw them against the couch. (42 RT 7212-7213.) She threw them "kind of hard, because, you know, my mom she was just so mean, you know." (42 RT 7213:12-13) The babies just screamed and cried louder, and Cleona would ask Delores

to take them and put them to bed, because she was so agitated. (42 RT 7213)

The abuse went on until Delores left at age 18, years of "not knowing whether you're going to live the next day or not." (42 RT 7214:14-15). It was directed toward all the kids. "[I]f you did not do what she wanted you to do, she would go off." (42 RT 7214:23-24).

One time when Larry came home from being with his grandmother and threw up, Cleona put him in the basement and starved him. The others went to a fair, and she sent Delores back to the house to get some money. Meanwhile, Larry must have come upstairs and eaten some donuts, and when they returned, Cleona blamed Delores, who took the blame for her brother, and Delores took a pipe from a partially-built swing set and hit her on the arm with it, hitting one of the main arteries or veins. She caused permanent damage, and Delores still carries the scar. It bled a lot, and on the way to the hospital, Cleona cut her hair to make her look like a boy, and the doctors did not believe what Delores said about how it happened, and she got punished again for trying to tell them. (42 RT 7215-7217.)

Another time, Delores put a fish into hot water instead of cold water to defrost it, and Cleona threw some scissors at her, which stuck in her leg, and it still feels numb at times. (42 RT 7219.)

Delores would stay in her room for security, but Cleona would call her downstairs, berate her for looking like her father, whom Cleona couldn't stand, and force James and Bailey, Jr. to beat on her. (42 RT 7219-20).

Cleona hit her with broomsticks, alphabet blocks, a belt buckle. She would have Bailey and James use objects to beat her, and sometimes, if Bailey would try to refrain, Cleona would jump on him. (42 RT 7220.)

Once, Delores saw Cleona hold Larry's hand over a flame on the stove when he didn't do something she asked. (42 RT 7220.) She did that repeatedly, until his skin started falling off his hand. (42 RT 7221.) The older brothers and her stepfather helped Cleona do this to Larry, but Bailey did not participate. (42 RT 7221.)

When there was no food, Cleona would have the kids go steal a chicken from the market, and she would rob elderly people out in the street (42 RT 7221-7222.) Once, Delores saw Cleona, dressed like a man, as old people were coming out of a neighborhood store, hit them, knocking them down, grabbing their groceries and running away. (42 RT 7233.) Another time at a Kentucky Fried Chicken, someone had left a bucket of chicken in the back seat of a car, and Cleona had Bailey Sr. drive up very close, open the door and take the bucket of chicken. (42 RT 7233-7234.)

Cleona also abused Bailey, Sr.'s mother, when she tried to protect him from Cleona's yelling, one time forcing their grandmother to sit on the roof naked in the winter, another time parading her naked in front of her son. (42 RT 7222-7223.)

From the time that Delores returned from foster care, she never saw Cleona cuddle the youngsters, or treat them as a normal mother would – she left that to Delores – and when they would cry, they would come to her for comfort. (42 RT 7227.) "And I know that if my brother if he had not been around her, he wouldn't be going through what he is going through now." (42 RT 7226:24-26).

Appellant's brother Larry Jackson explained that he had not seen his mother for 25-30 years, because of the need to get away from her, because of the beatings, the torture, the hot water, the burnings from stoves, and, again, the numerous beatings. (42 RT 7239-7240.)

Regarding the hot-water incident, he testified: "She had boiled some water and forced me to stand there and watch it boil, and then she threw it on me." (7240:15-16.) Bailey Jr., was there, and their father and the other brothers and sisters. Larry spent close to a month in the hospital. (42 RT 7240). His right leg from his thigh to his knee is scarred, as are both shoulders and down to his elbows on both arms. He still doesn't know what

he did wrong to get this punishment. This was when he was 14. (42 RT 7241.)

Other punishment included being forced outside in the dead of winter with no clothing, and being fed like a dog though a pipe while out there. This was when he was 13 or 14. (42 RT 7241.)

Was there a standard way of punishing the children? "Basically you never knew what was coming next." (42 RT 7241.) She struck them with belts, sticks, anything she could find, and would do so anywhere on their bodies that she could find. (42 RT 7242)

Another punishment was being forced to stay in the basement "for long periods of time not knowing what was going to happen next." (53 RT 7242.)

When their father was not there, was out driving a bus or a truck, the punishments would increase. (42 RT 7243.)

Cleona taught them to shoplift when he was about 12, in middle school. (42 RT 7243-7244). If they didn't get her what he wanted, she beat them. (42 RT 7244.)

For Larry the constant moving kept him from finishing school years, and kept him from forming friendships, especially because he learned not to trust anyone because there was no trust at home. (42 RT 7244-7245.)

Finally, when Larry was 14, Cleona went to the authorities and got him classified unruly. He was sent to a juvenile center, then another children's center, and then, when that was about to close down, a cousin, Rev. Hocker, took him in for three to four years. (42 RT 7245-7246.) Living at the juvenile centers was a relief, and living at the Hocker's was "Everything I hoped it would be ... stern but fair." He was able to stay in high school and graduate.[59] (42 RT 7245, 7247.)

Concluding, Larry reported that he was now 40, and still afraid of his mother. (42 RT 7248.) He still had trouble trusting people, and had never married or had children because of fear that he would do to them what Cleona did to her children. (42 RT 7251.)

Cleona's abuse did not end in appellant's childhood. Angie Fortson testified that when they were at his mother's house on Mother's Day, 2001, appellant's mother started yelling at him. "She was always yelling at him," but he wouldn't yell back, "He would just say, 'okay, mom, no mom,' or 'leave me alone, mom,' and try to get away. But she would follow him and she was something else." (35 RT 6121:22-28)

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[59] Larry escaped Cleona. Bailey, Jr., was not so lucky. On cross-examination, Larry said he never saw hot water poured on Bailey, or saw him locked in the basement. But he was certainly beaten, even at 4-5 years old – everybody was beaten. (42 RT 7255.)

This confirmed appellant's father's earlier testimony in cross-examination. The prosecutor asked Jackson, Sr. about the argument between Bailey and his mother on Mother's Day. They got into lots of arguments, he said. (39 RT 6861.) The prosecutor pursued it a bit further:

Q. Bailey did things that upset his mother, didn't he?

A. No. She'd be upset over anything. So it wasn't his fault about that. (39 RT 6862.)

D. PROSECUTION REBUTTAL

The prosecution's rebuttal focused entirely on Las Vegas and Donald Rogers. The tape of Rogers' second interview with Barnes was played for the jury. (43 RT 7284; transcript at 24 CT 6783 *et seq.*, and see *ante* at p. 100, fn. 56.) There had been evidence introduce earlier from the Las Vegas Price-Right store manager, Kenneth Adams, regarding why the security tapes were missing from the day that Rogers said he stole Myer's car. (19 RT 3718 *et seq.*; 42 RT 7071 *et seq.*) Carl Smith, a defense investigator who spoke with the Adams, was called by the prosecution and questioned about Adams' explanation for the absence of that security tape. (42 RT 7286 *et seq.*)

E. CONCLUDING STIPULATIONS

The presentation of penalty-phase evidence concluded with stipulations read to the jury: (1) that the newspaper article found in the

cabinet at the Jackson's Monroe Street apartment was published on May 23, 2001; (2) that James Jackson was sentenced to five years on May 11, 2001 for second-degree robbery and kidnaping, and he has been in custody since November 28, 1999; (3) that Angie Fortson was sentenced to 3 year, 8 months on August 13, 2003, for selling cocaine and for receiving stolen property (in this case); and (4) a listing of the seven other Riverside Press-Enterprise articles about the disappearance of Geraldine Myers published between May 16, 2001, and appellant's arrest. (43 RT 7291-92).

F. THE DETERMINATE SENTENCE IMPOSED FOR THE NON-MURDER COUNTS

After the second jury returned its death verdict, the trial court imposed a determinate sentence of 212 years to life for counts 2-10. Errors in the sentence are discussed at the end of the guilt-phase argument, which follows.

ARGUMENT

PART ONE: GUILT PHASE

I. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION TO SEVER THE MYERS-RELATED COUNTS FROM THE MASON COUNTS

This is a textbook case of a very weak capital murder case improperly joined with a strong and very inflammatory non-capital case, denying appellant due process of law and so infecting the jury against him as to cast serious doubt on the reliability of the jury's capital murder verdict.

That the Mason case was a strong case can admit of no doubt; indeed, the defense below focused almost entirely on the Myers case. Nor can the case against appellant in the Myers case be considered anything but weak: There was no physical evidence linking appellant to the crime, other than a Vans shoe print which was also linked to thousands of other pairs. Indeed, the Vans shoes alleged to have belonged to appellant were never found, but only linked to appellant through a picture shown to Angie Fortson. There was no physical evidence in Myers' car linked to appellant. No money or jewelry that might have been taken from Myers was found in appellant's possession or otherwise linked to him.

In terms of the circumstantial evidence against him, appellant's so-called admissions were given in the context of questioning about the Mason case, and his answers, though they led to police suspicions about his

involvement in Myers, were nearly incomprehensible, and never corroborated with direct evidence. Indeed, several searches in locations suggested by appellant turned up no evidence of a dead body.

Regarding Las Vegas, where Myers' car was found, there was as much or more evidence that appellant did not go there as that he did, and the hearsay that indicated he did go was entirely the product of coercive and leading police interrogation.[60] The dog-sniff evidence, as discussed *post*, was flawed by possible contamination, handler-cuing, and other questions raised by the defense expert. (See Arguments II-III, below.) Absent the biasing impact of the Mason-related evidence, it is unlikely any jury would have found beyond a reasonable doubt that appellant was responsible for Myers' death.[61]

Further, aside from the weakness of the evidence as to the perpetrator's identity, there was little that was known or could be inferred about the Myers disappearance. The evidence showed only that (1) she and

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[60] Contrast, for example, the answers of Angie and Sheena Fortson under threatening interrogation from Silva, and the repeated testimony of Billie Harris that at no time during the period from when Bailey moved in to Harris's home until his arrest were he or Angie gone overnight. (20 RT 3841-3842, 3855, 3859.)

[61] The inherent weakness of the case against appellant as to the Myers killing is confirmed by the fact that the initial jury hung 8-4 for life, at least in part on the basis of lingering doubt. (16 CT 4477.)

her car disappeared; (2) her blood was found on the Macy's bag in the trunk of her car; (3) some money was apparently stolen from an envelope found on her bed – an envelope which looked like but was never proven to be one in which she carried her money; (4) there was an apparent (but never proven to be) bleach stain on her hallway rug; (5) there were "obvious holes" in a t-shirt belonging to appellant, with what appeared to be lighter-colored discoloration around the perimeter of some of them, and a few small white spots on the bottom of a left pant leg, perhaps from bleach but otherwise of unknown origin (11 RT 2491); and (6) there was a drop of Myers' blood of unknown time of origin on the heater grate in her hallway.

In contrast, the evidence against appellant regarding Mason was not only strong, it contained all of the shocking and prejudicial detail – related thrice – of a violent and sexual assault, evidence that no jury member could have separated in his or her mind from what may have happened to Myers.[62]

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[62] The details of the assault against Mason were related through the testimony of the officer and of the nurse who questioned her, and the reading of Mason's preliminary hearing testimony. (6 RT 1600-1601, 1617; 16 RT 3050 *et seq.*)

A. THE TRIAL COURT'S DENIAL OF THE DEFENSE MOTION TO SEVER THE COUNTS

1. Appellant's Motion *in Limine*

Prior to trial, appellant filed a motion to sever the Myers from the Mason counts. (3 CT 776 *et seq.*) In his motion, appellant asserted first that there were no "common element(s) of substantial importance in [the] commission" of the two crimes. More specifically, appellant asserted that there was very little similarity between the sexual assault of Ms. Mason and the alleged murder of Ms. Myers, except for the age and neighborhood of the two victims. Moreover, the fact that one involved a sexual assault and in the other there was no evidence of such an assault belied the assertion that they were of "the same class of crimes" pursuant to Penal Code section 954.[63] (3 CT 779-781.)

In the alternative, the motion also sought severance in the interest of justice, citing *Williams v. Superior Court* (1984) 36 Cal.3d 441, 452, and *Frank v. Superior Court* (1989) 48 Cal.3d 632, 641. (3 CT 781-782.) The gravamen of appellant's argument was that, in a separate trial of the Myers case, few of the facts of the Mason case would be admissible. In particular,

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[63] Section 954 provides, in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, . . . or two or more different offenses of the same class of crimes or offenses, under separate counts . . . ."

there was no evidence of a sexual assault against Myers, and the facts with regard to proving intent to rob or burglarize her were so generic as to be of little aid to the trier of fact. (3 CT 782-783.) Moreover, as this Court held in *People v. Ewoldt* (1994) 7 Cal.4th 380, proving identity required an even higher degree of similarity. (3 CT 784-786.)

Third, the defense argued that the brutal facts of the sex-crime charges against appellant in the Mason case were particularly likely to inflame the jury against him. (3 CT 786-788.) Fourth, he argued, correctly, that it was improper to join such a weak capital murder case with such a strong sexual assault case. (3 CT 788-789.) And finally, addressing the final points of the standards set out in *Williams v. Superior Court*, *supra*, 36 Cal.3d at page 545, the defense motion argued that the fact that one of the charges carried the death penalty required a higher degree of scrutiny of the joinder of counts, and that no substantial judicial benefits would be gained from a joined trial. (3 CT 789-790.)

2. The Hearing on the Motion

At the hearing on the motion to sever, defense counsel focused on the prejudice inherent in allowing the evidence of the sexual assault on Mason to come into the murder trial with respect to Myers:

> I don't think we have to just rely on that in the abstract. When we had jury selection, not really jury selection, but time

> qualification going on the other day, and the Court was reading the charges, you know, I can indicate to the Court that I noticed a substantial difference in how jurors reacted to the charges. Not true when the Court read the charge of murder, with the very noninflammatory circumstances of burglary and robbery, but when the Court read the rape charges. And in line with that, the special allegation that it involved a person over the age of 70, quite honestly, I saw changed looks. I heard some gasps. The tenor of the courtroom changed at that point.
>
> I mean, I guess it just speaks the obvious to say, to state, how prejudicial allowing this type of evidence in, in a death penalty case[, a] death penalty murder case would be to Mr. Jackson and how this would be violent to his due process. I can't think of anything that would be worse, other than maybe a child molest type prosecution.
>
> We are talking about the rape of an 87-year-old woman. Unless that evidence is so relevant and so material to the murder case, and I'll deal with that in a second, I can't imagine how Mr. Mitchell can overcome -- the prosecution can overcome the prejudice that's going to cause Mr. Jackson, and having jurors in a fair and dispassionate manner, exam[ine] whether or not he's guilty of the murder charge in this case. (3 RT 1309-1310.)

The murder case, counsel pointed out, was in comparison non-inflammatory, because there was no body, no photographs, no physical evidence, and no inflammatory special circumstances. (3 RT 1312.) Moreover, there was little cross-admissibility, and the fact of the sexual assault against Mason would encourage the jury to speculate that Myers was sexually assaulted, too.[64] (3 RT 1313-1314.)

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[64] Again, the prosecutor made full use, in his guilt- and penalty- (continued...)

The trial court's response referenced appellant's "confession." If the Myers murder were tried separately, the court would be inclined to admit the entire confession because the statements regarding Myers, if that is what they were, came in response to questions about Mason:

> But, at any rate, if this was just one count of 187 against Miss Myers, that entire confession would come in. You can't separate it because it is so bound up and intertwined with everything. And then the People have the right to introduce evidence that he was making a false and misleading statement to the police, and bring in impeachment evidence from the Myrna Mason robbery, rape and attempted murder. So regardless of which count was being tried, the whole thing would come in.
>
> That's the key here. It's not only cross admissibility of evidence, it's the pivotal evidence which anchors both counts. (3 RT 1316-1317.)

Counsel responded that cross-admissibility usually refers to physical evidence, and that Evidence Code section 352 would be available to limit the details of the Mason case that might be used to impeach appellant's statements to the police. (3 RT 1317-1318.)

The court, responding to this and defense counsel's statement that appellant's statement to police is not a direct confession to the death of Myers, stated:

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[64] (...continued)
phase closing arguments, of just such speculation concerning a sexual assault against Myers, as discussed fully at pp.305-306, 401-403, *post.*

> And that's why -- that's why the entire statement would have to come in, as well as impeachment evidence from the People, because it isn't, it isn't, a confession that he stabbed Geraldine Myers. It's of an exceedingly strong admission.
>
> And if we want to talk about the inflammatory nature of that case by Mr. Jackson's admission, he was in this woman's house. He was eating a sandwich. He was surprised when she happened to confront him. And he stabbed her with something he referred to as a machete knife, apparently in the back, and the blade coming out her chest.
>
> And then putting her in the car, and grabbing her by the hair, and driving her apparently to some remote location and dumping the body. I mean, that's pretty inflammatory. (3 RT 1318.)

Counsel responded that there was little physical evidence at the scene to corroborate any of those parts of the "confession," but the court, maintaining its focus on the statement to the police "anchor[ing] both counts," denied the motion to sever. (3 RT 1318-1320.)

B. THE DENIAL OF THE MOTION TO SEVER WAS ERROR

Contrary to the trial court's conclusion, the cross-admissible evidence in this case was limited, there were no grounds on which to admit the most sordid details of the Mason assault in a separate trial on the Myers murder charge, and ample grounds to exclude them. The pairing of a weak murder case with a strong and inflammatory non-murder case was error of constitutional dimension.

1. Statutory and Case Law

Section 954 provides, in relevant part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or . . . two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated." The statute also provides that, "the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately." (*Ibid.*)

Section 954.1, added by Proposition 115 in 1990, provides as follows:

> In cases in which two or more different offenses of the same class of crimes or offenses have been charged together in the same accusatory pleading, or where two or more accusatory pleadings charging offenses of the same class of crimes or offenses have been consolidated, evidence concerning one offense or offenses need not be admissible as to the other offense or offenses before the jointly charged offenses may be tried together before the same trier of fact.

Also relevant to the issue of cross-admissibility are the provisions of Evidence Code section 1101, subdivision (b), which allow the admission of evidence of a defendant's having committed another crime "when relevant

to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, . . .) other than his or her disposition to commit such an act." (*Id.*)

Finally, there are the provisions of Evidence Code section 352, which 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." As applied here, and as appellant will explain below, section 352 would have mandated, in a separate trial on the Myers charges, that no mention be made in the Myers guilt trial of the sexual assault on Mason. There is nothing about it of sufficient relevance to the Myers crimes to overcome the severe prejudice of those charges, let alone the details underlying those charges.

Contrary to the trial court's reasoning, there was nothing about the sexual assault on Mason that was needed to give meaning to appellant's statements in the interrogation about stabbing and transporting a red-haired victim, other than that he had committed a home-invasion burglary and robbery at Mason's residence; that he took a fair bit of her property, much of which was soon traced to his residence; that he was quickly arrested and

following his arrest was interrogated; and that in the course of that interrogation certain of his statements – that the victim had red hair, was stabbed or killed and transported away and disappeared – did not seem to relate to the Mason incident for which he was arrested but rather, possibly, to Myers.

In *People v. Soper* (2009) 45 Cal.4th 759, this Court explained the difference between the issues of severance of properly joined crimes and the admission of facts underlying an uncharged offense. In the latter case, and in light of Evidence Code sections 1101 and 352, the burden is on the People to show that such evidence has substantial probative value that clearly outweighs its prejudicial effect. (*Id.* at pp. 772-773, citing cases.) When the issue is severance of properly joined offenses, the burden is on the defendant to "clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried. (*Id.* at p. 773, citing cases.) The burden is on the defendant to persuade the court that the danger of undue prejudice outweighs the countervailing considerations favoring a unitary trial. (*Id.* at p. 773.) Those countervailing considerations consist of the savings to the state in conducting one rather than two trials; the empaneling of and conducting voir dire for only one rather than two juries;

and reduced delay in disposition of the charges in the trial and appellate courts. (*Id.* at pp. 771-772)

Soper also explained that a defendant, in order to establish error on appeal, must show an abuse of discretion to the extent of falling outside the bounds of reason, and weighed against the benefits to the state (the above-referenced countervailing considerations) in the form of conservation of judicial resources and public funds. (*Id.* at p. 774.) Moreover, the determination of whether the trial court abused its discretion begins with the view of the record before the trial court at the time it made its ruling. (*Ibid.*) That is not, however, where it ends:

> We have held that even if a trial court's ruling on a motion to sever is correct at the time it was made, a reviewing court still must determine whether, in the end, the joinder of counts or defendants for trial resulted in gross unfairness depriving the defendant of due process of law. [Citations.]" (*People v. Rogers* (2006) 39 Cal.4th 826, 851[finding no such violation]; accord, *People v. Zambrano* (2007) 41 Cal.4th 1082, 1130 [same]; [*People v.*] *Mason* [2009] 52 Cal.3d 909, 935–936, [same]; see also *Bean v. Calderon* (9th Cir.1998) 163 F.3d 1073, 1084–1086 (Bean II) [finding such a violation]; see generally *United States v. Lane* (1986) 474 U.S. 438, 446, fn. 8 ["[M]isjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial"].) (45 Cal.4th at p. 783, parallel citations omitted.)

Soper then sets forth the analytical methodology: First, an analysis of cross-admissibility, and if the underlying charges would be cross-

admissible, "that factor alone is normally sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined charges." Even when there is no cross-admissibility, section 954.1 prohibits that fact, standing alone, from establishing the requisite abuse of discretion. (*Id.* at pp. 774-775.) Moreover, still assuming no cross-admissibility, the analysis turns to whether the benefits to the state are outweighed by (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case; and (3) whether one of the charges but not another is a capital offense. (*Id.* at p. 775.)

Regarding cross-admissibility, as *Soper* summarizes, the least degree of similarity is required to prove intent, a higher degree of similarity is required to prove common design or plan, and the highest degree of similarity is required to prove identity. (*Id.*, at p. 776, citing *People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.) With regard to identity, *Ewoldt* specifies, "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Soper,* 45 Cal.4th at p. 776*; Ewoldt, supra*, 7 Cal.4th at p. 403.) In this case, of course, there is insufficient evidence of what happened to Ms. Myers to come even close to finding a "signature."

The question presented here is whether, applying the *Soper* analysis and assuming some degree of cross-admissibility, there must nevertheless be severance because a very weak murder case has been joined with a very strong non-murder case, *and* the circumstances of the stronger, non-murder case are as inflammatory as the Mason sexual assault case. In a separate trial, section 352 would have mandated that, in a separate trial, evidence of the sexual assault not be admitted.[65] "Evidence is prejudicial within the meaning of Evidence Code section 352 if it uniquely tends to evoke an emotional bias against a party as an individual [citation] or if it would cause the jury to prejudg[e] a person or cause on the basis of extraneous factors. [Citation.]" (*People v. Foster* (2010) 50 Cal.4th 1301, 1331[internal quotation marks omitted], citing *People v. Cowan* (2010) 50 Cal.4th 401, 475.) It is difficult to imagine evidence more likely to "evoke an emotional bias" against appellant than the repeatedly-presented evidence of the sexual

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[65] It should be borne in mind, as will be more fully explained below, that the Mason charges included a residential burglary/robbery as well as sexual offenses, and no mention of the sexual assault was needed in order for a jury to appraise the possible relevance to the Myers homicide of the statements made by appellant during the interrogation following his arrest for the Mason offenses. And it was only those statements that made the Mason offenses relevant to or admissible at a separate trial on the Myers charges.

assault against Mason.[66] Excluding that evidence would have avoided such bias and would also have prevented the prosecutor from conflating the crimes and arguing, as will be discussed *post*, that appellant engaged in similar sexually assaultive conduct with Myers.

Of course, in addition to the state statutory standards governing the scope of a trial court's discretion whether or not to grant a severance, there is the overriding constitutional requirement that a defendant's due process right to a fair trial be preserved. The Ninth Circuit in *Bean v. Calderon* (1998) 163 F.3d 1073, in reviewing the denial of a defendant's severance motion, reversed a defendant's conviction on federal due process grounds fully applicable to this case.

Bean involved facts much closer to this case than those in *Soper*. Defendant Bean and his brother were charged with two robbery-burglary-murders. The evidence against Bean regarding the first incident ("Schatz") included a fingerprint and palm print at the scene; "strong indications" that a shoeprint in the garden were from shoes owned by Bean and his brother; testimony from a friend that Bean had told her the morning after the crime

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[66] The prejudicial nature of the Mason sexual assault evidence was before the trial court on the motion to sever, in the form of her gruesome and heart-breaking testimony in the preliminary hearing, read to the jury commencing at 16 RT 3042, and in particular 3050 *et seq.*

that he thought he had killed a woman; and admissions from Bean that he had stolen items similar to those taken from the Schatz home, as well as accurate descriptions of the location of the Schatz home and the location of their car that was stolen that night. (163 F.3d at p. 1075.)

In contrast, the evidence against Bean in the second incident ("Fox") was scant – a questionable fingerprint taken from the victim's glasses, and testimony from her neighbor that she had seen Bean sitting in bushes in the park across the street from Fox's residence on three separate occasions, the last one three weeks before the murder. (*Id.* at p. 1076.)

Bean was convicted, *inter alia*, of both murders, robberies, and burglaries, along with three special circumstances, and sentenced to death. (*Ibid.*) The Ninth Circuit, however, reversed the convictions regarding the crimes against Ms. Fox on grounds that are directly applicable to this case.

Bean had twice sought severance on the grounds that there was no cross-admissibility and the pairing of the relatively weak with the relatively strong case. The trial court upheld the joinder on the basis of the "considerable similarity" between the crimes, and that any prejudice could be minimized through jury instructions. (163 F.3d at p.1083.) The prosecution in its closing argument repeatedly urged the jury to consider the

similar "modus operandi," and that having done it once, it was much easier to do it again three days later and 10 blocks away.

The Ninth Circuit held that the joinder of the Schatz and Fox charges was so prejudicial that it resulted in a denial of due process. (*Bean v. Calderon, supra,* 163 F.3d at p. 1084.) The prejudice resulted from the disparity between the substantial evidence of guilt in the Schatz incident and the minimal evidence of guilt regarding Fox, resulting in the former crime's tainting of the jury with regard to the latter. (*Ibid.*) As the Court of Appeal explained, "'it is much more difficult for jurors to compartmentalize damaging information about one defendant derived from joined counts, than it is to compartmentalize evidence against separate defendants joined for trial[.]'" (*Ibid.*) Moreover, studies have established "'that joinder of counts tends to prejudice jurors' perceptions of the defendant and of the strength of the evidence on both sides of the case.'" (*Id.* at p. 1084, quoting *United States v. Lewis* (9th Cir. 1986) 787 F.2d 1318, 1322.)

With that legal background, appellant will argue (1) that while there was limited cross-admissibility of *some* of the crimes against Mason, there was no cross-admissibility of the *sex crimes* against Mason; and (2) that the coupling of the weak capital case with the strong and inflammatory non-

capital case, produced a fundamentally unfair trial of the Myers charges in derogation of appellant's Fifth and Fourteenth Amendment rights to due process.

2. There Are No Grounds Upon Which the Sex Crimes Against Mason Were Cross-Admissible in the Myers Case

The valid grounds for cross-admissibility in these two cases are limited, and in no instance are the sex crimes, with all of their sordid details, cross-admissible. Thus, the issue is whether, consistent with due process, the cross-admissibility of non-inflammatory charges can be allowed to bootstrap extremely inflammatory, but non-cross-admissible charges into an extremely weak capital murder case.

As noted in the foregoing section, there were some aspects of the Mason crimes which were cross-admissible, for the limited purpose of explaining appellant's comments to the police during their interrogation: that he had committed a home-invasion burglary and robbery at Mason's residence; that he took a fair bit of her property, much of which was soon traced to his residence; that he was quickly arrested and following his arrest was interrogated; and that in the course of that interrogation certain of his statements – that the victim had red hair, was stabbed or killed, and transported away and disappeared – did not seem to relate to the Mason

incident for which he was arrested but rather, possibly, to Myers. In the total absence of evidence, however, of any sex crimes against Myers, the importation of those aspects of the Mason case into a separately-tried Myers case would have been error.

Evidence Code section 1101, subdivision (b) would allow evidence in the Mason case to be introduced in a separate Myers-case trial if relevant to prove motive, opportunity, intent, preparation, plan, knowledge, or identity. Of these, as has been explained, identity requires the highest degree of similarity, amounting to "pattern and characteristics . . . so unusual and distinctive as to be like a signature." (*People v. Ewoldt, supra,* 7 Cal.4th at p. 403.) In this case, the perpetrator or perpetrators of the two crimes entered elderly ladies' houses late at night, five weeks and four blocks apart, and stole from them. This does not amount to a signature. Even if it did, the complete absence of evidence of a sex crime against Myers would preclude the use of the Mason assault to show identity.

So, too, regarding intent. Given the absence of either evidence or charges relating to sex crimes against Myers, there would have been no valid intent-related purpose to cross-admitting the Mason sex crimes in a separate trial of the Myers crimes. Rather, there was only her disappearance, coupled with the apparent theft of a substantial sum of

money from the crumpled envelope on her bed. Given that there was no defense effort to show that the perpetrator entered by mistake or with some innocent intent, proving entry with felonious intent was simple. In contrast, section 352 would have clearly barred the admission of sex crimes to show intent to commit burglary. Indeed, the danger of undue prejudice would have been enhanced by the admission of sex-crime evidence that was entirely unrelated to whatever intent evidence the prosecution could introduce regarding Myers. As argued above, there was no "signature" here. The sex-crime evidence added nothing but prejudice.

A similar analysis with regard to motive, opportunity, preparation plan, or knowledge yields similar results: There was no need for the prosecution to show motive with regard to the Myers crimes, nor knowledge, opportunity or preparation. As this Court has explained:

> [I]n establishing a common design or plan, evidence of uncharged misconduct must demonstrate "not merely a similarity in the results, but such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations." (2 Wigmore, [Evidence], (Chadbourn rev. ed. 1979) § 304, p. 249, italics omitted.) . . . . [¶] To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual. (*People v. Ewoldt, supra*, 7 Cal.4th at pp. 402-403.)

We don't know enough about what happened at Myers' residence to permit anyone to discern a common design or plan. Most important, however, *none of these factors would have rendered admissible in a separate trial on the Myers crimes the inflammatory details of the sexual assault on Mason.*

The trial court relied on the context of appellant's purported admissions, which seemed to relate to Myers but arose in the context of the police interview just after and regarding the Mason case. The trial court's reasoning exemplifies the dangers of bootstrapping in a case like this. Remember what the court said:

> You can't separate it because it is so bound up and intertwined with everything. And then the People have the right to introduce evidence that he was making a false and misleading statement to the police, and bring in impeachment evidence from the Myrna Mason robbery, rape and attempted murder. So regardless of which count was being tried, the whole thing would come in.
>
> That's the key here. It's not only cross admissibility of evidence, it's the pivotal evidence which anchors both counts. (3 RT 1316-1317.)

It is simply not so that any evidence of the rape (or other sex crimes) would have any relevance whatsoever in a separate trial on the Myers charges. Indeed, the only relevant matter would be that statements by appellant that may (or may not) have related to Myers arose in the context of questioning about the Mason crimes. And even if a court in a separate Myers trial considered itself bound to mention the charges regarding Mason, it is a far

cry from reciting those charges to putting before the jury the gruesome details of the sex crimes and interspersed successive choking incidents.

This Court's language in *Soper* seems to admit of at least the possibility of undue prejudice even when there is some cross-admissibility, in stating that cross-admissibility "is *normally* sufficient to dispel any suggestion of prejudice and to justify a trial court's refusal to sever properly joined offenses[.]" (*People v. Soper, supra,* 45 Cal.4th at p. 774, emphasis added, citing *Alcala v. Superior Court* (2008) 43 Cal.4th 1205, 1221.) Older cases bolster appellant's view that in a case such as this, sufficient prejudice might render the joinder inappropriate. The oft-cited *Williams v. Superior Court, supra*, 36 Cal.3d 441, stated the inquiry as follows: "[H]ad the severance motion been granted, would the evidence pertinent to one case have been admissible in the other under the rules of evidence which limit the use of character evidence or prior similar acts to prove conduct (Evid. Code, § 1101, subds. (a) and (b))." (*Id.* at p. 448.) In *People v. Baldaras* (1985) 41 Cal.3d 144, the Court described the first step of the *Williams* analysis in this way:

> Under *Williams*, the first step in assessing whether a combined trial was prejudicial is to determine whether evidence on *each* of the joined charges would have been admissible, under Evidence Code section 1101, in separate trials on the others. If so, any inference of prejudice is

dispelled. (36 Cal.3d at pp. 448-449.) (*Baldaras*, 41 Cal.3d at p. 172; emphasis added.)

In this case, while there may have been limited cross-admissibility, *each of the joined charges* – in particular, the sex-crime charges against Mason – would not have been cross-admissible. Now add in that the weak capital case was joined with a strong non-capital case, and that the very evidence that was not cross-admissible was the inflammatory evidence that would have been excluded at a separate trial, and the result is a fundamentally unfair trial on the Myers charges.

3. The Joinder of the Two Cases, Which Allowed the Prosecutor to Argue That Uncharged Sex Crimes Had Been Committed Against Myers, Violated Appellant's Due Process Right to a Fair Trial

Soper stated that, absent cross-admissibility, there are three factors "*any of which* might establish an abuse of the trial court's discretion . . . (1) whether some of the charges are particularly likely to inflame the jury against the defendant; (2) whether a weak case has been joined with a strong case . . .; or (3) whether one of the charges (but not another) is a capital offense . . . ." (*People v. Soper, supra*, 45 Cal.4th at p. 775, emphasis added, citing *People v. Arias* (1996) 13 Cal.4th 92, 127. In this case, while there is some cross-admissibility – though not, as just discussed, of the Mason sex crimes – *all three factors* are present, and in a most

pernicious way. That is, the weaker case is the capital case, and it is the stronger case which contains the highly inflammatory evidence which would otherwise be inadmissible at a separate trail. It is that combination of factors which takes this case beyond even the very high bar established for overturning denials of severance in this state, and renders the trial below fundamentally unfair and a denial of due process.

The strongest evidence of this is the initial jury's penalty-phase verdict. Even with the Mason sex-crime evidence, eight members of the jury which heard the guilt-phase evidence voted for life, with one or more of them basing that on lingering doubt.[67] (16 CT 4477.) There was no physical evidence linking appellant to the Myers crimes, nor to Myers' car; there was little evidence – and that only from witnesses under coercive

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[67] In a motion filed prior to the second penalty phase trial, asking the trial court to set aside the possibility of a death verdict in a second penalty trial, defense counsel made the following assertion:

> Following the court's declaration of a mistrial on the "penalty phase" trial, and during an informal conversation between the prosecution, defense counsel, and almost all of the jurors, it was learned that, at the time the mistrial was declared by the court, the jury was deadlocked 8 to 4 in favor of life imprisonment without the possibility of parole, with one or more of them expressing a "lingering doubt," as argued by the defense. (16 CT 4477.)

While this statement was not made in a declaration under penalty of perjury, it was never contradicted by the prosecutor on the record.

police questioning – suggesting that appellant *might* have been the one who drove Myers car to Las Vegas; and there was only the rambling and nearly incoherent "admissions" in his initial, station-house police interview, which may or may not have described the Myers crime, and the results of the initial dog-sniff experiment (about which much more, *post*), to implicate him in the crime. That should be sufficient to show the high probability of undue prejudice.

There was, however, more, because the joinder provided the opportunity for the prosecutor both to explicitly rely on the Mason evidence to gain the Myers conviction, and to improperly import the sex crimes of the Mason case into the Myers case.

In his closing argument, the prosecutor invited the jury to first analyze the Mason evidence, which he characterized – accurately – as undisputed. (22 RT 4045-4046.) He went on:

> Because it's the details of the commission of those crimes [against Mason], the defendant's conduct in the commission of those crimes and afterwards, the evidence that was collected during the investigation of those crimes, and the defendant's statements when he was being questioned about those crimes that *prove beyond a reasonable doubt that he is also the one who viciously attacked and murdered Geraldine Myers* on May 13th, 2001. (22 RT 4046; emph. added)

It is hard to imagine a more obvious example of the State's use of a strong non-capital case to bolster a weak capital case than a prosecutor's

argument that the evidence in one case proves beyond a reasonable doubt the defendant's guilt in another case. But it does not stop there. After taking the jury in detail through the Mason crimes, including the sexual assault and the multiple instances of choking (22 RT 4047-4053), the prosecutor turned to Myers. He then, not so accurately – and indeed improperly – imported the sex crimes against Mason directly into the Myers case:

> Neither place was ransacked. Not Myrna Mason's, not Geraldine Myers'. And that tells you something. The person who attacked Gerry Myers, like the person who attacked Myrna Mason, their primary motivation wasn't theft. It was a concurrent or secondary motivation, yes. *The primary motivation was something else: violent, vicious sexual assault.* (22 RT 4045; emph. added.)

And the prosecutor's speculation went further:

> 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.)

As to the relative lack of blood at the scene and in Myers' car, the prosecutor argued:

> [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.)

There was no evidence of a sexual assault against Ms. Myers. None whatsoever. Yet by virtue of the improper joinder of these cases, the prosecutor could import the "violent, vicious sexual assault" against Mason, as well as the manner of death – choking – into the Myers case. As shown above, however, there was nothing about the sex crimes against Mason that would have been admissible in a separate trial on the Myers crimes.

In *Bean v. Calderon, supra*, the Ninth Circuit discussed the difficulty a jury has in compartmentalizing the evidence, and, as in that case, the instructions given here did not specifically admonish the jurors that they could not consider evidence of one set of offenses as evidence establishing the other. (163 F.3d at p. 1084.) Instead, the prosecutor was given free rein to conflate the two.

Thus, despite whatever cross-admissibility there was, the coupling of these cases allowed the most inflammatory parts of the very strong non-capital case to be imported into the weak capital case. Even accounting for the state's "countervailing considerations," the denial of the motion amounted to an abuse of discretion to the extent of falling outside the bounds of reason. (*People v. Soper, supra*, 45 Cal.4th at p. 774.)
Finally, the error was exacerbated by the trial court's failure to instruct with CALJIC 2.50 (Evidence of Other Crimes). This was initially offered by the

prosecution, but withdrawn. (21 RT 3940.) This failure to instruct on the limits of the use of the Mason sex-crimes evidence in their consideration of the Myers crimes exacerbated the error and removes this case from the orbit of those in which the jury might be assumed to be able to compartmentalize the evidence. (*Bean v. Calderon, supra*, 163 F.3d at p. 1085.) Instead, the joinder resulted in a fundamentally unfair trial on the Myers charges and a denial of due process. Under *Chapman v. California* (1967) 386 U.S. 18, 24, it will not be possible for the state to show beyond a reasonable doubt that the error was harmless.

It is difficult to read through the facts of the Myers case standing alone and not come away with doubt both as to what happened and as to whether appellant was the responsible party. It is equally difficult to read through the facts of the Mason crimes and not come away angry and upset. Appellant set forth the facts, *ante*, as he did – reciting the Myers case before the Mason case – for a purpose. That purpose was to show that the prosecution's case, in Myers, was on its own extremely weak, and there is a very strong possibility that, had the trial court not erred by denying severance, the Myers evidence would not have led to a conviction.

II. THE COURT VIOLATED APPELLANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY ADMITTING DOG-SNIFF IDENTIFICATION EVIDENCE WITHOUT HOLDING EITHER A *KELLY* OR AN EVIDENCE CODE SECTION 402 HEARING TO PRELIMINARILY ASSESS ITS VALIDITY

A. INTRODUCTION TO ARGUMENT

There were four separate occasions when dogs were used in the investigation of this case. It is important to distinguish among them, because they involved different uses of dogs, and appellant's challenge goes to only some of those uses. The four occasions were: (1) a June 22, 2001 early-morning trailing from the scene outside Mason's house, across the street and down the block to the trash can containing her purse and to the houses behind and on either side of the trash can; (2) a trailing later that morning at the Spruce Street Station, attempting to identify appellant as the perpetrator of the Mason crimes; (3) a June 25, 2001 trailing in the basement of the Orange Street Station, leading to a purported scent identification of appellant as the perpetrator of the Myers crimes; and (4), on February 5, 2005, between the first and second penalty trials, two trailings at the San Bernardino Police jail holding area leading to further purported identifications of appellant. Appellant raises legal challenges concerning only the evidence resulting from the use of dogs on the latter two occasions.

It is also important for the discussion that follows to distinguish among six possible uses of forensic canines, and in particular between the two uses occurring in the present case. Four possible uses, not involved in this case, are (1) tracking, in which the dogs are trained to follow ground disturbances, crushed vegetation, and, although a human odor component may be present, they are not required to match a scent; (2) article detection, in which dogs are trained to locate items recently deposited within a search area; (3) substance detection, used for detecting the presence of narcotics, explosives, arson accelerants, or human remains; and (4) area search and rescue by canines trained to search mass disaster areas for the presence of live humans. Most relevant to this case are the two other uses of canines: trailing, and scent-identifications. These have been described in the forensic literature as follows:

> Trailing canines are trained to match the volatiles profile (scent/odor) acquired from an article of evidence to a matching trail of scent/odor present on the ground or in the field. . . . Scent identification line-up canines are trained to use the scent/odor acquired from an article of evidence to identify the suspect of a crime from a line up of scented objects.[68] (Eckenrode et al., *Performance Evaluation of the Scent Transfer Unit (STU-100) for Organic Compound*

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[68] Eckenrode, et al., used the European method of presenting the dogs with identical-looking scented objects, one of which contains the target scent, rather than human targets.

Collection and Release (July 2006) 51:4 J. Forens. Sci. 780 [Appendix A].)

The distinction between trailing and scent identification is important because in the court below, the crucial purported scent identifications involved both trailing and scent identification. The trial court's fundamental error was that it applied the law as if only trailing were involved, while in their most significant aspects they were scent identifications. This was error because while trailing and tracking have a long history of acceptance, scent identifications are the least accepted in the law and the most subject to error, and human influence, in the field.

In the discussions which follow, "tracking" and "trailing" will be used interchangeably. Counsel and the trial court, as well as some of the cases cited, commonly use "tracking" to describe what in the formal sense is really trailing. Whichever term is used, it is used to describe on-scene, contemporaneous or nearly contemporaneous searches for a perpetrator or other evidence, as distinguished from the scent identifications, in which the dogs were asked to distinguish between multiple possible targets, which occurred here.

B. SUMMARY OF THE FOUR USES OF CANINES IN THIS CASE

1. The June 22, 2001 Trailing at the Mason Residence

In the early morning hours of June 22, 2001, Sheriff's Deputy Coby Webb and her dog Maggie Mae went to the Mason residence and collected scent from the shoe print in the garden. She used a Scent Transfer Unit (STU) to collect the scent onto gauze pads within the unit. (19 RT 3538-3541.) Webb then presented one of the two gauze pads with the collected scent to Maggie, who immediately trailed from Mason's residence across the street, to around the trash can in front of and between the Harris and Schrader houses. Deputy Webb flipped back the trash-can lid and discovered Mason's black purse. Maggie then went up one of two side-by-side driveways and onto a porch (the Schraders'), then turned and went to the Harris house on the right, crossing the driveways. (19 RT 3542.) Maggie worked in the area around the side of the house closest to the Shraders', near the gate to the backyard, working that house for quite a bit, and seemed confused, so Webb moved her back closer to the trash can where she knew she had scent, Maggie then continued to trail down the street, and then lost the scent. (19 RT 3543-3544.) Deputy Webb testified that Maggie's confusion was due to "pooling" of scent around the

Harris/Jackson residence from too many scent trails, not knowing which one to take. (19 RT 3544.)

This was a classic use of trailing, unfettered by scent identification. Appellant raises no issue concerning this evidence.

2. The June 22, 2001, Trailing and Attempted Scent Identification at the Spruce Street Police Station

Later the same morning, after appellant had been taken into custody, Deputy Webb and Maggie sought to identify appellant as the perpetrator of the Mason crimes. Starting from the station-house lobby where she was told appellant had been, Webb harnessed Maggie and presented her with the scent pad collected from the shoeprint, and Maggie began to trail. (19 RT 3548-3549.) Using the diagram on Exhibit 140, Webb described Maggie's path, leading first into an interview room with a couch and toys, coming right out, and then into Interview Room 1, where Mr. Jackson and an officer were sitting, and Maggie went in and smelled Mr. Jackson and just sat there. (19 RT 3552-3553). She did not continue to trail, and Webb noticed the air-conditioning was on. (19 RT 3553). Webb concluded that Maggie "had trailed the subject and stopped right at him and wasn't sure – I've noticed with Maggie, when she gets confused, she will just stop, which tells me she did not know which subject was the possible suspect. But she was – she did not commit herself to jump up on Mr. Jackson." (19 RT

3553.) Because Maggie did not attempt to leave the room and go elsewhere, Deputy Webb explained, her actions indicated that the trail stopped there. (19 RT 3553.)

This "trailing" was problematic both because it involved a scent item brought from the crime scene to another location, and a scent-identification at the end – that is, choosing between two possible persons in Interview Room 1 – and thus was not a classic trailing to locate a suspect. It did, however, expose to Maggie appellant's scent and what he looked like, which could have affected her later trail and alert. Moreover, while the failure of Maggie to make a clear alert at the end made it of doubtful relevance and doubtful admissibility, it was also of doubtful harm to appellant, considering the strength of the other prosecution evidence regarding Mason. Accordingly, appellant will not here challenge the admission of this evidence. In contrast, the trails and scent identifications described below were problematic, objectionable, and prejudicial in multiple ways.

3. The June 25 Orange Street Station Basement Trail and Scent Identification

Three days after the dog Maggie had trailed into the interview room at Spruce Street and sniffed but did not clearly alert on appellant, another trail using Maggie was arranged in the basement of the Orange Street

Station. This time the scent item presented to the dog was the crumpled manila envelope found on Myers' bed and identified by her family as having contained (or at minimum being like those which contained) the larger denomination cash she carried in her purse (and was now missing therefrom).[69]

Officer Tina Banfill (Gould)[70] arranged the dog-scent trail in the basement of the Orange Street Station after determining that appellant had not previously been there. Banfill followed Deputy Webb's instructions to have the basement air-conditioning turned off (15 RT 2936), and to lay out a trail from the street entrance to another room, at least two-three turns away, which turned out to be the former men's locker room . (15 RT 2937.)

Detective Barnes testified that his instructions from Officer Banfill, the dog's handler, was to put the suspect in an area where he couldn't readily be seen when she came into the basement area. (17 RT 3182.)

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[69] Criminalist Timothy Ellis identified Exhibit 78 as that envelope, and explained that it was very dark in color because of the Ninhydrin it was treated with in an attempt to lift latent fingerprints. (15 RT 2923.) The Ninydrin contamination of the envelope is the subject of further discussion in the argument which follows, at pp. 224-225.

[70] Officer Banfill had the last name Gould by the time of trial. (17 RT 3203.)

In the locker room, Barnes and Detective Johnson were in casual attire, and were wearing sidearms. Jackson was in orange jail jumpsuit and his hands were cuffed in front of him. (17 RT 3174, 3187.)

They brought Jackson in via the alley-way door, moved toward the elevator, stopped, and then went down a hallway past the Communications Center door and into the locker room. (17 RT 3176, Ex. 113.) Detective Johnson sat in the first row of benches; they placed Jackson in the second row; and Barnes remained in the first row where he could also maintain visual contact with Jackson. (17 RT 3177.)

Gould had both the manila envelope, Exhibit 78, and a scent pad which had been exposed to it, with her. (15 RT 2838-2839.) Deputy Webb decided to use the envelope as the scent item for the dog. (15 RT 2842.) The dog (Maggie) trailed from the entrance to the locker room. The locker room door, which was closed, was opened for the dog, and Maggie went past the row of benches that Barnes and Johnson were in, to and down the row in which Jackson was seated. Barnes initially testified that the dog almost playfully jumped up onto Jackson's lap. (17 RT 3178-3179.) On cross-examination, Barnes changed his description to say that the dog went up to Jackson, put her paws on the bench and her head next to his chest, though Barnes did not see

the dog physically make contact with Jackson because Jackson leaned back to avoid the contact. (17 RT 3188-3189.)[71]

4. The Between-Trials Dog Trails at the San Bernardino Police Department

Between the two penalty trials, in an attempt to bolster its case to overcome the lingering doubt expressed by first-trial jurors, the prosecution arranged, over defense objection, a further trail and scent identification attempt. These were arranged and conducted by the prosecution's dog-sniff expert, Dr. Lisa Harvey, in the San Bernardino Police Station jail holding section, because appellant had never before been there. (37 RT 6510.) She used two dogs, Shelby and Dakota, and neither made a clearly positive identification of appellant. (37 RT 6515, 6517-6518.) Nevertheless, the jury was shown a videotape of the trails, with Harvey providing running commentary. (37 RT 6519 *et seq.*) Shelby trailed to between two cells, in one of which appellant was located, but did not go into his cell. Harvey declared that she was following someone's scent to the area, but could not

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[71] Detective Johnson confirmed many of the details reported by Detective Barnes, including that they entered with Jackson through or near what was apparently the same door as did Deputy Webb and the dog. (See Ex. 113; 17 RT 3205-3206; 15 RT 2935) Given that Maggie was already familiar with appellant's scent, from both of the June 22 trailings, she may have been as aware of his scent from those trailings as from the Ninydrin-contaminated manila envelope, and was presumably aware of his physical appearance as well.

say why the dog did not make an identification. (37 RT 6513-6515.) Dakota did somewhat better, and after walking into a cell and sniffing appellant, and walking back out, Harvey opined that this was sufficient to constitute an identification. (37 RT 6517-6518.) A more detailed description of the faulty trails will be set forth in the penalty phase argument, *post.* While these dog trails and scent identifications relate specifically to the second penalty phase, what is said here as part of the overall dog-sniff argument apply to them also, for their failings are of a piece with the Orange Street Station basement trailing. Further argument will appear later, along with the other canine-related penalty phase arguments.

C. THE ADMISSION OF THE ORANGE STREET STATION AND SAN BERNARDINO TRAILINGS AND SCENT IDENTIFICATIONS WERE *KELLY* ERROR AND PREJUDICIAL

What follows is a multi-part legal argument. Preliminarily, it is well to keep in mind that there can be no doubt of the prejudicial nature of the erroneous admission of the two Orange Street Station and San Bernardino trailings and scent identifications. With regard to the June 25, 2001 Orange Street Station basement trailing introduced in the guilt phase trial, there was scant other evidence connecting appellant to the Myers crime – too scant to

constitute corroboration of what was, at best, a confused and confusing "admission." With regard to the San Bernardino trailing before the second penalty trial, it was added to what was essentially the same evidence – with one exception – as presented in the guilt trial. What made it prejudicial is that the second penalty jury found it to be sufficient to overcome the lingering doubt expressed in the eight-to-four vote of the first-trial jurors for life without parole.

As noted above, however, the following discussion will focus principally on the Orange Street Station scent-identification, without which the prosecution evidence was unlikely to have persuaded any rational jury to have found appellant guilty of the Myers crimes.

1. The Trial Court Erred in Denying the Defense Motion for a Hearing to Assess the Dog-Sniff Evidence Under *People v. Kelly*

Prior to the first trial, the defense moved to exclude the canine identification evidence. (4 CT 802 *et seq.*) According to the defense, this evidence constituted a "novel" scientific technique, subject to the strictures of *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*), and *People v. Leahy* (1994) 8 Cal.4th 587 (*Leahy*), and lacking the foundational requirements of *People v. Malgren* (*Malgren*) (1983) 139 Cal.App.3d 234 (disapproved on other grounds, *People v. Jones* (1991) 53 Cal.3d 1115, 1144).

At the hearing on the motion, defense counsel made precisely the point that will be made here: That the scent identifications in this case went beyond the facts of the cases that had approved dog tracking or trailing, in ways sufficient to bring them under the purview of *Kelly*. (1 RT 950-952.)

The defense argued that the scent identification of appellant in the basement of the Orange Street Station involved *both* tracking and scent-identification, and to the extent that it involved the latter, this was an unproven scientific technique.

The trial court ruled that the cases did not require a *Kelly*-type hearing here, because there was no use of a scientific device, and because it involved tracking, not scent-discrimination. Indeed, the court opined that the tracking portion of the experiment served to corroborate the scent identification:

> In this particular case, there wasn't any scientific mechanism utilized to collect or to preserve this scent. And as far as a subsequent identification lineup, I don't know if I would call this a hybrid case or not. More appropriately it was one of tracking. In this particular case, the tracking was in a situation that was actually constructed by the police. The defendant went on a fairly complex path through the police department and into the basement, and this dog tracked that path and alerted on -- ultimately alerted on the defendant.
>
> I think from a tracking standpoint, the tracking is important because it gives circumstantial corroboration for the actual alerting rather than an actual scent identification where

> the dog smells a pad, walks over and alerts on pads one, two, three, four, or five, and that -- that's the evidence.
>
> In this particular case there was a complex path that the dog actually followed in tracking the scent. And so from my standpoint at least, the way I evaluate this, this is more of a tracking case than a scent identification because this was nothing more than a tracking done in controlled -- in a controlled context rather than being out in the field.
>
> The fact that this was in a controlled atmosphere and the officers knowing the path that the defendant actually took through the police department and the testimony that the dog actually followed that path identically I think is strong circumstantial evidence that the dog was on the proper scent. (1 RT 964.)

Nevertheless, the court indicated that it would consider the five foundational requirements (described below) set forth in *Malgren, supra*, before the evidence was introduced. (1 RT 964-965.)

The defense sought a contested section 402 hearing to show that the *Malgren* foundational requirements were not met. (1 RT 965.) After further discussion on that day (1 RT 965-967), on the following court day the trial court ruled that the foundation had been laid in the preliminary hearing, and denied the defense request for a contested hearing: "[T]he court makes the specific finding that the foundational requirement is satisfied. And based upon the defendant's offer of proof, I do believe it does go to the weight that the jury should attach to the this evidence, if any." (2 RT 981.)

2. The Legal Landscape at the Time of Trial Regarding Canine Evidence

(a) The Tracking and Trailing Cases Upon Which the Trial Court Relied

The Court of Appeal cases decided before appellant's trial involved classic dog tracking or trailing – that is, cases in which a dog was brought to a crime scene and ultimately led police to the perpetrator.

The first of these was *People v. Craig* (1978) 86 Cal.App.3d 905. Three men in a white Chevy Nova pulled into a gas station and robbed the cashier's booth. The cashier and two other employees pursued the Nova in two vehicles, until the three suspects exited the vehicle and ran. A trained canine sniffed inside the Nova, and then led his handler to the location of the three men. (*Id.* at pp 909-910.) The defendant challenged the use of the dog-trailing evidence under *Kelly*. The court held that *Kelly* was not applicable, and that rather than a question of general acceptance in the scientific community (*Kelly*), the question involved one particular animal's ability to utilize a subjective, innate capability. (*Id.* at pp. 915-916.) The court held that before dog-trailing evidence could be admitted the proponent of such evidence would have to make a foundational showing of the human-trailing ability and reliability of the particular dog. (*Ibid.*)

People v. Malgren, supra, 139 Cal.App.3d 234, expanded the foundational showing required by *Craig*. Malgren held that the following factors must be shown before dog trailing evidence is admissible:

> (1) the handler was qualified by training and experience to use the dog;
>
> (2) the dog was adequately trained in tracking humans;
>
> (3) the dog has been found reliable in tracking humans;
>
> (4) the dog was placed on the track where circumstances indicated the guilty party to have been; and
>
> (5) the trail had not become stale or contaminated. (*Id.* at p. 242.)

In *Malgren*, the defendant was found hiding in the bushes less than seven-tenths of a mile north of a house that had been burglarized, approximately 30 minutes after the burglary. (*Id.* at p. 237.)

*People v. Gonzale*s (1990) 218 Cal.App.3d 403 also involved a classic tracking or trailing scenario: the dog was presented with a pillow case containing some household articles, presumably left behind when a deputy, responding to a silent alarm, arrived to see a man fleeing. The dog sniffed the pillowcase, and found the suspect lying prone in some tall grass approximately nine-tenths of a mile away. (*Id.* at pp. 406-407.) *Gonzales* also held that a dog-tracking instruction, while requiring corroboration, need not require that the corroboration be "evidence which independently links the defendant to the crime; it suffices if the evidence merely supports

the accuracy of the dog tracking."[72] (*Id.* at p. 408.) In *Gonzales*, however, the failure to give an appropriate instruction on the need for corroboration required reversal.[73]

As noted, each of the just-discussed cases involved tracking or trailing from a fresh scent to the location of the perpetrator, and it is clear that the trial court in this case relied on at least *Craig* and *Malgren* in rejecting appellant's request for a *Kelly* hearing. A fourth case, however, also decided before the trial herein, makes clear the trial court's error. That case, *People v. Mitchell* (2003) 110 Cal.App.4th 772, involved a scent-identification scenario analogous to the one we are dealing with here. As discussed in the following section, the *Mitchell* court's ruling – that canine scent identification is subject to *Kelly* analysis, was directly applicable to this case.

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[72] The sufficiency of the instruction used in this case, CALJIC 2.16, which included the *Gonzales* court's corroboration holding, is discussed *infra* at pp. 255-264.

[73] The appellant in *Gonzales* did not challenge the admissibility of the dog-trailing evidence.

(b) *People v. Mitchell* – The Case Upon Which the Trial Court Should Have Relied

In *Mitchell*, the police found five bullet casings at the scene of a shooting. Mitchell had been identified as a possible perpetrator. Following Mitchell's arrest on another matter, the officers searching his home found some bullets of the same caliber and brand. (*People v. Mitchell, supra,* 110 Cal.App.4th at pp. 776-777.)

The prosecution arranged a scent-identification lineup. The vacuum-like device known as a scent transfer unit (STU) was used to collect scent onto a gauze pad from the expended bullet shells at the scene of the crime. Scent pads were also collected from shirts that Mitchell and another suspect had worn; other scents were collected from the shirts of other members of their Crips gang; and three others were collected as a control from three detectives. (*Id.* at p. 780.) The lineups were conducted in the manner established by European police agency protocols; that is, after the dog sniffed the scent-item, he was not presented with humans to choose among; rather, he was presented with a series of "line-ups" of scent pads. In *Mitchell*, the dog was presented with nine lineups of scent pads, and alerted only when the scents of the two suspects were present, and alerted on those specific scent pads. (*Id.* at pp. 780-781.)

At issue in *Mitchell* was the applicability of *Kelly* both to the STU and to scent-identifications in general, and as to both, the court held that *Kelly* indeed applied. As it applies to this case, the decision regarding the STU will be discussed separately, in the penalty-phase argument below addressing the trails conducted between the penalty trials. With regard to the scent-identification, the *Mitchell* court rejected the applicability of both the dog-tracking/trailing cases from California and scent-identification cases from other jurisdictions. The dog-tracking cases did not apply because their application would require a "dramatic revision of the final element of the *Malgren* test, that 'the trail had not become stale or contaminated.'" (*Id.* at p. 790, quoting *Malgren*, *supra*, 139 Cal.App.3d at p. 238.) Cases approving scent identification from other jurisdictions, the court found, had accepted the scent-identification evidence too uncritically, and were "too facile." (*Id.* at pp. 786-787, discussing *Winston v. State* (Tex.App. 2002) 78 S.W.3d 522, 527 ["there is little distinction between a scent lineup and a situation where a dog is required to track"]; and *State v. Roscoe* (1985) 145 Ariz. 212, 700 P.2d 1312, 1319-1320 [it is "common knowledge that some dogs, when properly trained and handled, can discriminate between human odors."].) Rather, while agreeing with the *Roscoe* court "'that no one knows exactly how or why some dogs are able to

track or scent, or the degree to which they are able to do so' (. . . 700 P.2d at p. 1319)," the *Mitchell* court could not "ignore the California foundational requirement that scent identification evidence have a tendency in *reason* to prove a disputed facts. (See *People v. Leahy, supra, 9 Cal.4th at pp. 597-598.*)" (100 Cal.App.4th at p. 790; emphasis in original.) The *Mitchell* court's next sentence is the most telling: "Difficulty in understanding the precise nature and parameters of a dog's ability to discriminate scents does not take this phenomenon out of the realm of science." (*Ibid.*)

The court explained its concerns as follows:

> [W]e are concerned in this case with the possibility that the scent of the shell casings found at the scene of the shooting may have been affected by the heat and pressure of being fired from a gun, the passage of time between when the casings were purportedly touched by defendant Mitchell, the conditions under which the casings were stored, and collection of the casings' scents by the scent transfer unit. Dog handlers D'Allura and Hamm testified that a scent will remain on an object for two to four months after it has been touched and that Reilly had succeeded in lineups conducted with objects that had been burned beyond recognition or surgically sterilized. But no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions. Thus, we are left with anecdotal rather than scientific explanations of Reilly's capabilities.
>
> We are also concerned about the absence of any evidence that every person has a scent so unique that it provides an accurate basis for a scent identification lineup. Neither D'Allura nor Hamm, who also has no background in science, is aware of any scientific data which supports the notion that each person

has a unique scent. On appeal, no such data has been brought to our attention. (*Id.* at p. 791.)

Many of the same concerns ought to have been brought to light in this case – not before the jury, but in a pre-trial *Kelly* hearing, the result of which, as explained below, would have been to exclude the evidence.

Finally, the *Mitchell* court relied on *People v. Leahy*, *supra,* 8 Cal.4th at page 606, for the definitive call on the application of *Kelly* to canine scent-identifications:

> "[A] technique may be deemed 'scientific' for purposes of *Kelly/Frye* if 'the unproven technique or procedure appears *in both name and description* to provide some definitive truth which the expert need only accurately recognize and relay to the jury.' [Citation.]" A scent identification by Reilly appears to provide a definitive truth, with Reilly being analogous to a machine that D'Allura (and only D'Allura) can calibrate and read. Thus, we conclude that *Kelly* should have been applied to this evidence. (*Mitchell, supra,* 100 Cal.App.3d at p. 793.)

In the same way, in this case, the scent identification by Maggie appears to provide a definitive truth, with Maggie being analogous to a machine that Deputy Webb, and only she, could calibrate and read.[74]

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[74] A second case involving scent-identification followed the *Mitchell* ruling. *People v. Willis* (2004) 115 Cal.App.4th 379 was decided January 28, 2004, well before the *Kelly* motion hearing in this case on October 6, 2004. (1 RT 923, 950.) While *Willis* came to the same conclusion as *Mitchell* with respect to scent-identifications, as distinct from tracking or trailing (115 Cal.App.4th at p. 386), it focused principally on the (continued...)

As discussed below, not only should the trial court have applied *Mitchell*, and thus *Kelly* and *Leahy*, to this case, but if it had done so, the evidence would not have survived *Kelly* scrutiny. Moreover, even now, given the current state of the scientific research in the field, scent identifications would not survive a *Kelly* analysis.

3. This Case Involves Scent Identification, not Simple Tracking or Trailing

As noted previously, the fundamental error underlying the trial court's denial of a *Kelly* hearing was the application of the dog-tracking cases (*Malgren* and *Gonzales*), rather than the scent-identification cases (*Mitchell* and *Willis*). The distinction is critical, and the trial court ignored crucial differences in this case from typical tracking or trailing, two of which occurred at the beginning of the tracking, and the other at the end.

The differences which occurred at the beginning of the tracking arose from the facts that the scent item presented to Maggie was not fresh, and it had been treated with the chemical ninhydrin. In typical tracking cases, the scent is picked up at the scene of the crime, a relatively short period of time after the crime has taken place. (See, e.g., *People v.*

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[74] (...continued)
application of *Kelly* to the use of the STU, and will discussed more fully *post*, in the penalty phase arguments.

Gonzales, *supra*, 218 Cal.App.3d at p. 406 [dog sniffed scent item 25 minutes after suspect fled]; *People v. Malgren*, *supra*, 139 Cal.App.3d at pp. 236-237 [dog ordered to track approximately 25 minutes after robber ran from scene].) Unlike such trailing or tracking cases, the scent item here was some 40 days old, came from an envelope which had been chemically treated, and then stored at room temperature. This raises issues regarding the effects of storage, contamination by the chemical and scent retention. With regard to all three, the science is anything but settled.

While Deputy Webb discussed Maggie's abilities, and Dr. Harvey described her own studies regarding scent aging, as in *Mitchell*, "no effort was made to present information from any academic or scientific sources, let alone peer review journals, regarding these testimonial assertions." (*Mitchell, supra*, 110 Cal.App.4th at p. 791.) To the extent that Dr. Harvey's testimony, or even her peer-reviewed article, could be considered a scientific source, it is "questionable whether the testimony of a single witness alone is ever sufficient to represent, or attest to, the views of an entire scientific community." (*Kelly*, 17 Cal.3d at p. 37.) Moreover, "[i]deally, resolution of the general acceptance issue would require consideration of the views of a typical cross-section of the scientific community, including representatives, if there are such, of those who

oppose or question the new technique." (*Ibid.*) Had the testimony of Dr. Harvey and the defense expert, Dr. Myers, been heard at a *Kelly* hearing, the trial court would have been hard-pressed to find that there had been general acceptance in the scientific community.

The same logic applies to the end-of-trail distinction between typical tracking and trailing cases and this case. In the former, as exemplified by the facts in *Malgren* and *Gonzales*, the fresh scent leads from the scene directly to a suspect. In this case, both pretrial and between trials, the dogs did trail, but at the end of the trail were presented with a choice of possible suspects. In one instance, Maggie clearly alerted on appellant, but we have no idea *why* she did so. Was it because his was the scent on the 40-day-old envelope; or his were the clothes (an orange jail jumpsuit) that were the brightest or most distinctive; or his was the scent that was most distinctive, or strongest; or his was the scent that was most familiar, because Maggie had sniffed him three days earlier in the Spruce Street Station interview room? None of these issues have been resolved in the scientific literature, and none were resolved in the testimony here.

Neither can the trial court's corroboration-by-tracking theory be credited. The court found that the scent identification was corroborated by the fact that Maggie tracked to appellant's location, but again, we can't

know why. Appellant's scent – or that of one of the detectives – may simply have been the freshest, or strongest. Indeed, appellant had entered through the same door as Maggie, and she may simply have been following his already-familiar scent. And even if it could be assumed that the dog was tracking a smell similar to what it discerned from sniffing the envelope, there would be no way to know what that means. Would it be that appellant (or one of the detectives) had a scent similar to that of the perpetrator, or only that appellant (or one of the detectives) had a scent similar to the scent of the perpetrator after that scent had been mixed with the scent of ninhydrin and stored at room temperature for 40 days? Further, as the most recent research – described below – has shown, we can't know, but must be suspicious, of the dog handler's influence.[75]

As recently as 2010, there has been judicial recognition of the differences between tracking/trailing and scent identification. "Like our sister courts across the county, we now hold that scent-discrimination lineups, whether conducted with individuals or inanimate objects, to be separate and distinct from dog-scent tracking evidence." (*Winfrey v. State* (Tex. Ct. Crim. App. 2010) 323 S.W.3d 875, 883, citing Taslitz, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup* (1990)

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[75] The research referenced is discussed, *infra*, at pp. 200-204.

42 Hastings L.J. 15, 42 (hereinafter, Taslitz) [in record commencing at 4 CT 866].); see also *Ramos v. State* (Fla. 1986) 496 So.2d 121, 123 [using dog to track a human to detect the presence of drugs of explosives is distinctive from using a dog in a lineup].)

Accordingly, the trial court erred in its adoption of the tracking cases, and rejection of the scent-identification cases, which in crucial aspects this case most closely resembles. All of the evidentiary and scientific concerns that led the *Mitchell* court to hold that *Kelly* analysis applies to scent identification line ups were fully applicable here. Neither *Mitchell* nor *Gonzales* involved a classic trailing from a fresh crime scene to a suspect hiding in a bush – a scenario providing its own circumstantial reliability. The *Mitchell* court was concerned that the scent on the crime scene scent objects (the bullet casings) may have been affected by the heat and pressure of being fired by a gun, by the passage of time between the defendant's purportedly touching them and the purported scent identifications (35 days[76]), and the conditions under which they were stored. (*Mitchell, supra,* 110 Cal.App.4th at p. 791.) Here there was similar reason to be concerned that the scent on the crime scene object (the envelope) may

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[76] The crime in the *Mitchell* case occurred on August 20, 1999; the scent line-ups were conducted on September 24, 1999. (*Mitchell, supra,* 110 Cal.App.4th at pp. 777, 780.)

have been affected by treatment with ninhydrin, by the passage of time (40 days), and by the conditions of storage (room temperature). The *Mitchell* court was also concerned about the absence of scientific data supporting the idea that every person has a scent so unique as to provide an accurate basis for a scent identification made far from the crime scene in both time and place. (*Ibid.*) The same concern is applicable here. Even if the perpetrator's scent was still intact and unchanged on the envelope, and even if appellant's own scent was similar enough to lead the dog to him, what does that mean? Nothing, unless there really is a reliable basis for believing that every individual has a unique scent, so unique as to make canine identification unerring.

The trial court should have been alerted to the difference between the ordinary dog trailing case and what took place in this case by the article attached to appellant's *Kelly* motion, in which it is explained:

> Even the briefest review of the scientific principles underlying dog scenting reveals that, contrary to the conclusions of many courts, there are significant scientific differences among the various uses of scenting: tracking, narcotics detection, and scent lineups. These differences make it dangerous to rely upon judicial precedent regarding the reliability of one form of dog scenting when addressing the reliability of another form. (Taslitz, *op. cit. supra,* 42 Hastings L.J. at p. 42, 4 CT 893.)

The foregoing article was supplemented, in appellant's motion, by one representing the views of a researcher in 1999 who came to much the same conclusions. Analyzing dog-scent discrimination in light of *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, 587 – a less exacting standard than that set forth in *Kelly* – Dr. Josef Wojcikiewicz came to the following conclusions: With regard to the whether the method has been tested, peer-reviewed and published, "Taslitz's (1990) opinion about the incipient stage of the research on dog-scent lineups is still valid, even taking into consideration some additional research on their reliability." (4 CT 987; J. Wojcikiewicz, paper presented August, 1999, to International Academy of Forensic Scientists, published on-line at <http://forensic-evidence.com/site/ID/ID_DogScent.html> (as of 10/12/2011). Further page references will be to the CT.) In his conclusions, Wojcikiewicz stated, *inter alia*:

> Canine identification of human scent does not yet have a proper scientific foundation. . . . The method has been introduced into trial proceedings too early, by overly hasty police practitioners [who] have caused miscarriages of justice. (4 CT 990.)

This provided ample warning to the trial court that a *Kelly* hearing was needed. Whether by its erroneous view of this as a dog-tracking case, its failure to review or to credit the articles submitted by counsel, or merely

an uncritical acceptance of canine abilities, the court erred. *Kelly* should have been applied, and had it been, the evidence admitted here would have failed the test.

D. *KELLY* APPLIES TO DOG-SCENT IDENTIFICATIONS BECAUSE THEY INVOLVE ALL OF THE DANGERS INHERENT IN SCIENTIFIC TESTIMONY

This Court, in *People v. Kelly, supra*, 17 Cal.3d 24, adopted the "conservative" test of *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013), to determine when a new scientific technique moves from the experimental stage to being sufficiently established and recognized to be admissible in court. Even when the U.S. Supreme Court adopted a less conservative standard (*Daubert v. Merrell Dow Pharmaceuticals, Inc.. supra*, 509 U.S. 579, 587), this Court maintained the *Kelly/Frye* – now denoted *Kelly* – standard. (*People v. Bolden* (2002) 29 Cal.4th 515, 545.)

The first prong of the *Kelly* test requires proof that the techniques is generally accepted as reliable in the relevant scientific community. The second prong requires proof that the witness testifying to the technique and its application is properly qualified as an expert. And the third prong requires proof that the person performing the test in the particular case used correct scientific techniques. (*People v. Kelly, supra*, 17 Cal.3d at p. 30.)

The underlying caution informing *Kelly* was to keep from the jury not-yet-established "'scientific proof [which] may in some instances assume a posture of mystic infallibility in the eyes of the jury . . . .'" (17 Cal.3d at p. 32, quoting *United States v. Addison* (D.C. Cir. 1974) 498 F.2d 741, 744.) As *Kelly* noted, "Exercise of restraint is especially warranted when the identification technique is offered to identify the perpetrator of a crime." (*Ibid.*) That, of course, is precisely the use made of the dog-scent identifications in this case.

The initial question which arises is whether dog-scent identifications involve a "new" scientific technique to which *Kelly* should apply. The answer is clearly "yes."

1. Dog-Sniff Identifications Involve All of the Dangers Involving Science that *Kelly* Seeks to Guard Against

The trial court in this case concluded that because scent identification did not involve a new scientific "device" or "process" as we are accustomed to thinking of them, *Kelly* did not apply. As to canine tracking, the trial court may have been right, at least as to that technique not being "new" to the law. (See *People v. Stoll* (1989) 49 Cal.3d 1136, 1156 [*Kelly* only applies to expert testimony which is based on a technique which is new to science, "and, even more so, the law"].) Scent-identifications, however, are a far more recent phenomenon, in both science and law. (*See,*

e.g., the research set forth *infra* in section E of this argument,, research which began only in the 1980's and, because of the small numbers of researchers and studies, has progressed quite slowly.) And no matter how long it has been in use by law enforcement, as this Court stated in *Leahy*: "To hold that a scientific technique could become immune from *Kelly* scrutiny merely be reason of long-standing and persistent use by law enforcement *outside* the laboratory or the courtroom, seems unjustified." (8 Cal.4th at p. 606.)

The *Mitchell* court set forth the applicable principles in an elegant, straightforward manner:

> "*Kelly* is applicable only to 'new scientific techniques.' [Citations.]" (*People v. Leahy* [*supra*] 8 Cal.4th [at p.] 605.[]) It "'only applies to that limited class of expert testimony which is based, in whole or part, on a technique, process, or theory which is *new* to science and, even more so, the law.' [Citation.]" (*Ibid.*) As stated by the *Leahy* court in discussing *People v. Stoll* (1989) 49 Cal.3d 1136 [], "by reason of the potential breadth of the term 'scientific' in the *Kelly/Frye* doctrine, the courts often refer 'to its narrow "common sense" purpose, i.e., to protect the jury from techniques which ... convey a "'misleading aura of certainty.'" [Citations.]' (49 Cal.3d at pp. 1155-1156.) According to *Stoll*, a technique may be deemed 'scientific' for purposes of *Kelly/Frye* if 'the unproven technique or procedure appears *in both name and description* to provide some definitive truth which the expert need only accurately recognize and relay to the jury.' (*Id.* at p. 1156, italics added.)" (*People v. Leahy, supra,* 8 Cal.4th at p. 606.)
>
> As explained in *People v. McDonald* (1984) 37 Cal.3d 351[]: "When a witness gives his personal opinion on the

> stand--even if he qualifies as an expert--the jurors may temper their acceptance of his testimony with a healthy skepticism born of their knowledge that all human beings are fallible. But the opposite may be true when the evidence is produced by a machine: like many laypersons, jurors tend to ascribe an inordinately high degree of certainty to proof derived from an apparently 'scientific' mechanism, instrument, or procedure. Yet the aura of infallibility that often surrounds such evidence may well conceal the fact that it remains experimental and tentative. [Citation.] For this reason, courts have invoked the *Kelly-Frye* rule primarily in cases involving novel devices or processes such as lie detectors, 'truth serum,' Nalline testing, experimental systems of blood typing, 'voiceprints,' identification by human bite marks, microscopic analysis of gunshot residue, and hypnosis [citation], and, most recently, proof of guilt by 'rape trauma syndrome' [citation]. In some instances the evidence passed the *Kelly-Frye* test, in others it failed; but in all such cases 'the rule serves its salutary purpose of preventing the jury from being misled by unproven and ultimately unsound scientific methods.' [Citation.]" (*People v. McDonald, supra*, 37 Cal.3d at pp. 372-373, overruled on another ground in *People v. Mendoza* (2000) 23 Cal.4th 896, 914 [].) (*People v. Mitchell, supra*, 110 Cal.App.4th at p. 783.)

The canine scent identifications in this case involved the very dangers recited in *McDonald* and quoted in *Mitchell*: the danger of the jurors tending to ascribe an inordinately high degree of certainty to the evidence, and embracing the aura of infallibility that often surrounds canine evidence, despite very real questions about its reliability – questions which were never fully explored below because of the trial court's denial of a *Kelly* hearing.

The trial court, in deciding to consider this a "tracking" rather than a "scent identification" case (1 RT 964), failed to even reach the question of "newness" of the scent identification. If it had, however, it might well have erred in finding *Kelly* inapplicable because scent identification does not involve a "scientific mechanism." (*Ibid.*, noting non-use of STU in the challenged identifications.) *Kelly* is not so limited. In *People v. Shirley* (1982) 31 Cal.3d 18, 56, this Court applied the *Kelly* consensus test to the use of hypnosis to "fill in the gaps" in the memory of a witness. (See also *In re Christian C.* (1987) 191 Cal.App.3d 676 [*Kelly* applied to therapist's observation of children's behavior with anatomically correct dolls to prove sexual abuse]; *Leahy, supra* [*Kelly* applied to eye movement test administered by officers to determine intoxication during traffic stops].)

Confirmation of the "scientific" nature of the scent identification evidence was provided by the testimony of the prosecution's expert, Dr. Lisa Harvey, who, in the guilt phase, sought to validate the technique by a description of her own "scientific" studies designed to validate scent identification. Dr. Harvey described several experiments, including one which she said proved that individual scents were of genetic origin (17 RT 3321-3322); described scientific theories about the source of human scent (17 RT 3322-3323); and described her study, published in a peer-review

journal, on the reliability of bloodhounds in criminal investigations (17 RT 3325-3327).

If the prosecution relies on science – or pseudo-science – to validate the technique used to identify appellant, then how can the technique not be scientific, in the sense that the jury may be prone to accept it unquestionably? It cannot be. Further, as the *Mitchell* court concluded: "Difficulty in understanding the precise nature and parameters of a dog's ability to discriminate scents does not take this phenomenon out of the realm of science." (110 Cal.App.4th at p. 772.)

In addition to the dangers of admitting scent-identifications as "scientific," there existed an additional danger, set forth in the Taslitz law review article already cited, *supra*, and which accompanied appellant's *Kelly* motion. (4 CT 866 *et seq.*) That danger is suggested by the title of the article, *Does the Cold Nose Know? The Unscientific Myth of the Dog Scent Lineup,* as well as the first section therein: "The Mythic Infallibility of the Dog." Taslitz carefully sets forth, and then debunks, what had become an all-too-easily accepted myth of canine infallibility, due to the plethora of stories about dogs finding lost people, detecting bombs and drugs, and tracking escapees, and sets forth the dangers of this myth in the courtroom use of scent identification. (42 Hastings L.J. at pp. 17-38 [4 CT 868-889];

See also *Illinois v. Caballes* (2005) 543 U.S. 405, 411-413 (Souter, J., dissenting) ["The infallible dog, however, is a creature of legal fiction."].)

In a paragraph which could have been written to the trial judge in this case, Taslitz notes that the scent lineups that had so far (as of 1990) survived legal challenges had done so principally as a result of the "courts' persistent use of standards that are used to determine the admissibility of more traditional forms of dog identification evidence such as tracking and narcotic detection." (Taslitz, at p. 19 [4 CT 870].) He documents the origins and pervasiveness of the myths surrounding canine forensic uses, both in fiction and in real life, and notes that "the greatest canine mythology has surrounded a single breed: the bloodhound." This resulted, in 1968, in an American Bar Association statement regarding "the risk that a jury will be swayed by a 'superstitious faith' in the bloodhound's accuracy." (*Id.* at pp. 26-27 [4 CT 877-878].) This is particularly relevant to the case at bench, for all of the canines used were bloodhounds, and Dr. Harvey repeatedly insisted that bloodhounds were superior to all other breeds, adding to the myth, but unsupported by any but her own research, or notions. (17 RT 3327 [bloodhounds can scent-discriminate; 17 RT 3333 [contamination does not seem to affect bloodhound]; 18 RT 3351 [Schoon research irrelevant because Schoon does not use bloodhounds] ; *but see* 18

RT 3384 [doesn't know any other scientists in her field, hasn't read any scientific findings on contamination related to bloodhounds]; *and see* defense testimony of Dr. Myers, 19 RT 3642 [no proven difference between breeds, little or no prior research on bloodhound superiority, and that being done is incomplete]. If little research had been done to show bloodhound superiority (and Dr. Harvey admitted of none other than hers), then, added to the dangers set forth in *Kelly* and *Leahy* for such "scientific" evidence, there is added here the additional dangers inherent in the mythology of canine, and, in particular, bloodhound infallibility.

In sum, the canine evidence introduced in this case involved all of the dangers warned of in *Kelly*, and were introduced without the countervailing benefits of a *Kelly* hearing.

2. Scent Identification Was "New" in the Sense That It Had Not Gained Acceptance by Appellate Decision

There is no temporal aspect to the concept of a "new" scientific technique. Instead, *Kelly* requires that the technique be barred until it is "sufficiently established to have gained general acceptance in the particular field in which it belongs." (*People v. Kelly, supra,* 17 Cal.3d at p. 30, quoting *Frye v. United States, supra*, 293 F. 1014 (italics omitted).) This scrutiny delays admission of such evidence so that judges and juries will not

attempt to resolve technical questions on which even experts cannot agree. (*People v. Leahy*, *supra*, 8 Cal.4th at pp. 601-603.

The state of the science at the time of the trial is discussed in the following section. In terms of appellate acceptance, the matter was clear: Dog scent identifications were deemed a new scientific technique within the meaning of *Kelly*, and could not be admitted without a showing of general acceptance within the relevant scientific community, and at the time of trial – and indeed, continuing to date – no such showing had or has been made. *Mitchell* and *Willis,* both *supra*, should have given the trial court ample warning of this. So, too, should have *Kelly* itself: "[O]nce a trial court has admitted evidence based upon a new scientific technique, *and that decision is affirmed on appeal* by a published appellate decision, the precedent so established may control subsequent trials, at least until new evidence is presented reflecting a change in the attitude of the scientific community." (17 Cal.3d at p. 32; emph. added.) *Mitchell* and *Willis* should have made clear to the trial court that no such appellate approval existed for scent-identifications.

Accordingly, as it had not gained appellate acceptance, it was error for the court to deny appellant's motion for a *Kelly* hearing on the dog-scent

identification. Had there been such a hearing, as discussed next, it would have been excluded.

E. WHETHER JUDGED BY THE SCIENCE AT THE TIME OF TRIAL OR BY THE SCIENCE AVAILABLE NOW, THE SCENT IDENTIFICATIONS IN THIS CASE COULD NOT SURVIVE *KELLY* ANALYSIS

Not only would the scent-identifications presented in this case have failed *Kelly* scrutiny in 2004 when they were presented to the trial court, they would fail today. The fact is, the more research that is done, the more there is doubt about the reliability of scent identifications.

1. The Science at the Time of the Trial

In this case, defense expert Dr. Lawrence Myers identified several issues that had not been resolved by scientific research. To begin with, he said, there was no science to support the supposition that bloodhounds are any more able with human scent than other breeds.[77] (19 RT 3624.) Moreover, while the components of human scent are known, it is not known which of these components the dog is scenting. (19 RT 3645-3636.) More

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[77] Other than Dr. Harvey's testimony, the prosecution presented no research directly comparing the abilities of bloodhounds with that of other breeds. Interestingly, the prosecution dog scent expert in *Mitchell, supra,* who had relied upon a Labrador in conducting a scent line up, expressed a somewhat disparaging view of bloodhounds: "Bloodhounds, to be straight with you, they are pretty stupid. They just follow human scent.... They are not good at scent discrimination work at all." (*Mitchell, supra,* 110 Cal.App.4th at 792.)

specifically, regarding scent discrimination, there had been very little research done since World War II, and that research could not be properly evaluated because it was not written up in a way that allowed for proper evaluation . (19 RT 3646-3647.) Dr. Myers also suggested that different areas of the human body will emit different scents, but dogs have difficulty discriminating among them, though one researcher determined that dogs could be specially trained to do so.[78] (19 RT 3647.)

Dr. Myers opined that while individuals may have an underlying fundamental individual scent that probably doesn't change, other odors, such as toiletries, foods, bathing habits, proximity to smokers, and the like, may or may not interfere with the detection of that scent. (19 RT 3648-3649.)

Regarding scent discrimination, Dr. Myers acknowledged that dogs could do this "to some extent. We just simply don't know that extent." (19 RT 3651.) Moreover, if there is more than one scent on the article, it is unknown which scent the dog is following – it might simply be the freshest scent, but that had not been experimentally tested. (19 RT 3657-3658.)

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[78] This is a reference to the research of Adee Schoon, discussed and cited below at pp. 193-198.

Regarding scent lineups, Dr. Myers was especially critical of those involving people as the potential targets.[79] "The worst examples I've seen of this is where a dog was brought into a situation where there were five individuals. As it turned out, there were seven. Four of them were sitting peaceably and one was in a yellow jumpsuit and handcuffs surrounded by two officers. That is not a very good lineup. That's contributing a cue that is hard to ignore." (19 RT 3661.) Of course, that is similar to the lineup here in the basement of the Orange Street station. Present in the locker room were two officers, with sidearms, in "casual" garb, while appellant wore an orange jumpsuit and was cuffed in the front. (17 RT 3174, 3187.)

Dr. Myers also questioned the handling and storage of the scent items used here. Latex gloves (such as those used by the criminalist in this case, 7 RT 1804), are not "clean" in terms of scent because they allow odor transmission, and they themselves contain certain odors. (19 RT 3662-3663.) Moreover, because most people put them on by grasping them on the outside, their own odor is already on the glove. And in terms of storage,

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[79] In Europe, where scent lineups have been used and studied for years, scent "line-ups" consist of scent pads – one of which is the suspects, others are of other humans, and at least one, a control, contains no scent – inserted in identical rods or other devices. (See, *e.g.*, the research protocols in the research cited *infra*, at p. 197.) In this way, the chances are minimized that the dog will alert on the basis of other cues, such as differences in clothing, a fear scent or added perspiration on the suspect, or cues from the handler.

neither a paper bag, or plastic baggie that is sealed, will preserve odors, because they are in fact porous, and a K-pack,[80] while better, is also porous. (19 RT 3664-3665.)

Finally, with respect to the mode of storage, Dr. Myers noted that the best is flash-freezing, or at least freezing to super-cold temperatures. Refrigeration will slow degradation of scent, and lack of refrigeration will allow it to degrade much more quickly.[81] (19 RT 3665-3666.)

What is striking about Dr. Myers' testimony is how much of his doubt about what was done in this case was borne out in the scientific research. As early as 1973, Fred Buytendijk set forth findings which later research has confirmed. Taslitz summarized it thus:

> Frederick Buytendijk has noted several canine behaviors, displayed even by well-trained police dogs, that must be kept in mind in designing a fair dog scent lineup. These behaviors include, among others: (1) a dog is more likely to select an object at the end of row; (2) a dog will stop sniffing objects in a line – he will sniff no further – once he reaches an object

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[80] A K-pack (also known as KPAK and KayPack) is a plastic evidence bag which can be heat-sealed in an effort (not entirely successful, according to Dr. Myers) to protect it's contents from environmental degradation. (See, generally, Hudson, *et al., The Stability of Collected Human Scent Under Various Environmental Conditions* (2009) 54 J. Forens. Sci. 1270 [Appendix G] [concluding that glass is the best storage medium for scent articles].)

[81] The manila envelope was stored at room temperature, from shortly after it was collected on May 15, to June 25, 2001, when the Orange Street scent trail was run, about 40 days. (7 RT 1809-1810.)

> that, to him, has a "special" smell; (3) a dog often will select an object with a "similar" but not identical smell to the object upon which the dog was scented – for example, odors from the same group, such as all tar smells, will be "matched"; (4) a dog often chooses an object because of visible characteristics instead of scent; (5) a dog may choose the object that the trainer wants the dog to select, a desire that Buytendijk suggested might be conveyed to the dog by slight differences in the trainer's tone of voice but which, of course, also can be conveyed by other minimal cues. (Taslitz, 42 Hastings L.J. at pp. 102-103 [4 CT 953-954] (internal citations omitted), citing F. Buytendijk, *The Mind of the Dog* (1973) at pp. 81, 90, 92-93.)

A recent UC Davis study discussed in the next section confirms the validity of Buytendijk's concern about cues from the handler. Even without that, the circumstances of the Orange Street Station basement identification contain bases for several of Buytenkijk's other concerns: appellant was the last in line, in the sense of being furthest from the doorway; he was distinct from the detectives in his dress and, most likely, demeanor; and his scent may simply have been the most interesting or special, or most familiar, to Maggie Mae. And, of course, even if Maggie was entirely focused on the scent discerned from the crime scene object (the envelope), we don't know if Maggie was selecting a scent identical to that scent or merely similar to it.

More recent research, much of it by Dr. Adee Schoon in Holland, has both confirmed the concerns raised by Buytendijk and raised new concerns. In one of her experiments, she studied the effect of age on crime-scene

objects. Her research showed that, if you take only the dogs who showed 100% success on fresh materials, their success dropped markedly as the material aged, to 42-60% after two weeks, after which it leveled off and varied, up to six months, between 33% and 75%. (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 B) (hereafter, Schoon, *The effect of aging.*) In this case, of course, the envelope had been stored at room temperature for 40 days.

In a 2004 book about the scientific process, Stephen H. Jenkins included a chapter on the question of whether police dogs can identify a suspect by smell. (Jenkins, How Science Works, Evaluating Evidence in Biology and Medicine (2004) (Appendix C) (hereafter, "Jenkins"). In the chapter, he reviews a considerable amount of the research on the subject, with an end toward explaining how experiments are used to test hypotheses about animal behavior. In doing this, he makes some very salient points relevant here. The first rebuts the idea that canine evidence is not based on science, thereby precluding application of the *Frye* (and thus the *Kelly*) Rule: "This is clearly faulty logic. The olfactory abilities of dogs are subject to experimental testing, and a few such experiments have in fact been done (citation). What is the evidence that trained dogs can recognize

unique odors of individual people and use this ability to accurately identify subjects in lineups?" (*Id.* at p. 38.)

Jenkins references a study involving twins by Peter Hepper in 1988,[82] which tested dogs with three sets of twins: male fraternal twins 2-3 months old (i.e., genetically different but with a common environment and food); male identical twins 2-3 months old (genetically identical and sharing a common environment and food); and identical male adult twins living apart (genetically identical but environmentally distinguishable). (*Id.* at pp. 38-39.) The results of the test showed that dogs can use *either* genetic *or* environmental factors to discriminate between people. (*Id.* at p. 39.) This refutes Dr. Harvey's insistence that everyone has a unique smell, and that environment does not play a part in a person's scent. (17 RT 3321-3322; 18 RT 3390) Indeed, a 1991 study showed that there was even a difference between the smell on the hand and the smell from another part of the body. "The dogs were successful at distinguishing scent obtained from the hand of their handler from that from the hands of strangers, but could not similarly distinguish their handler's scent when it was obtained from the crook of his arm." (Brisbin & Austad, *Testing the individual odour theory of canine olfaction* (1991) 42 Anim. Behav. 63 (Appendix D).) The point

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[82] Hepper, *The discrimination of human odour by the dog* (1988) 17 Perception 549-554.

here, it must be remembered, is not whether Harvey or the other researchers are correct; rather, it is that there was at the time of trial herein no general agreement within the scientific community.

Indeed, in a 1994 paper, Schoon and De Bruin conducted experiments with dogs which showed that, properly trained, dogs *could* successfully cross-match hand and crook-of-elbow scents. (G.A.A. Schoon and J.C. De Bruin, *The ability of dogs to recognize and cross-match human odours* (1994) 69 Forensic Sci. Int'l 111 (Appendix E).) It also showed, however, that the greatest success was achieved in experiments using the scents of familiar people, rendering the results questionable for forensic purposes: "Our experiments show that while dogs are capable of performing scent lineups, in the simple experimental setup of a choice between six, a large number of mistakes are made." (*Id.* at p. 117.) More important, it casts doubt on Harvey's studies, and in particular her ninydrin experiment undertaken for this case, which used the target her husband, who was familiar to her dogs. (17 RT 3335; 18 RT 3347.)

Returning to the Jenkins book, Jenkins also summarized three experiments by Schoon to investigate the possibility that a dog will falsely accuse a suspect.[83] The protocols of the experiments will not be set forth

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[83] Schoon, *Scent identication lineups by dogs (Canis familiaris):* (continued...)

here, but are described, *Id.* (Appendix C), at pp. 43-44 and in the research papers just cited in the margin. What is important here are the results of the tests, as Jenkins describes them:

> The performance of the dogs in this experiment was not particularly impressive. In 30 of the 60 trials, the dogs were disqualified because they made errors in the check tests [by identifying the smell of a person other than the perpetrator that had previously been presented to them]. In the remaining trials in which the suspect was the same as the perpetrator, the dogs correctly selected the suspect in four trials, for a success rate of 4/11, or 36%. In the trials in which the suspect was not the same as the perpetrator, the dogs correctly made no selection in nine cases, they selected the suspect's scent in one case, and they selected a decoy's scent in nine cases, for a success rate of 9/19, or 47%. (*Id.* (App. C) at p. 44.)

While Jenkins correctly points out these numbers suffer from being based on a small number of successful trials by only six dogs, and may not exactly mimic actual forensic conditions, they certainly suggest that scent identification is not reliable enough a measure on which to base a conviction.

As did Taslitz in discussing Buytendijk's 1973 book, Jenkins summarizes a number of dangers revealed by Schoon and others:

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[83] (...continued)
Experimental design and forensic application (1996) 49 Applied Animal Behavior Science 257; Schoon, *Scent identification by dogs (Canis familiaris): A new experimental design* (1997) 134 Behavior 531; Schoon, *A first assessment of the reliability of an improved scent identification line-up* (1998) 43 J. Forens. Sci. 70 (hereafter cited as "Schoon (1998)" (Appendix F)).

> They might select the odor that was *closest* to the odor on the target object, even if it wasn't identical . . . . In scent lineups, the control scents often come from police officers who may be familiar to the dog, so the dog may pick the odor from the lineup that is least familiar, regardless of whether it matches the scent of the target object. The handler may believe the suspect is guilty and therefore reward the dog for making any selection at all. If the lineup consists of a suspect and several control individuals, none of whom are known to the handler, the handler may pick out the likely suspect by using visual cues and communicate this identification to the dog unconsciously. (Endnote omitted.) (Jenkins, at p. 43; emphasis in original.)

It is worth repeating that the above-described line-up studies by Schoon used the European protocols, using scent objects only rather than human targets. Yet, all of these dangers were present, or potentially present, in the Orange Street basement scent-identification, and amplified by the fact that there were additional dangers due to the human presence. The dog may have been familiar with the detectives also present; she was, in fact, familiar with appellant's odor (from sniffing him three days earlier at the Spruce Street Station); or the dog may have been selecting the odor *closest* to the odor on the crime scene object even if not identical to it; or appellant's odor may have simply been the most distinctive; or the dog may have been guided to him by unconscious cues from Deputy Webb. The point is that we simply do not know for sure the reason for the dog's alert on appellant.

The 1998 Schoon article referenced by Jenkins contains some further valuable information. The first regards the "check" scent mentioned by Jenkins:

> Incorporating a "performance check" in the experimental set-up, whether the dog's ability/willingness to work was tested directly prior to the scent identification, significantly enhanced the result of the identifications: there were both more correct identifications and less false responses. (Schoon (1998), *supra,* 43 J. Forens. Sci. (Appendix F) at p. 70.)

No such "performance check" was conducted here in the station house prior to the purported identification of appellant.

In her discussion of the experimental results, Schoon also points to another danger: "[T]he current rules [i.e., European line-up protocols] do not guarantee that the dog did not respond to the odor of the suspect because he found it of interest." (*Id.* at p. 74.) In both the Spruce Street station interview room on June 22 and the Orange Street station locker room on June 25, Maggie's interest in appellant could simply have been because he had the most interesting odor.

In short, it cannot be said that, at the time of the trial below, there was general agreement in the relevant scientific community that scent identification was reliable.

2. Research Since the Trial Casts Further Doubt on the Reliability of Canine Evidence

Even today, there is no general acceptance of the reliability of canine scent-identification. Indeed, there is a recent study from UC Davis which casts serious doubts on the entire field of canine forensics. That study, completed in 2010 and published January, 2011, determined that handler beliefs affect scent detection dog outcomes to a startling degree.[84] (Lit, *et al.*, *Handler beliefs affect scent detection dog outcomes* (2011) 14 Animal Cognition 387-394 <http://www.springerlink.com/content/j477277 481125291/fulltext.pdf> (as of Sept. 13, 2011) (Appendix H).)

The study's aim was to evaluate how human beliefs affect working dog outcomes. (*Id.* at p. 387.) The test involved eighteen drug and/or explosive detection dogs and their handlers. Each dog/handler team was tested in four brief search scenarios in a series of rooms in a church. Handlers were falsely told that in two of the four rooms, a paper marker they could see would mark the location of the scent object. Two of the rooms – one with the paper marker, one without – contained two decoy scents, consisting of two Slim-Jim sausages and a new tennis ball. Thus,

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[84] The test involved scent *detection* dogs, not scent *identification* or *discrimination* dogs. Nevertheless, there is no reason to doubt that the outcome would be the same for the latter. At minimum, it suggests that until equally rigorous experimentation is done with scent-identification dogs, their reliability must be considered seriously in doubt.

there were four separate test conditions: one room, the control, containing neither the paper marker or the decoy scent; a second room containing only a marker but no scent item; a third room containing no marker but the decoy scent; and a fourth room in which the location of the decoy scent was marked. The church rooms otherwise contained cabinets, tables, chairs, and art supplies. (*Id.* at pp. 387, 389.)

The scent items brought to the church were unmarked bags of marijuana and gunpowder, but there were no marijuana or gunpowder scent items in the rooms – that is, the proper response to the test in each of the rooms was "no alerts." Nevertheless, handlers were told that there might be up to three scent targets in a room, and that the target scent markers consisting of a red piece of construction paper would be present in two of the rooms. (*Id.* at pp. 389-390.)

Each of the 18 teams ran the course twice, on different days, in each of the four rooms, for total of 36 runs per room and a total of 144 separate runs. Multiple alerts were possible within each room, but, again, *none* of the alerts was correct. Nevertheless, there were 225 alerts issued, as determined by the handlers. There were 21 (15%) clean runs, and 123 (85%) runs with one or more alerts. (*Id.* at pp. 390-391.) That bears repeating – in a test scenario in which "no alert" was the proper response,

there were 123 alerts, and only 21 no-alert runs! Moreover, as between human suggestion (i.e., alerts on marker-identified locations) and dog interest (the decoy scents), more alerts were identified on target locations indicating human suggestion. (*Id.* at p. 392.) As the authors noted, "The overwhelming number of incorrect alerts identified across conditions [the rooms] confirms that handler beliefs affect performance. Further, the directed pattern of alerts in conditions containing a marker compared with the pattern of alerts in the condition with unmarked decoy scent suggests that human influence on handler beliefs affects alerts to a greater degree than dog influence on handler beliefs. (*Id.* at p. 391.)

The authors offered two possible explanations for the large number of false alerts identified by the handlers. "Either (1) handlers were erroneously calling alerts on locations at which they believed target scent was located or (2) handler beliefs that scent was present affected their dogs' alerting behavior so that dogs were alerting at locations indicated by handlers . . . ." (*Id.* at p. 392.) Unfortunately, both possibilities are present in this case: To the extent that Maggie Mae or, between trials, Harvey's two dogs, made an alert, we don't whether or to what extent the alert may have been triggered or influenced by the handler. And while the alert on appellant by Deputy Webb's dog Maggie in the Orange Street Station

basement was unambiguous, neither Maggie's "alert" in the earlier Spruce Street station interview room nor the supposed alerts called by Lisa Harvey at the San Bernardino police holding cells could be considered anything but ambiguous.

Nor are the courts unaware of these dangers:

> Handlers' cues, such as voice or physical signals, have been recognized to compromise a dog's objectivity and impermissibly lead the dog to alert at the suspected item or person. *United States v. Trayer*, 283 U.S. App. D.C. 208, 898 F.2d 805, 809 (D.C. Cir. 1990) ("We are mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs."), *cert. denied*, 498 U.S. 839, 112 L. Ed. 2d 83, 111 S. Ct. 113 (1990); see also *United States v. $80,760.00*, 781 F. Supp. 462, 478 n.36 (N.D. Tex. 1991) (reliability problems arise when, among other things, the dog receives cues from its handler).

(*United States v. Heir* (D. Neb. 2000) 107 F.Supp.2d 1088, 1096; see also *United States v. Trayer* (D.C. Cir. 1990) 898 F.2d 805, 809 ["We are mindful that less than scrupulously neutral procedures, which create at least the possibility of unconscious 'cuing', may well jeopardize the reliability of dog sniffs"]; Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog* (1997) 85 Ky.L.J. 405, 421-31 [noting some of the empirical evidence showing instances of low accuracy by canine inspections and examining the factors that cause such errors].

As with the UC Davis study, the foregoing cases involve detection dogs, whose task, compared to that of scent-discrimination-and-identification dogs is far simpler, and yet still subject to substantial error.

Had the trial court granted the motion for a *Kelly* hearing, it would have been presented, at minimum, with the testimony of Lisa Harvey and Lawrence Myers showing very different views regarding the settled nature of the research. Even if the court had discounted Dr. Myers' testimony, however, Dr. Harvey's testimony would not have been sufficient to show that dog-scent identification evidence satisfies the *Kelly* test. As this Court explained in *People v. Leahy, supra*, 8 Cal.4th at pages 611-612, *Kelly,* 17 Cal.3d at page 37, and *People v. Shirley*, *supra*, 31 Cal.3d at pages 55 and 56, *Kelly* determinations regarding general acceptance mandate more than the testimony of a single witness. Rather, it requires the views of a typical cross-section of the relevant scientific community, or a fair overview of the scientific literature. A "fair overview of the literature," as appellant has shown from the research discussed above, would have precluded a finding of general consensus regarding reliability of the technique.

3. Lisa Harvey's Claim that Bloodhounds Have Scent-Discrimination Abilities Far Exceeding That of Other Breeds is the Sort of Magical Thinking That Prior Cases Have Rejected

Prosecution expert Dr. Lisa Harvey claimed that bloodhounds are uniquely able to scent-discriminate. Her peer-reviewed study, she said, showed that her mature bloodhounds were able to scent-discriminate 95 percent of the time, although younger dogs were only able to do so 60-70 percent of the time.[85] (17 RT 3326.) This, however, is simply one study, and *Kelly* teaches that this is insufficient to establish reliability. Indeed, the prosecution, had a *Kelly* hearing been held, would have been hard-pressed to find a study supporting Harvey's view.

Moreover, Harvey's testimony, part of which follows, was replete with opinions that are different than those of others in the field, and the jury was allowed to make the reliability determination that, under *Kelly*, *Mitchell,* and *Willis,* was the province of the judge.

When asked by defense counsel if she was aware of studies by other researchers regarding the effects of contamination of a scent article on the reliability of canines, the following transpired:

> Q Now, you mentioned contamination. You don't know what it means as defined by the courts. Scientists and

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[85] Harvey, *Reliability of Bloodhounds in Criminal Investigations* (2003) 48 J. Forens. Sci. 811.

researchers in your field, that is, bloodhounds and human scent, also talk about contamination, do they not?

A I don't know any other scientists in my field.

Q Well, you've read documentation?

A Not from scientists, no, I have not. Not on Bloodhounds.

Q Other dogs?

A I don't know that other dogs would be similar to bloodhounds, so I couldn't make a comparison. (18 RT 3383.)

There are several problems with this testimony. The first is that Harvey is relying on one study that *she* conducted, hardly a matter of general acceptance in the field – indeed, she admitted that she either did not know of other studies or had not reviewed them. Further, she disagreed with the National Police Bloodhound Association's view that scent can be affected by diet, clothing, cleansing, soaps, toiletries, and other environmental factors. (18 RT 3391-3391.) Again, the point here is not who is correct; the point is that it should not have been up to the jury to decide who was correct – the evidence should never have come in.

So, too, with her comments denying that she had ever seen a target cue a dog, and stating that she had never read material from the aforementioned Bloodhound Association describing cuing as a significant

problem to be avoided by handlers, bystanders, and target subjects. (18 RT 3425.) Harvey said she had never seen a handler cue a dog by his or her tone of voice, or demeanor. (18 RT 3426.) All of Harvey's views concerning these matters were disputed by Dr. Myers, but, again, the jury should not have been asked to judge the legitimacy of the science by which expert they believed – this was a matter for the trail court in the *Kelly* hearing that never took place. If Harvey did not agree with the views generally held by others in her field, then, *ipso facto*, there was no general acceptance of the "science" she was presenting.

Moreover, this is just the sort of "science" decried in a recent report by the National Research Council of the National Academies, *Strengthening Forensic Science in the United States: A Path Forward* (2009) (hereinafter, "NAS Report".) While it did not look at canine scent evidence specifically, it found that "with the exception of nuclear DNA analysis . . . no forensic method has been rigorously shown to have the capacity to consistently, and with a high degree of certainty, demonstrate a connection between evidence and a specific individual . . . ." (*Id.* at p. 7.) In further discussion in the opening summary of its findings, the Report states, with remarkable exactitude with respect to the scent-identification evidence presented here, that two "very important questions" must be answered to provide the

foundation for admissibility of forensic evidence in criminal trials. First, to what extent is a particular forensic discipline founded on a reliable scientific methodology that gives it the capacity to accurately analyze evidence and report findings? Second, to what extent does this evidence rely on human interpretation that can be tainted by error, bias, or absence of sound operational procedures and performance standards? (*Id.* at p. 9.) These questions should have been before the trial court in a *Kelly* hearing, and had they been, the evidence would have been excluded.

F. ADMISSION OF THE DOG-SNIFF IDENTIFICATIONS VIOLATED THE CONFRONTATION CLAUSE UNDER THE PRINCIPLES ENUNCIATED IN *CRAWFORD V. WASHINGTON* AND ITS PROGENY

Given the many alternative explanations for the dog's identification of appellant set forth in the previous sections, the fact that the dog cannot be cross-examined offends the Confrontation Clause of the Sixth Amendment.

One of the grounds on which the defense objected to the admission of the dog-sniff evidence was that it constituted hearsay and violated appellant's Sixth Amendment rights to confrontation and cross-examination. (4 RT 1348.) Indeed, the confrontation and cross-examination issues were raised in early motions, though without specific mention of *Crawford v. Washington* (2004) 541 U.S. 36 (hereafter, "*Crawford*"). (4 CT 826-827; 1 RT 962-963.)

In *Crawford*, the high court overturned years of Confrontation Clause jurisprudence to rule that "[t]estimonial statements of witnesses absent from trial" were permitted "only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross examine." (541 U.S. at p. 69.) In *Melendez-Diaz v. Massachusetts* (2009) 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (cocaine analysis) and *Bullcoming v. New Mexico* (2011) ___ U.S. ___, 131 S.Ct. 2705, 180 L.Ed.2d 610 (blood-alcohol analysis), *Crawford* was applied to the results of scientific testing, requiring that the analyst who performed the testing be available for cross-examination. Thus, an analyst's certification of the results of a testing machine was "testimonial" and thus subject to the Confrontation Clause (*Melendez-Diaz*, 129 S.Ct. at p. 2532); and it was not sufficient for the testing laboratory to send a "surrogate" to testify – the lab director, or another colleague. (*Bullcoming*, 131 S.Ct. at p. 2716.)

The analogy to this case is not precise. To the extent that Deputy Webb could be considered analogous to the laboratory analyst running the testing device, she was available for cross-examination. But the dog Maggie was not a testing machine, subject to calibration and verification. She was a sentient being, subject to her own individual proclivities as well as non-scent cues, yet not subject to cross-examination. If anything,

admission of Deputy Webb's testimony *interpreting* the dog's "alert" should be subject to more, not less, scrutiny and constitutional protection.

So, too, with Lisa Harvey's admission, in the second penalty trial, that while her dogs are well trained, they do not always do as trained. (37 RT 6590.) The result is that the uncertainty that the Court identified in *Melendez-Diaz* and *Bullcoming* – uncertainty focused on the analyst's interpretation of the results – is more than doubled because the *source* of the results is also capable of subjective decision-making.

These concerns were highlighted in a 2006 article in Champion Magazine, regarding detection dogs. One problem with treating positive canine alerts as nearly *per se* probable cause, the authors warned, is that,

> it assumes that an 'alert' is an alert because the handler said it was. Most courts have failed to consider – or even recognize – the role of the dog's handler in the process. The handler is not simply someone who holds the leash while the dog walks around and sniffs. Instead, the dog and handler function as an integral team. The dog is the sensor, and the handler is the trainer and interpreter. The handler's performance in both roles is inseparably intertwined with the dog's overall reliability rate. . . . And since the net result is the product of the interaction between two living beings, both roles of the handler are highly subjective. (Weiner and Homan, *Those Doggone Sniffs Are Often Wrong: The Fourth Amendment Has Gone to the Dogs* (April 2006) *Champion Magazine* 12 (Appendix I)

The underlying question is, if the dog is the accuser who is making a testimonial statement of appellant's guilt based on its own interpretation of

what it smells, how can the handler be a sufficient substitute to be available for cross-examination under the *Crawford* line of cases? The problem is only increased by the fact that the handler's testimony, as noted in the above quotation, heaps subjectivity upon subjectivity. The dog's alert necessarily is at least partially subjective – even the best trained dog could, as the research shows, be reacting to some non-guilt-proving factor present at the time of the accusatory alert. Similarly, the handler's interpretation of the dog's alert is subjective, and similarly subject to other factors. This is most starkly shown by the fact that of all of the alerts described in this case, only the one in the Orange Street Station basement was a clear, jump-up-on-the-subject alert. And yet, on June 22, 2001, Deputy Webb interpreted the fact that Maggie stopped trailing after sniffing appellant in the Spruce Street Station interview room as an alert; and Lisa Harvey interpreted her two dogs' obvious failures to give a clear alert on appellant at the San Bernardino Police Station holding cells as, in fact, at least one alert. In addition, and as warned of in *Melendez-Diaz*, both Webb and Harvey worked for law enforcement, and a "forensic analyst responding to a request from a law enforcement official may feel pressure – or have an incentive – to alter the evidence in a manner favorable to the prosecution." (*Id.*, 129 S.Ct. at p. 2736, referencing the NAS Report at 6-1.) Thus, in this case, we

have the subjective opinions of dog handlers *and* their dogs, all of them driven by a reward-based system which depends for reward on their making positive identifications, providing the key "testimony" which established appellant's identity as that of the perpetrator of the Myers crimes. That is the Confrontation Clause, over in the corner, weeping.

If the Confrontation Clause analysis is not an exact fit, it certainly highlights the necessity of a *Kelly* hearing in order to insure at least a base level of reliability before the jury is presented with scent-identification evidence. The trial court's error in the denying the *Kelly* hearing was exacerbated by its failure to at least conduct an Evidence Code section 402 hearing, as discussed next.

G. EVEN IF *KELLY* DID NOT APPLY, A SECTION 402 HEARING WOULD HAVE ESTABLISHED THAT THE DOG-SNIFF IDENTIFICATIONS WERE UNRELIABLE AND HENCE IRRELEVANT AND INADMISSIBLE

As an alternative to a *Kelly* hearing, appellant sought an Evidence Code section 402 hearing to test as a foundational matter the reliability of the dog-scent identification (5 CT 1153 *et seq.*) and, immediately after the trial court denied the *Kelly* hearing, appellant sought a ruling on his section 402 request. (1 RT 965.) The court indicated that it had heard a foundation laid at the preliminary hearing, but the defense pointed out the additional matters

which had arisen since then, and that it's expert would challenge that foundation. (2 RT 978-979.) Specifically, the defense indicated that its expert's challenge would go to the training of the handler and the dog, and the staleness and contamination of the scent item. (2 RT 980-981.) The court denied the request for a hearing, ruling that the prosecution had satisfied its section 402 foundational burden with the evidence it had presented at the preliminary hearing, and that the matters defense counsel wanted to litigate went to the weight of the dog-scent evidence and not its admissibility. (2 RT 981.) The trial court was wrong.

Evidence Code section 402, subdivision (a), provides the procedure for determining the existence or non-existence of a preliminary fact in

dispute.[86] Here, the preliminary fact was the reliability, and thus the relevance, of the evidence at issue. (*See* Evidence Code section 403.[87])

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[86] Evidence Code section 402 reads as follows:

> § 402. Procedure for determining foundational and other preliminary facts
>
> (a) When the existence of a preliminary fact is disputed, its existence or nonexistence shall be determined as provided in this article.
>
> (b) The court may hear and determine the question of the admissibility of evidence out of the presence or hearing of the jury; but in a criminal action, the court shall hear and determine the question of the admissibility of a confession or admission of the defendant out of the presence and hearing of the jury if any party so requests.
>
> (c) A ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute.

[87] Evidence Code section 403 states, in pertinent part, as follows:

> The proponent of the proffered evidence has the burden of producing evidence as to the existence of the preliminary fact, and the proffered evidence is inadmissible unless the court finds that there is evidence sufficient to sustain a finding of the existence of the preliminary fact, when: [¶] (1) The relevance of the proffered evidence depends on the existence of the preliminary fact . . . .

1. If *Kelly* Did Not Apply to the Dog Scent Identifications in This Case, a Section 402 Hearing Was Still Necessary, Yet Was Denied

Even if the trial court was correct that dog-scent identifications were not a "new scientific technique" subject to a *Kelly* hearing, it was still bound to find, outside the presence of the jury, that the scent identifications were reliable.

Certainly there was as much danger of suggestiveness (by the handler's belief, by the difference in clothing, etc.) as there may be in a photo lineup. *People v. Citrino* (1970) 11 Cal.App.3d 778, 783, held that the trial court must determine as a "preliminary fact" that the prosecution had shown by a preponderance of the evidence that a photo line-up was not overly suggestive. In *People v. Bonin* (1989) 47 Cal.3d 808, 847-848, this Court held that it was error (though not prejudicial in that case) for the trial court to refuse a section 402 hearing to determine the foundational facts supporting a criminalist's experiment with a t-shirt to see if it matched the ligature marks on the victim's neck. (See also *People v. Stanley* (1984) 36 Cal.3d 253, 356-257 [section 402 hearing held to assess qualifications of treating therapist to testify as expert on rape trauma syndrome].)

In this case, the foundational showing required was that set forth in *People v. Malgren, supra*, 139 Cal.3d at page 238: The training of the

handler and the dog, the dog's history of reliability, whether the dog was placed on a track where the guilty party had been, and that the trail – or in this case, the scent item – had not become stale or contaminated. These tracked very closely what the defense proposed to challenge with its expert testimony.

The trial court's reliance on the preliminary hearing testimony was not sufficient. The only testimony relating to the dog trail in the preliminary hearing was that of the dog handler, Deputy Webb. (2 CT 286 *et seq.*) While she could and did testify to her experience (2 CT 287-289), her dog's experience (2 CT 291-294), and the dog's reliability (2 CT 295-298), she had absolutely no actual knowledge and certainly no expertise in the staleness or contamination-with-ninydrin of the scent item. *Malgren*, however, held that these were *foundational* matters which must be shown *before* the canine evidence was presented to the jury.

Perhaps the trial court was bedazzled by the self-validation inherent in the process wherein, according to the handler, the dog only trails when there is a scent, and, if there is a scent, will only alert on the proper target. That ignored, however, everything presented in the two articles attached to appellant's *Kelly* motion. (Taslitz, 4 CT 866 *et seq.* and the Wojcikiewicz paper which followed, at 4 CT 986 *et seq.* and discussed above) That

motion was heard six days prior to hearing on the defense request for a section 402 hearing. (1 RT 923, 950; 2 RT 975, 977.) That additional knowledge should have alerted the trial court that the matter was not as simple as it appeared, and that at least two of the *Malgren* foundational elements had not been met by Deputy Webb's preliminary hearing testimony.

If it was improper in not to hold a section 402 hearing regarding the suggestiveness of a photo-lineup (*Citrino, supra*) , the qualifications of a therapist to testify to rape trauma syndrome (*Stanley, supra*), or a criminalist's experiment with a t-shirt on his upper arm to compare it with ligature marks on the victims neck (*Bonin, supra*), then certainly a section 402 hearing was necessary in the present case. The purported dog-scent identifications are analogous to both the experiments in *Bonin* and to the possibly suggestive photo lineups in *Citrino*. Indeed, the possible suggestiveness of photo lineups was far more likely to be familiar to the trial court in this case than the uncertain reliability of dog-scent identifications.

2. Had the Trial Court Held a Section 402 Hearing, It Would Have Been Bound to Find a Lack of Reliability for Dog-Scent Identifications

As set forth above in the *Kelly* discussion, the same studies and contradictions between Dr. Harvey's testimony, Dr. Myer's testimony, and

the scientific literature would have ineluctably led the trial court to find that the reliability of dog-scent identifications had not been sufficiently shown as a foundational matter. Accordingly, the scent-identification testimony should and would have been found inadmissible.

Another ground raised by appellant, which would have been addressed in a contested section 402 hearing and/or a *Kelly* hearing, and which should and would have led to a finding of inadmissibility of the Orange Street Station scent-identification, was that the scent article, the crumpled manila envelope from Myers' bed, was contaminated with ninydrin, thereby failing the fifth prong of the *Malgren* test, whether or not the trail – or here, the scent item – had become contaminated. (139 Cal.App.3d at p. 242.) The contamination issue is addressed in the next section of this argument.

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

The prosecution faced an uncomfortable truth: the envelope that was found on Ms. Myers bed and later used as the scent item in the Orange Street basement scent identification had been treated with ninhydrin, a fingerprint-enhancing chemical that may have fatally contaminated the scent item. (7

RT 1812.) The ninydrin spray used by the criminalist consists of ethyl acetate, ethanol, and ninhydrin crystals, which include the chemical xylene. (16 RT 3138-3139.)

In order to overcome the inference that ninhydrin was a contaminant that would have so affected the scent article that the scent-identification was unreliable, the prosecution ordered two "controlled studies" to refute that inference.

When the prosecution confirmed during trial that it would present the scent-identification evidence despite the contamination, the defense renewed its objection to admitting the evidence without first conducting a foundational hearing under *Malgren* (section 402) or *Kelly*. (13 RT 2659-2660.) The defense asserted that the scent item (the envelope from Myers' bed) had been contaminated by the ninydrin, and that the contamiantion went to the issue of admissibility. Counsel also complained that the prosecution was only then bringing forth two "experiments" that had been done over the previous weekend to counter the issue of contamination, and the defense had no time to develop rebuttal. (13 RT 2659-2665.) The court ruled that contamination went to the weight of the evidence, not its admissibility, and the defense would have ample time to rebut during the presentation of its own case. (13 RT 2665-2668.)

Later, the defense sought to exclude testimony regarding those studies for lack of relevance and under Evidence Code section 352. (17 RT 3145-3148.) The trial court again ruled the evidence admissible. (17 RT 3148-3149.)

The court erred on several grounds. First, the contamination of the scent item was certainly a foundational issue under *Malgren* and Evidence Code sections 400-403, as well as *Kelly*. Second, had the court held a section 402 (or *Kelly*) hearing on the matter, it should have and would have excluded the evidence. And third, the evidence should not have survived appellant's objections on the grounds of lack of relevance and Evidence Code section 352.

1. The Trial Court Erred in Not Holding a Foundational Hearing Out of the Presence of the Jury Regarding the Contamination of the Envelope from Myers' Bed

In the initial pre-trail hearing on the dog-sniff evidence, when the trial court denied appellant's *Kelly* motion, it stated that would follow the guidelines set forth in *People v. Malgren* as far as they required a foundation before the canine evidence was introduced. (1 RT 964-965.) When the contamination issue arose again mid-trial, the defense specifically asserted *Malgren's* fifth foundational requirement, whether or not the trail

had become stale or contaminated. (139 Cal.App.3d at p. 242.) The prosecutor argued that *Malgren* did not apply here, because there is no mention of a scent item in that case, and the focus should be on guideline 4, whether the dog was placed on the track where the circumstances indicate the guilty party had been.[88] (17 RT 2662.) The only issue, then, according to the prosecutor, was whether ninhydrin destroyed the scent on the envelope, and as to that, the dog handler would testify that if the scent were not present, the dog would not trail. That is, the very fact that the dog trailed "mirrors the studies that were recently done . . . indicating that scent is not destroyed by the ninydrin processing." (17 RT 2663.) Defense counsel countered that his definition of "trail" began with scenting the envelope (*ibid.*), a starting point which, as counsel had argued, was marked by contamination.

The prosecutor's argument was circular, and wrong. It was circular because he was using the dog's positive trailing to affirm the validity of the ninydrin studies, which were being used to affirm the validity of the dog trail. More fundamentally, he was wrong because, as defense counsel pointed out, the scent item in this case was analogous to the trail in *Malgren*

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[88] The prosecutor was here apparently assuming that appellant was the guilty party and hence that anywhere appellant had recently been would qualify as a fresh track for purposes of *Malgren*.

which the Court of Appeal held must not be contaminated. That is, in a pure tracking or trailing case which is initiated from the crime scene, it is the trail which must not be contaminated. At the beginning of the "trails" or "tracking" in this case, *Malgren's* logic and basic principles of evidentiary relevance require that the scent item not be contaminated.

It cannot be otherwise. If the scent item is contaminated, then the results are irrelevant, and inadmissible. The fact that in *Malgren* there was no scent item to be contaminated does not reduce the force of *Malgren's* requirement of a lack of contamination. The prosecutor would have it both ways – this *is* a tracking case and not a scent-identification case for purposes of the *Kelly* issue, but since the crucial trigger of the dog's tracking – a scent item – is what may have been contaminated, the non-contamination requirement of *Malgren* does not apply. This is self-serving illogic.

Accordingly, all of the evidence which was presented to the jury regarding whether or not the ninhydrin contamination invalidated the scent-identification was foundational, and should have been presented initially in a section 402 (or *Kelly*) hearing out of the presence of the jury.

2. The Prosecution's "Studies" Could Not Overcome the Evidence of Contamination Because They Were Inadmissible

As presented to the jury, the prosecution evidence regarding contamination consisted of (1) Lisa Harvey's claim that bloodhounds are not deterred by any form of contamination she had encountered (*e.g.*, 17 RT 3332-3333, 3382); (2) Deputy Webb's testimony that Maggie will not trail in the absence of scent – that is, if a scent is not on the item or not on the trail, Maggie will simply walk in circles (18 RT 3500) and (3) the two "controlled studies" – described below – which were done over a weekend during the trial to show that ninydrin did not contaminate a scent item.

Had a section 402 (or *Kelly*) hearing been conducted, the defense could have countered this evidence with some of the scientific evidence reviewed in the foregoing sections; the guidelines of the American Bloodhound Association warning against contamination; the testimony of Dr. Myers regarding contamination; Dr. Myers' testimony regarding Harvey's study and the fact that Harvey, who acted as the dog handler in her experiment with a ninhydrin-treated envelope, knew that her husband, not her daughter (the decoy) was the one who touched the envelope (which, after the UC Davis study concerning the impact of handler beliefs and cues,

takes on added import); and, most important, the fact that the two ninydrin experiments were themselves inadmissible.

The first of the prosecution's mid-trial "studies" was by Douglas Lowry, a Maryland State Police bloodhound handler. (17 RT 3226.) He set up a trail with his dog to see if it could follow a scent trial using a scent article contaminated with ninydrin. (17 RT 3241.) Lowry attempted to duplicate the factual setting of this case – placing money in an envelope, having it taken out and crumpled, spraying it with ninydrin. But he failed to do so in one striking respect: he ran the trail a day, rather than 40 days, after the envelope had been sprayed with ninydrin. (17 RT 3243-3246.) However, as the trial court would have known had it held either a *Kelly* or a proper section 402 hearing pre-trial, and reviewed the research, the passage of time is critical: canine success drops off considerably after two weeks. (Schoon (1998), *supra,* 43 J. Forens. Sci. (Appendix I) at pp. 45-46.) As this Court said in *People v. Bonin*, "Admissibility of experimental evidence depends upon proof of the following items . . . (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation] . . . ." (*People v. Bonin, supra, 47 Cal.3d at p. 847,* quoting *Culpepper v. Volkswagen of America, Inc.* (1973) 33 Cal.App.3d 510, 521.) The stark difference in time of storage rendered Lowry's

experiment inadmissible. Even Mr. Lowry recognized this, in cross-examination. Asked about the gap of 40 days between exposure of the scent item to the suspect and the dog trail, he acknowledged that he could not say what the results would be without trying it. But 40 days, he said, "would be really stretching it for a dog to successfully do that." (17 RT 3288.) That rendered the study probative of nothing, irrelevant, and excludable under section 352 at both any foundational hearing and at trial.

So, too, with Harvey's experiment. She had her husband touch some white and manila envelopes, then had a technician spray them with ninhydrin, put the envelopes into K-packs, and then ran a series of successful trails with three different dogs. (17 RT 3335.) But these trails were done only three days after the envelopes were exposed to her husband's scent, and then sprayed. (18 RT 3364-3365.) Moreover, unlike what occurred to the manila envelope presented to Maggie on June 25, Harvey's experimental envelopes were not left out in the open for 24-36 hours before being sprayed, did not come in contact with other individuals, or latex gloves, or a gauze scent pad, and were not placed in a paper bag, or commingled with other items. (18 RT 3362-3363; compare 7 RT 1770-

1772, 1776, 1816, 1821.) Clearly, this did not meet the "substantially similar conditions" test of *Bonin*, and should not have been admitted.[89]

Without the *faux*-scientific "studies" conducted by Lowry and Harvey – indeed, even with them – the prosecution would not, in a section 402 (or *Kelly*) hearing, have been able to meet its foundational requirement that the scent-item was not fatally contaminated by the ninydrin, especially after 40 days of storage at room temperature, and the prosecution's most damning (albeit bogus) evidence against appellant would not have been heard by the jury.

3. The Trial Court Erred in Denying Appellant's Evidence Code Section 352 Motion to Exclude the Evidence of the Prosecution's Two Ninydrin Experiments

Even without the section 402 (or *Kelly*) hearing, the Orange Street Station trial and scent-identification would have been severely undercut had

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[89] Indeed, the applicability of Harvey's studies and dog-training differed in still other crucial aspects from the scent identifications of appellant. Harvey would test her dogs by sending a decoy person and a target together along a trail, and then have them diverge from each other. In that setting, the "target" (i.e., guilty person) is the only one at the end of the proper trail, whereas here, the dogs (both Webb's and Harveys') were asked, at the end of the trail, to choose among several persons. In addition, Harvey made extensive use of her family and students – persons familiar to the dog. We can't know that the dogs' abilities to choose among persons with whom they are familiar verifies their abilities to choose among strangers.

the prosecution not been able to present to the jury the evidence of the Lowry and Harvey ninhydrin "studies." The trial court overruled an Evidence Code section 352 objection to exclude testimony regarding those studies. (17 RT 3145-3149.) This too was error.

Evidence Code section 352 provides, in relevant part, "The Court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will . . . (b) create substantial danger of undue prejudice, or confusing the issues, or of misleading the jury." Underlying the term "probative," however, are the same considerations as discussed in the foregoing sections. That is, the "studies" were probative of nothing whatsoever if they were not, as a foundational matter, scientifically reliable.

This was, in fact, fundamentally unreliable evidence, of no probative value or relevance, and certainly prejudicial. Absent the evidence of the two misbegotten ninydrin experiments, the jury would have properly questioned the validity of the Orange Street basement scent identification, and their lingering doubt on the question of death would have ripened into a finding of not guilty.

I. THE COURT ERRED IN REJECTING DEFENSE CHALLENGES TO THE USE OF THE UNAPPROVED SCENT TRANSFER UNIT

As has been previously described, the scent transfer unit (STU) was used in the guilt phase trial in Lisa Harvey's studies, and the court refused to credit or allow the defense to bring out the fact that, in both *People v. Mitchell, supra*, 110 Cal.App.4th 772, and *People v. Willis, supra*, 115 Cal.App.4th 379, the STU had been found subject to *Kelly*, and that no published California appellate opinions had found STU test results admissible. The trial court's ruling both defied logic and allowed the prosecution to impart a false patina of validity to procedures and research which they did not deserve.

During cross-examination of prosecution expert Lisa Harvey, it was brought out that in her studies of the accuracy of bloodhound scent identification, the scent items she used were gauze pads from a scent transfer unit (STU), which she described as "an instrument that has a type of vacuum device that collects the scent onto a gauze pad made out of paper pulp."[90] (18 RT 3418.)

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[90] In this cross-examination and the following discussion with the court and counsel, the defense attorney mistakenly referred to the STU as an "STV device." (18 RT 3418 *et seq.*) For consistency in this brief, it will be referred to here as an "STU."

Defense counsel asked Dr. Harvey whether the STU was generally accepted in the scientific community. "As far as the people doing scent research are concerned," she answered, "Florida International University uses the scent-transfer unit to collect scent, Oak Ridge Laboratories uses [it], the FBI uses it, and yes, we use it." The followup question was whether the STU had ever been accepted by any court of law in the published opinion in the California. The prosecution objected on relevance grounds, and the court stated that the objection was sustained "under 352." (18 RT 3419-3420.)

Out of the presence of the jury, the defense argued that the prosecution was asserting that Harvey's study was intended to show the reliability of bloodhound scent identifications, and it was relevant to bring out that the STU used in her research had never been approved by any published opinion in California, and had been rejected by two of them. (18 RT 3421.) The court, however, observed that in this case, it was only used in research. "There's no evidence here that the instrument was used in any part of the identification of Mr. Bailey Jackson." (18 RT 3422.) Moreover, the court agreed with the prosecutor's reading of *Mitchell* and *Willis* as not rejecting the STU or finding it unreliable, only that there was an insufficient foundation to pass the *Kelly* test. (*Ibid.*)

Defense counsel then asked that the trial court take judicial notice of *Mitchell* and *Willis*. The court declined:

> As far as instructing the jury that the device has not been approved in a court of law, I'm not going to do that, because it's apples and oranges. This is a research device. Certainly they are free to use any research device they want. If we're talking about the actual admissibility in court of an item of evidence, that's something entirely different. (18 RT 3423.)

While the court cited Evidence Code section 352, it's logic was flawed *ab initio*. It seems to be saying that if a novel device, unaccepted in the scientific community, is used by a researcher, the results of that research are beyond the reach of *Kelly*. There is no legal basis for this conclusion, nothing in the cases which say that *Kelly* is so limited. Indeed, the cases say quite the opposite: "When the expert's opinion is based on tests of techniques which themselves are subject to *Kelly-Frye* analysis, the *Kelly-Frye* criteria must be met before the expert's opinion is admissible. (*People v. Parnell* (1993) 16 Cal.App.4th 862, 869 [psychologist's opinion based on defendant's 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].

The purpose of requiring general acceptance in the scientific community is to insure that a new device has some history of reliability. As the courts of this state had, as of 2004, not found such acceptance, then, perforce, Harvey's research, all of which relied on the STU, must similarly be considered unreliable. Accordingly, having ruled against the defense on section 352 grounds (though the court never specified the specific section 352 grounds for its ruling), it should have at least informed the jury in some fashion that the machine on which Harvey relied had not been approved as reliable in the courts of this state.

What's more, the trial court should have ordered either a *Kelly* or section 402 hearing to assess the reliability of the STU. It is true that the defense did not seek such a hearing; to have done so, however, would have been a futile gesture, given the trial court's persistent rulings denying such hearings. (*People v. Hill* (1998) 17 Cal. 4th 800, 820)

Finally, the trial court's error was exacerbated by its use of an entirely inadequate dog-sniff instruction, as argued in Argument III, D, *infra*.

J. THE TRIAL COURT'S ERRORS VIOLATED APPELLANT'S RIGHTS UNDER THE FEDERAL AND STATE CONSTITUTIONS, AND WERE PREJUDICIAL

1. The Erroneous Admission of the Dog-scent Identification Evidence Violated Appellant's Rights under the Sixth, Eighth, and Fourteenth Amendments to the Federal Constitution

The trial court's error in admitting both the dog scent identification evidence and studies purporting to support its reliability without the requisite foundational showings violated not only state law, but appellant's rights under the federal constitution. By admitting the unreliable yet seemingly very incriminating dog sniff evidence, without the reliability enhancing protections of a *Kelly* or section 402 foundational hearing and without the possibility of cross-examining the sentient being purported to have made the identification, the trial court undermined appellant's Sixth, Eighth, and Fourteenth Amendment rights to due process and a fair trial, to confrontation, and to the heightened reliability required for determinations of guilt and sentence in a capital case. (*Crawford v. Washington* (2004) 541 U.S. 36, 61 [admission of statements deemed reliable by judge fundamentally at odds with right of confrontation]; *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]; *Zant v.*

Stephens (1983) 462 U.S. 862, 879 [Eighth and Fourteenth Amendments require reliable, individualized capital sentencing determination].)

The erroneous admission of this unreliable evidence deprived petitioner of his right to a fair jury trial and due process, as guaranteed by the United States and California Constitutions. (U.S. Const., 5th, 6th & 14th Amends.; Cal. Const., art. I, §§ 15-16. see also *Duncan v. Henry* (1995) 513 U.S. 364, 365-366 [noting argument (though deeming it forfeited) that admission of evidence violated Fourteenth Amendment guarantee of due process]; *Estelle v. McGuire* (1991) 502 U.S. 62, 75.)

A criminal defendant's right to due process protects against the admission of unreliable evidence, particularly against unreliable identification evidence. (*Manson v. Brathwaite* (1977) 432 U.S. 98, 106-114 [in determining whether identification testimony is admissible, the linchpin of due process analysis is reliability]; *White v. Illinois* (1992) 502 U.S. 346, 363-364 (conc. opn. of Thomas, J.) [due process protects against unreliable evidence]; see also *Lisenba v. California* (1941) 314 U.S. 219, 236; *McDaniel v. Brown* (2010) __ U.S. __, 130 S.Ct. 665, 674-675, 175 L.Ed.2d 582 [per curiam] [noting argument (though deeming it forfeited)

that DNA identification testimony must be reliable to comport with due process under *Manson v. Brathwaite*, *supra*].)

2. The Errors Were Prejudicial under Both the State and the Federal Constitutional Standards

The trial court's errors in admitting the dog-scent identification and other "scientific" evidence, over appellant's many objections, was prejudicial.

As has already be set forth, the remaining evidence against appellant was extremely weak. The Van's Shoes shoeprint matched alleged shoes that were never found, matched appellant only in size, and there were 20-30,000 other pairs of Vans Shoes that could have made that print. Appellant's so-called admissions to the police in the context of questioning about another case were at most suggestive, and certainly not probative. Neither were the suggestions that he drove Myers' car to Las Vegas, nor that it was the same bleach that stained his clothes and was poured on Myers rug, if it was, in fact, bleach that made the stain. Indeed, the importance of the dog-sniff evidence to the prosecution is shown by the importance placed upon it in the prosecutor's closing argument:

> 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; emph. added.)
>
> Courts are telling you the law tells you that you can consider this evidence in a capital murder case, in any type of criminal case. That's why we have these jury instructions to instruct you on it. This isn't novel techniques. This isn't new evidence that's never been presented before. *This is evidence that has been tested and found to be reliable and allowed in courts for which juries can use them as evidence of guilt if you find it credible and corroborated.*" (22 RT 4151; emph. added.)

Thus, the prosecutor was well aware of, and impressed upon the jury, the key role that the purported scent-identification evidence played in obtaining appellant's conviction.

There is simply no way to conclude that, absent the erroneously-admitted dog-scent identification evidence, the jury would have returned a verdict of guilty. More specifically, under the state's *Watson* test, it is far more than reasonably possible that the jury would have reached a different result absent this evidence. (*People v. Watson* (1956) 46 Cal.2d 818, 836;

People v. Superior Court (Ghilotti) (2002) 27 Cal.4th 888, 918; *College Hospital, Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715. And under the federal *Chapman* standard, the state cannot possibly show beyond a reasonable doubt that the admission of this evidence was harmless. (*Chapman v. California, supra*, 386 U.S. at p. 24.)

III. THE TRIAL COURT MADE ADDITIONAL ERRORS RELATED TO THE CANINE SCENT EVIDENCE

A. THE COURT ERRED IN ALLOWING IN PICTURES OF THE DOG MAGGIE OVER AN EVIDENCE CODE SECTION 352 OBJECTION

Prior to trial, the defense moved, pursuant to Evidence Code section 352, to bar the bringing into court of either Deputy Webb's dog, Maggie, or pictures of her. (4 CT 30-32; 4 RT 1348-1350.) The court agreed to exclude the dog, but allowed in the pictures. (4 RT 1353; *see* Ex. 133, nine photos of Maggie.) This was error, and it led to an even greater error.

It was error because it was not relevant to any issue before the court. Only relevant evidence is admissible (Evid. Code § 350), and relevant evidence is defined as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code § 210.) While appellant's objection was couched in terms of section 352, he argued vigorously that the evidence had no relevance. The defense was not going to contend that the dog did not exist, or was not a dog, or a bloodhound. (4 RT 1349.) Accordingly, there was nothing related to the issue of appellant's guilt that would be illuminated by photographs of the dog. In terms of section 352, this is not the classic case of negative evidence inherently likely to bias a jury against the defendant. (*E.g.*, ,

People v. Arline (1970) 13 Cal. App. 3d 200, 205 (rev'd on other grounds, *People v. Hall* (1986) 41 Cal. 3d 826, 832) [proffered testimony had no probative value, little if any relevance, and only effect would be to create suspicion and prejudice].) The evidence at issue, however, the pictures of the dog Maggie Mae, would inevitably invoke positive emotional reactions in some jurors, reactions which in this case could only inure to the benefit of the prosecution.

Indeed, the trial court was aware of this danger. In ruling that the actual dog could not be brought in, the court stated: "If we had the dog in the courtroom, that may engender some sympathetic responses from the jury, especially from pet lovers." (4 RT 1353.) Appellant is at a loss to understand the rational basis upon which the trial court could conclude that photos of the dog might not have the same effect. Given that they were not relevant to any issue before the jury, the court's ruling admitting the photographs was both incomprehensible and improper.

That there was the risk described by appellant is shown by the jury's reaction to the pictures, which led to one or more jurors asking a witness a question during an entirely improper incident that occurred while the court

and counsel were in chambers. That incident is discussed in the next section of this argument.

B. THE COURT ERRED IN NOT GRANTING A MISTRIAL FOLLOWING JUROR AND WITNESS MISCONDUCT TRIGGERED BY THE DOG PHOTOS AND DOG-RELATED TESTIMONY

During a break in her testimony, and while the court and counsel were in chambers, Dr. Harvey and some of the jurors engaged in an improper conversation. The court's subsequent failure to declare a mistrial was an abuse of discretion.

1. The Incident

On the second day of Dr. Harvey's testimony, after the lunch break, the clerk reported that while the court and counsel were in chambers during the morning session, there was a discussion between the witness and four of the jurors, who were asking questions about her dog, not related to this case. (18 RT 3437.) The prosecutor reported that Dr. Harvey did tell him about the conversation, and he told defense counsel about it. (18 RT 3438.) Second defense counsel Gunn, apparently not in chambers at the time, reported that he heard "a question in the form of like or aren't there like six thousand agencies that use this dog[,]" although Gunn did not know if Harvey answered that question. (18 RT 3438.) Lead defense counsel John

Aquilina reported that he was informed by one observer that there were a number of other questions, such as, are these the same bloodhounds used in the South, can we see the dog, and a number of other related questions. The defense asserted misconduct by the witness and by the jurors, and since there was no record, asked the court to conduct individual voir dire. (18 RT 3438.)

The bailiff was sworn and asked what he heard. He answered:

> THE DEPUTY: I believe I heard all those questions that were addressed. I believe the first question was they wanted to see the picture of the dog. "Does he drool a lot?" That was another question. Something that Mr. Gunn addressed about six thousand searches or something like that, pertaining to the South, questions of that nature. I think that's basically all I can remember.
>
> THE COURT: Did the witness respond to any of the questions?
>
> THE DEPUTY: She did.
>
> THE COURT: What did she say?
>
> THE DEPUTY: Her dog drools a lot; and then I think there was a lot of nonverbal responses.
>
> THE COURT: Do you recall any other verbal responses from the witness other than that?
>
> THE DEPUTY: No, sir.
>
> THE COURT: All right. (18 RT 3440-3441).

The court and counsel then agreed to individual voir dire of the jurors. (18 RT 3441.)

Juror No. 1 reported that a few jurors in the front row asked Dr. Harvey a few questions about her dogs, including how big the dog Tank was, which she answered by spelling his weight with her fingers, 1-3-5. (18 RT 3442.) Jurors 2, 3, 4 and 6 said they purposely ignored the conversation, and Jury No. 5's attention was drawn to it only upon hearing words "like Elvis." (18 RT 3447.)

Juror No. 7 was more expansive:

> A um, what I did hear, it was questions about one of them, somebody made a comment, are they going to get a chance to see the dog, or kind of like in a joking manner. And I think there was a question asked about Tank and how big actually is Tank. And what the witness shared, it was, you know, it was kind of like odd. We didn't realize she was saying how long, big that dog actually was, basically height and weight description. That's all I can kind of remember.

(18 RT 3450:2-10). Juror No. 7 did not take part in the conversation, he said: "I was just listening to what she was saying about the dog, basically looking at the picture." (18 RT 3450.) He did not remember any questions about the case, and would have because they would have been improper. (18 RT 3451.)

Juror No. 8 reported that someone asked how much Tank weighed, and in response to a comment from a juror about bringing the dog in as a witness, Dr. Harvey said he would just howl. (18 RT 3452.) Juror No. 8 made a comment, to no one in particular, that it would be a pitiful sound, but did not remember any other questions or answers. (18 RT 3352-3453.) Responding to further questioning by the prosecutor, Juror No. 8 expressed ambivalence about whether it was Dr. Harvey or someone else who made the comment about the dog howling, but she did remember Dr. Harvey saying that if Tank put his paws on someone's shoulders, he would be about five eight. (18 RT 3454.)

Juror Number 9 pointed to the picture of the dog on the poster board and commented, "What a cute puppy." Dr. Harvey said that one was not one of hers, and then there was a little other laughter regarding her dogs. (18 RT 3455-3456.) Another juror made a comment such as, "These in the pictures aren't your dogs," and that was the only other comment made. (18 RT 3456.)

The Court then commented for the record that Exhibit 133 consisted of approximately nine photographs of a bloodhound on a board. (18 RT 3456.) It was later clarified that the exhibit was on the floor, propped

against the wall behind the witness, and the pictures were of Deputy Webb's dog, Maggie. (18 RT 3473, 3476.) These were the pictures admitted by the court over appellant's section 352 objection.

Juror Number 10 reported hearing chitchat among the jurors about the dogs, but did not recall anything that Harvey said. (18 RT 3458.)

Juror Number 11 heard a juror asked the weight of Tank, to which Harvey hand-signaled 135, but otherwise wasn't paying attention. (18 RT 3459-3460.)

Juror Number 12 remembered only the question about Tank's weight, but otherwise did not participate. (18 RT 3461.)

Alternate Juror 1 said she kept her head down, saying to herself, "Don't talk. Don't talk. Don't talk." She did see Dr. Harvey sign Tank's weight and heard the comment about his height, and saw that Dr. Harvey a few times was trying to turn her head, as if to not engage in further conversation. (18 RT 3462-3463.) The questions were only about the dog, not about the case. (18 RT 3463.)

Alternate Juror 2 was one of those who brought the matter to the clerk's attention. He or she heard something about the picture that was down on the floor: "Is that your dog," and "No, that is not my dog." And

then Alternate 2 did not really hear anything further, because in trying not to interact, he or she was "talking to the two girls beside me." Alternate 2 continued:

> And then one said, I heard in a later conversation, I basically just heard him ask, "How big is Tank? You're talking like Tank must be pretty big". She just basically went [indicating] -- she didn't say. She was just showing 1-3-5. She really wasn't interacting at that point a lot with them, but then they just kept kind of laughing and cutting up; and then someone said -- she said they asked -- I didn't hear the other stuff they were asking, other things about the dog. It was still dog-related. I heard something about a hound dog is like the Elvis movie, "ain't nothing like -- but a hound dog."
>
> Q [by The Court] That was a reference to Elvis Presley?
>
> A Yes
>
> Q "Nothing but a hound dog"?
>
> A Yeah, "nothing but a hound dog," in reference to the Elvis song and his movie. Then I heard, basically, she said when the dog stood up, put his paws on you, he was about five foot eight. And, you know, we were sitting there together, not -- just trying to not discuss -- and she -- then I think -- Deanna's the girl beside me. She said, "Boy, that's a big dog."
>
> I said, "Yeah"
>
> That was -- that was basically what I heard of it. But basically everything that I kind of heard was talking about the dog. I do know the ones that were talking, but --
>
> Q I'm going to ask you about that in a minute. But you did not ask any questions?

A No. (18 RT 3464-3468.)

The court then led Alternate 2 through identifying which of the jurors said what during the conversation, though nothing different came out about what was said. (18 RT 3466-3468.)

Alternate Juror 3 repeated most of what Alternate 2 had said, but added that one of the jurors said, "Oh, we should see the dog work." (18 RT 3469.)

Alternate Juror 4 did not remember the question, but saw the 1-3-5 that Dr. Harvey signaled. "I didn't hear anyone say anything to her like she responded to something. I think there was just conversation going on amongst jurors, and I think she might have overheard something and then responded to that. . . . She said something about how the dog sounds, how they sound when they howl" in response to conversation about the dog howling, "and she made mention of how the dog sounds when they howl, she kind of gave a howling sound." (18 RT 3472.)

Each of the jurors commencing with Juror No. 7 indicated that the incident would not affect how they viewed the witness or the case. (18 RT 3451, 3453, 3456, 3458-3459, 3460, 3461, 3463, 3467-3468, 3470, 3472.)

Defense counsel put on the record the configuration of where each of the jurors sat in the jury box. (18 RT 3472-3473.) He then commented that it was apparent that several of the jurors who were involved in the incident were not being candid, and violated their oath not to communicate with any witness. And the witness should have known better, as she apparently did by her initial use of hand signals. But without a record of what occurred, it can't be known how any of this would affect the jurors, even though they all indicated that it would not. (18 RT 3473.) Alternate Juror 3 and Jurors 6-10 (or 7-10) appeared to be more involved than anyone else, and while the questions and comments did not go to the witness' testimony, the idea that jurors are not supposed to have contact with witnesses prevents the formation of a relationship, which goes to their ability to render impartial verdicts. The fact that it is not on the record should not result in benefit to the jurors or the witnesses. (18 RT 3474.) Defense counsel requested either excusing those jurors, or a mistrial. (18 RT 3473-3475.)

The prosecutor commented that the interaction was brief, insubstantial, and not related to the ongoing examination, and suggested that an admonition was sufficient. (18 RT 3475.)

The court found as follows:

All right.

After being on the bench for eighteen years, there's always something new. This has never happened in any of the numerous trials that I've conducted. It does appear to the Court that no specific questions were asked about this case. I'm not trying to minimize what happened. I'm just trying to put it in proper context. The questions were general in nature regarding her dog or dogs. The jurors have represented to the Court that what transpired would not affect how they evaluate her credibility based upon the kinds of questions asked and her answers. It seems reasonably apparent to me that they wouldn't.

The Court will be admonishing the jurors collectively when we bring them in.

Mr. Aquilina's request, number one, to excuse jurors or, number two, for mistrial, will be denied at this time without prejudice." (18 RT 3475-34 76).

When the jury was brought back into court, the judge admonished them thus:

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

of the Court's view and in front of the attorneys, and that's the way it has to be.

If anybody cannot follow that admonition, I want to know now.

Can you all follow that admonition? Can all of you put aside what you heard this morning and evaluate the testimony of Dr. Harvey based upon what you saw and heard in open court with the Court present?

The jurors responded, collectively, "Yes." (18 RT 3478-3479.)

2. The Trial Court's Denial of the Motion for Mistrial Was an Abuse of Discretion

This is not a case of mere "innocent" or "inadvertent" exposure of the jury or jurors to material that was not admitted (See, *e.g.*, *People v. Kitt* (1978) 83 Cal.App.3d 834, 849-850 [four photographs not admitted into evidence sent into jury room].) This case involves affirmative misconduct by the jurors, who thereby violated their oaths.[91] As long ago as 1894, this Court explained the presumption of prejudice in such cases: "'A juror is not

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[91] While the court did not specifically admonish the jurors not to speak with witnesses while the court and counsel were in chambers, his instruction at the opening of trial (CALJIC No. 0.50) could not have been interpreted otherwise: "In this case, ladies and gentlemen, you must not converse among yourselves or with anyone else . . . ." (6 RT 1560.) "You must not converse among yourselves or with anyone else on any subject connected with this trial . . . until it is finally submitted to you . . . ." (6 RT 1562.) At the close of each day, the trial court reminded them, in shortened version, of the rules, *e.g.*, " . . . please remember the admonishment. Do not discuss the case, form no opinions." (13 RT 2731.)

allowed to say: I acknowledge to grave misconduct. I received evidence without the presence of the court, but those matters had no influence upon my mind when casting my vote in the jury-room. "The law, in its wisdom, does not allow a juror to purge himself in that way."'" (*People v. Stokes* (1894) 103 Cal.193, 196-197, quoted in *People v. Holloway* (1990) 50 Cal.3d 1098, 1109.)

Here, as in *People v. Belmontes* (1988) 45 Cal. 3d 744, the question is not the *content* of what the jurors heard outside of the evidence admitted by the court; rather, it is how their exchange with a witness may have affected their view of that witness's testimony, her credibility, and the core issue – the reliability of canine scent identifications – in the prosecution's case against appellant. In *Belmontes*, two prospective jurors had spoken with members of the victim's family, on purely non-case-related topics, and assured the trial court that these conversations would not affect their view of the case. This Court held that any presumption of prejudice which might have arisen had been sufficiently rebutted. (*Id.* at pp. 809-810.)

The present case presents more serious concerns, for several reasons: First, it was not one, but several jurors, who engaged with the witness. Second, it was a witness – on the stand – with whom they engaged. Third,

the topic of the discussion was her dogs, in a case in which the reliability of dogs was at issue and was the very issue on which Dr. Harvey was testifying. Now include the pictures of Deputy Webb's dog Maggie which were visible to the jury at the time – and which triggered at least one of the juror's questions to Dr. Harvey – and the entire incident played directly into the prosecution's hands. The dogs are cute, big, lovable, loyal, trustworthy – this is all of a piece with the prosecution's theory of the case. And finally, as Alternate Juror 2 related, the jurors with whom Harvey was engaged were "laughing and cutting up," precisely the sort of danger – affecting their view of the witness's testimony – discussed in *Belmontes*.

As a general rule, juror misconduct " 'raises a presumption of prejudice that may be rebutted by proof that no prejudice actually resulted.' [Citations.]" (*In re Hitchings* (1993) 6 Cal.4th 97, 118.) In determining whether misconduct occurred, "[w]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence. [Citations.] Whether prejudice arose from juror misconduct, however, is a mixed question of law and fact subject to an appellate court's independent determination. [Citations.]" (*People v. Nesler*

(1997) 16 Cal.4th 561, 582 (lead opn. of George, C. J.); accord, *People v. Majors* (1998) 18 Cal.4th 385, 417.)

In this case, the trial court's view was colored by its uncritical acceptance of canine olfactory powers. The proof, it seems, was that Maggie alerted on appellant; therefore, the identification must be valid. In that setting, the trial court was blind to the subtle influences this misconduct – by both the jurors and the witness – may have had.

Nor can the jurors' professions of fairness be considered definitive. The court's admonition and question to the jury was stated as mandatory: "Anything that you heard or anything that was said has to be put aside and this case evaluated on what is done in open court in front of the Court's view and in front of the attorneys, and that's the way it has to be. [¶] If anybody cannot follow that admonition, I want to know now." The *only* answer available to a juror, other than one who wished to get out of serving on the jury, was yes. Moreover, we are dealing here, as stated, with subtle matters, slight or unknowable favoritism. Appellant has no doubt that the jurors who answered "yes" to the court's questions about fairness believed they were telling the truth. There is, however, simply no way to gauge the accuracy of their answers, and in a case so lacking in real

evidence against appellant, there is a real possibility, "a reasonable chance, more than an abstract possibility" that the error affected the trial outcome. (*People v. Superior Court (Ghilotti)* (2002) 27 Cal.4th 888, 918, and cases there cited.)

Moreover, the juror (and witness) misconduct implicated appellant's constitutional rights (1) to be tried by an impartial jury, (2) to due process of law, and (3) to a reliable adjudication of the capital charges against him and a reliable determination of any sentence imposed. (U.S. Const., 6th and 14th Amends.; Cal.Const., Art. I, §§ 7, 16; *Parker v. Gladden* (1966) 385 U.S. 363, 364.) As the United States Supreme Court has explained: 'Due process means a jury capable and willing to decide the case solely on the evidence before it .... ' [Citations.]" (*People v. Nesler, supra*, 16 Cal.4th at p. 578, quoting *Turner v. Louisiana* (1965) 379 U.S. 466, 472-473, and *Smith Phillips* (1982) 455 U.S. 209, 217.)

In this case, some of the jurors, and the witness, went beyond the evidence introduced at trial, and the state failed to rebut the presumption of prejudice.

C. THE COURT ERRED IN OVERRULING THE DEFENSE OBJECTION TO COBY WEBB'S OFFERING AN OPINION ABOUT WHETHER DOGS ARE COLORBLIND

During the defense case, Dr. Meyers testified as to how various forms of cuing can undermine the reliability of purported dog-scent identifications. Among the "worst examples" he had seen of this was a situation involving seven individuals, four of whom "were sitting peaceably and one was in a yellow jumpsuit and handcuffs surrounded by two officers." "That," explained Dr. Meyers, "is not a very good lineup. That's contributing a cue that is hard to ignore." (19 RT 3661.) Of course, that was similar to the lineup in the basement of the Orange Street station, where two officers sat in "casual" garb, with sidearms, while appellant was in an orange jumpsuit and cuffed in the front. (17 RT 3174, 3187.)

The prosecution responded, in its rebuttal, with an attempt to counter the implication that the dog Maggie alerted on appellant in the basement locker room because he was dressed in an orange jail jumpsuit. The question was put to Deputy Webb, "Are dogs color-blind?" Deputy Webb answered "Yes, they are." The defense immediately thereafter objected on the ground of a lack of foundation, but the court overruled the objection.

Deputy Webb, as it happens, was wrong. In an experiment by Jay Nietz at UC Santa Barbara, he determined that

> dogs actually do see color, but many fewer colors than normal humans do. . . . In other words, dogs see the colors of the world as basically yellow, blue and gray. They see the colors green, yellow and orange as yellowish, and they see violet and blue as blue. Blue-green is seen as a gray. (S. Coren, Can Dog's See Colors? (2008) *Psychology Today* (on-line edition) <http://www.psychologytoday.com/blog/canine-corner/200810/can-dogs-see-colors> (as of 1/19/2012).)

It is perhaps a small matter, but part of a larger, and disturbing, pattern. The defense was correct. Deputy Webb was a dog-trainer. She was not, nor was she testifying as, an expert in canine physiology. Pursuant to Evidence Code section 800, her opinion about the color-blindness of dogs was admissible only if it was both rationally based on her perception and helpful to a clear understanding of her testimony. It is possible that she had reason to know, but that should have been presented in a *voir dire.* Absent that, it was inadmissible. (*See, e.g.*, *People v. Neverette* (2003) 30 Cal.4th 458, 493, *cert. denied sub. nom, Navarette v. California* (2004) 540 U.S. 1151 [defendant failed to establish proper foundation for opinion of lay witness that he had appearance of someone on drugs].)

Deputy Webb's inaccurate opinion should not have been admitted. If credited by jurors, it provided a spurious basis for discounting the likely

cuing effect of the orange jumpsuit and the doubt that this cuing effect may have raised as to the reliability of the dog's purported scent identification. Further, the error, reflective of the trial court's blind acceptance of all things canine, was cumulatively prejudicial, as argued below in subsection (E).

D. THE VERSION OF THE CALJIC CANINE-EVIDENCE INSTRUCTION THAT THE COURT USED WAS INSUFFICIENT TO WARN THE JURY OF THE NEED FOR SIGNIFICANT CORROBORATION, FAILED TO ADVISE THE JURY TO VIEW SUCH EVIDENCE WITH CAUTION, AND IMPERMISSIBLY LIGHTENED THE PROSECUTION'S BURDEN OF PROOF

The trial court's conflation of dog-tracking with scent-identification, discussed *ante*, led it to use, without modification, the dog-tracking jury instruction, CALJIC No. 2.16 ("Dog-Tracking Evidence").[92] As has been

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[92] CALJIC No. 2.16 ("Dog-Tracking Evidence"), as given in this case, read as follows:

> Evidence of dog tracking has been received for the purpose of showing, if it does, that the defendant is the perpetrator of the crimes charged in Counts One, Two, and Three of the Amended Information, to wit: Murder, Burglary, and Robbery. This evidence is not by itself sufficient to permit an inference that the defendant is guilty of these crimes. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the

(continued...)

set forth above in Argument II, however, scent-identification is an entirely different animal, subject to far greater questions and doubts. Accordingly, the middle paragraph of the instruction, which provides that corroborating evidence "need not be evidence which independently links the defendant to the crime," and is "sufficient if it supports the accuracy of the dog tracking" permitted appellant to be convicted on insufficient evidence.

As a preliminary matter, defense counsel did approve the instruction as to its form. (21 RT 3937.) This does not constitute a forfeiture of the issue, however, because an appropriate instruction concerning the canine evidence was necessary to the jury's consideration of the case, and thus a *sua sponte* instruction. (*People v. Malgren, supra,* 139 Cal.App.3d at p. 242; *People v. Craig, supra,* 86 Cal.App.3d at p. 917.)

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[92] (...continued)
defendant as the perpetrator of the crime of these crimes.

The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking.

In determining the weight to give to dog-tracking evidence, you should consider the training, proficiency, experience, and proven ability, if any, of the dog, its trainer, and its handler, together with all the circumstances surrounding the tracking in question. (15 CT 4101.)

1. Even if CALJIC 2.16 is Appropriate in Tracking or Trailing Cases, It Insufficiently Reflects the Dangers of this Evidence in Scent-Identification Cases

For *tracking* cases, the Court of Appeal in *People v. Gonzales*, *supra*, 218 Cal.App.3d at p. 414, held that it was not necessary that "the other corroborative evidence must, as a matter of law, be evidence which, standing alone, independently links the accused to the crime; the corroborative evidence need only support the accuracy of the tracking itself." The *Gonzales* court explained, in response to an argument that dog-tracking evidence must be corroborated by "independent" evidence of guilt, that "the concern is not trustworthiness for that is addressed in the threshold decision to admit the evidence. Rather, the concern is that there be other circumstances supporting the accuracy of the inferences drawn from the dog-tracking evidence." (*Id.* at pp. 413-414.)

That is not the situation here. First, the trial court held neither a *Kelly* nor an Evidence Code section 402 hearing to establish the foundational reliability of the scent-identifications in this case. Second, if it had, they would have been excluded, but if not, then at minimum sufficient doubt would have been raised to require a more exacting degree of corroboration. As exhaustively discussed *ante*, there is significant doubt

regarding the reliability in general of scent identification, and the circumstances here were rife with reasons for Maggie to have alerted on appellant *other* than a perceived match to whatever scent the perpetrator may have left on the envelope: Appellant was the only one wearing an orange jail jumpsuit and cuffed; he was the last choice available among the three in the room; he may have been the only one familiar to Maggie, by virtue of the Spruce Street Station trailing three days earlier; he may have had a scent similar to but not matching the perpetrator's scent or similar to whatever that scent may have become after being treated with ninhydrin and stored for forty days; and unconscious cues by Webb could have led to the alert. The fact is that we don't know why Maggie alerted to appellant in the station-house basement.

In light of all this, a far more circumspect role should have been given to this evidence in the instruction. The defense instruction rejected in *Craig*, a dog trailing case, would have advised the jury that dog trailing evidence:

> must be viewed with the utmost of caution and is of slight probative value. Such evidence must be considered, if found reliable, not separately, but in conjunction with all other testimony in the case, and in the absence of some other direct evidence of guilt, dog trailing evidence would not warrant conviction. (86 Cal.App.3d at p. 917.)

Nothing less than such an instruction should have been given in this case, and in any future case involving dog scent identification.

2. CALJIC 2.16 Suffers from Being More Permissive than Cautionary

There is another danger to the use of CALJIC 2.16 in this case: It's language can be understood as permissive rather than cautionary.

First, the instruction contained no words of caution. Contrast this with, for example, the CALJIC instruction on accomplice testimony, No, 3.18, which concludes with the admonition that such testimony, "[t]o the extent that [it] tends to incriminate the defendant, [] should be viewed with caution." (See also CALCRIM No. 334) There are other instructions which require no corroborative evidence, but include an express cautionary admonition, such as that "[e]vidence of an oral confession or an oral admission of the defendant not made in court should be viewed with caution" (CALJIC Nos. 2.70, 2.71), or that "[t]he testimony of an in-custody informant should be viewed with caution and close scrutiny." (CALJIC NO. 3.20)

Justice Feinberg, in his dissent in *Malgren*, expressed his view that dog-tracking evidence is

> of little probative value and must be viewed with caution. While I agree with the majority that a *sua sponte* instruction is required as to the necessity for other direct or circumstantial evidence of the identity of the defendant . . . . I would hold further that whenever the evidence is admitted after a proper foundation has been laid, the jury must be instructed to view it with caution. [Citation.] I do not believe that the scientific validity of dog-tracking evidence has been demonstrated even as well as voice printers; exercise of restraint is therefore warranted. [Citation.] I am concerned with the matter of undue weight as evidence gleaned from the efforts of dogs has been part of our folklore for centuries." (*People v. Malgren, supra*, 139 Cal.App.3d at p. 246 (Feinberg, J., dissenting).)

Not only is there no cautionary language in the instruction given in this case, it goes on to allow conviction on only slight corroborative evidence. While it requires "other evidence that supports the accuracy of the identification of the defendant as the perpetrator," it allows the corroboration to not be "evidence with independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking." (15 CT 4101.) Thus, the jury could deem Lisa Harvey's testimony about her research, or Coby Webb's testimony about Maggie Mae's training, as sufficiently corroborating to convict appellant, without any link to any other

incriminating evidence.[93] This amounts not to a cautionary instruction, but a permissive one.

3. Because CALJIC No. 2.16 Does Not Link to the Burden of Proof, Its Permissive Language Undercuts that Burden

Whether or not CALJIC No. 2.16 is sufficient as a cautionary instruction, it raises another, constitutional, issue, because of its failure to relate the question of dog-scent identification evidence to the reasonable-doubt standard.

The instruction states that "This evidence is not by itself sufficient to permit an inference that the defendant is guilty of these crimes. Before guilt may be inferred, there must be other evidence that supports the accuracy of the identification of the defendant as the perpetrator of the crime of these

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[93] The prosecutor, in closing argument, encouraged the jury to do just that:

> if you . . . 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. . . . 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. A*nd that's really all you need.* (22 RT 4060; emphasis added.)

crimes. [¶] The corroborating evidence need not be evidence which independently links the defendant to the crime. It is sufficient if it supports the accuracy of the dog tracking." (15 CT 4101.) A fair reading of this instruction, however, is that the dog-scent evidence *was* sufficient "to permit an inference that the defendant is guilty of the crimes" if there was "other evidence" that "suppor[ed] the accuracy of the dog tracking" even if that evidence did not "independently link defendant to the crime." This directly implicates and undermines the reasonable-doubt standard, absent some additional language such as found, for example, in the current CALCRIM No. 376, concerning recently-stolen property found in defendant's possession and its tendency to implicate the defendant as the perpetrator: "Remember that you may not convict the defendant of any crime unless you are convinced that each fact essential to the conclusion that the defendant is guilty of that crime has been proved beyond a reasonable doubt."

CALJIC 2.16 is deficient because in its permissiveness, authorizing conviction as long as there is slight evidence corroborating the dog scent identification of appellant, it unconstitutionally lightened the prosecution's burden of proof beyond a reasonable doubt. (See *In re Winship* (1970) 397

U.S. 358, 364.) It is true that the instruction does not in itself address the burden of proof, or expressly relieve the prosecution of it's burden. (Compare *People v. Parsons* (2008) 44 Cal.4th 332, 355-356) Nevertheless, it presupposes the inherent accuracy of the dog-scent evidence by requiring that it need only be corroborated by evidence not independently indicative of guilt, even evidence that has nothing to do with connecting the defendant to the commission of the crime. One simply cannot speak of evidence being sufficient for an "inference that the defendant is guilty" under these circumstances without implicating the burden of proof.

Without language specifying that dog-scent evidence is to be assessed within the overall burden of proof of beyond a reasonable doubt, then there is at least a substantial likelihood that the instruction will be applied by a lay jury in an unconstitutional manner that allows jurors to confer undue probative weight to the dog-scent evidence. (*Estelle v. McGuire* (1991) 502 U.S. 62, 74; *Boyde v. California* (1990) 494 U.S. 370, 381.) The jury, in effect, is told that the dog-scent evidence "is so incriminating that to warrant conviction there need only be . . . slight

corroboration . . . ." (*People v. McFarland* (1962) 58 Cal.2d 748, 754; *People v. Vann* (1974) 12 Cal.3d 220, 224.)

4. The Error Was Prejudicial

The prejudice is clear: By allowing the prosecution to convict on a less-than-sufficiently-stringent standard, the trial court's inadequate instruction violated appellant's Eighth and Fourteenth Amendment rights to due process, and to the fair and reliable determinations of guilt and sentence required in capital cases. (*In re Winship*, *supra,* 397 U.S. 358 [due process requires proof beyond a reasonable doubt as a prerequisite to conviction of a criminal offense]; *Beck v. Alabama, supra,* 447 U.S. at pp. 637-38 [heightened reliability is required by the Eighth and Fourteenth Amendments for conviction of a capital offense].) Given at least some of the jurors' lingering doubt in the first penalty trial, respondent cannot show beyond a reasonable doubt that what was in this case lingering doubt would not have ripened into reasonable doubt of guilt had the jury been appropriately instructed. (*Chapman v. California*, *supra*, 386 U.S. at pp. 23-24.)

Even under the state standard, the error was prejudicial, for there is more than "merely a reasonable chance, more than an abstract possibility"

that the error affected the trial outcome. (*People v. Superior Court (Ghilotti), supra*, 27 Cal.4th at p. 918.) The only pieces of evidence linking appellant to the Myers crime were the dog-scent identifications and his rambling and incoherent "admissions" to the police, the Van's shoes (never found) that may or may not have been his, possible (but never proven to be) bleach holes on a shirt, and testimony on both sides of the question of whether or not he had been gone from the Harris residence – and none that he had been in Las Vegas – for two or three days around Mother's day. Had the instructions properly required independent evidence of the crime and advised the jury to view dog-scent identification evidence with caution rather than authorizing conviction upon a finding of slight corroboration of that evidence, it is more than merely possible that the jury would have acquitted.

E. THE TRIAL COURT'S MYRIAD ERRORS WITH REGARD TO THE CANINE IDENTIFICATION EVIDENCE WERE CUMULATIVELY PREJUDICIAL

Appellant has shown, in several of the foregoing subsections, that the errors discussed therein were themselves prejudicial, under either or both the state or federal standards. Cumulatively, they show a repeated pattern of blind adherence to the myth of canine infallibility, repeated twisting of the law and logic to admit otherwise inadmissible evidence, and subverting of appellant's valid challenges to the prosecution's evidence. (*People v. Hill*, *supra*, 17 Cal.4th 800, 844, 847 [cumulative error may be prejudicial].) The result, cumulatively, was to allow appellant, in gross violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, a fair trial, and the reliable determinations of guilt and sentence mandated in a capital case, to be convicted on unreliable, irrelevant, and improperly validated evidence that he was the perpetrator of the Myers crimes, despite not one shred of direct evidence that it was so. The errors, cumulatively, were more than prejudicial under any standard, and his conviction of the Myers crimes must be set aside.

IV. THE TRIAL COURT PREJUDICIALLY ERRED IN DENYING APPELLANT'S MOTION TO EXCLUDE HIS PURPORTED ADMISSIONS FOLLOWING ASSERTION OF HIS RIGHT TO REMAIN SILENT

The defense sought to suppress appellants statements to the police made after he terminated questioning – statements which contained the alleged admissions regarding the Myers crimes. (4 CT 1039 *et seq.*) The court's denial of the motion was prejudicial error, and violated appellant's Fifth Amendment right to remain silent, because it focused on the good faith of the detectives rather than, as the law requires, the mind-set of the suspect.

A. THE DETECTIVES RENEWED THEIR QUESTIONING OF APPELLANT, AND HIS MOST DAMAGING STATEMENTS WERE MADE SHORTLY AFTER HE ASKED TO STOP THE INTERVIEW

On the day that appellant was arrested for the Mason crimes, he was interviewed at the police station by Detectives Barnes and Joseph. (14 CT 3820.) He was given the standard *Miranda* warnings and agreed to talk. (14 CT 3821.) During the course of the interview, appellant asked to stop: "Man just take me jail man, I don't wanna talk no more." The detectives left the room. (14 CT 3878.)

After a four-minute break (14 CT 3878), Officer Sutton came in and offered appellant a drink. What ensued is crucial for appellant's argument that he did nothing to countermand his desire not to talk further:

SUTTON: Were you thirsty at all? I've got some cold water if you do.

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

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

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

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

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

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

JACKSON: Is my girl still here?

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

JACKSON: How long am I gonna be here man?

SUTTON: Again, I'm sorry[.]

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

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

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

SUTTON: Just kinda relax.

JACKSON: my medicine right now man.

SUTTON: What medication are you . . .

JACKSON: Uh I . . .

SUTTON: supposed to have.

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

SUTTON: . . . . . its unlawful for me to dispense medication.

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

SUTTON: Okay so you wanna talk to 'em again . . . . I'll get them here and then you can talk to 'em some more and tell 'em everything you need to tell 'em okay, okay? Is that a yes or a no? Okay. (14 CT 3879-3880.)

After leaving the room and returning, Sutton informed appellant that Barnes and Joseph would be back to talk with him in a minute.

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

SUTTON: They're the men to talk to about that, I, all I can say to you is I don't know, okay, they should be here in a minute to two, alright? (14 CT 3880-3881.)

The transcript indicates sounds of the door opening and closing, once as Sutton exited and again as Barnes and Joseph entered. The following ensued:

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

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

JACKSON: Yes sir.

BARNES: Okay what's up.

JACKSON: I'm just, I'm sorry man, I, I just wanna . . . whatever, whatever you wanna write in there just write down in there uh you just, you know, put down there 'cause I know, I know I, you know what I'm sayin', I know I did it. (14 CT 3881.)

There ensued a series of admissions by appellant regarding the Mason incident. ". . . I know I did it." (14 CT 3881.) In the midst of a series of statements about Mason, he began to make statements leading to the detectives forming a suspicion about the Myers crimes: That the victim, like Myers, had red hair (14 CT 3882, 3887-3888); that he thought he had put her in a car and he threw her out the window (14 CT 3891-3892); and then, specific questions and answers about the Myers case (commencing at 14 CT 3909 and described in more detail *ante*, at pp. 55-56).

B. THE HEARING ON APPELLANT'S *MIRANDA* MOTION

Appellant's motion raised, *inter alia*, three major points: that the *Miranda* warning as given was insufficient; that the police improperly continued the questioning shortly after appellant asked to terminate it; and that under the totality of the circumstances, the interview was coercive.

While the argument here will focus on the second point, the renewal of questioning shortly after appellant's invocation of his right to remain silent, it is well to note that the motion asserted several elements of coercion. Thus, according to the motion, prior to the commencement of the interrogation, appellant was left for at least two hours, handcuffed and alone, in the interrogation room.[94] He was, however, able to hear that his girlfriend was being questioned in another room. (14 CT 3824.) In addition, the motion alleged, throughout the interview, the police used a

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[94] At the hearing on the motion, the trial court asked how long appellant had been in the interview room before he given his *Miranda* warnings. Detective Barnes estimated 1 to 2¼ hours. (3 RT 1294.) Defense counsel explained that appellant was taken into custody at about 9-9:30 a.m., and with the interrogation starting at about noon, he was in custody for 2½ to 3 hours before the interrogation commenced, during which time he could hear detectives interrogating his girlfriend. (3 RT 1295-1296.) The prosecutor disagreed with defense counsel regarding the time, saying that appellant had arrived at the station house between 10 and 10:30 in the morning, which would make Detective Barnes' estimate correct.

variety of tactics meant to overcome his will. (4 CT 1043.) Nevertheless, as the focus of this brief, is on the Myers crimes, and any purported admissions related to those crimes came *after* appellant's clear assertion of his right to remain silent, that will be the focus of this argument.[95]

Officer Sutton testified at the hearing on the motion that the detectives had only asked him to watch Jackson while they were gone from the room – nothing more. That is, no one asked him to try to get Jackson to reinitiate the questioning. (3 RT 1285-1286.) After Jackson asked him to tell Barnes and Joseph he wanted to talk to them again, he did, but did not tell the detectives *why* Jackson wanted to do so, or what Jackson wanted to talk to them about. (3 RT 1287.)

The prosecutor argued that, regarding what happened when the detectives returned to the room after Officer Sutton left, "they didn't make any statements that were designed to elicit any incriminating response. They merely walked in based on what Officer Sutton had said to them about defendant wanting to speak to them." (3 RT 1301.)

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[95] That appellant's invocation of his right to remain silent was clear and unequivocal distinguishes it from those cases in which the invocation of the right was said to have been ambiguous, and thereby insufficient. (*E.g., Berghuis v. Thompkins* (2010) 560 U.S. ___, 130 S.Ct. 2250, 2259-2260, 176 L.Ed.2d 1098; *People v. Stitely* (2005) 35 Cal.4th 514, 535.)

The court ruled as follows: It accepted Officer Sutton's testimony that he went into the room to see how Mr. Jackson was doing and to offer him drink; Jackson initiated the conversation with Officer Sutton; and Jackson requested that the detectives return. When they did return, they verified that Jackson was initiating the contact and wanted to talk to them, and then simply said "'Okay, what's up.'" "He's basically saying what do you want to talk about. That could be what's going to happen to him, anything in general terms, but Mr. Jackson goes back in to talking about the particular offense." That, the court ruled, did not violate *Miranda* because Jackson initiated the contact and the officers were acting in good faith.[96] (3 RT 1302-1303.) The court erred.

C. THE TRIAL COURT APPLIED THE WRONG STANDARD IN HOLDING THAT THE FIFTH AMENDMENT DID NOT APPLY TO THE POLICE QUESTIONING AFTER APPELLANT INVOKED HIS RIGHT TO SILENCE

The trial court imported a Fourth Amendment standard – the good-faith of the police – into this Fifth Amendment question of whether the

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[96] On the more general issue of the voluntariness of the confession, having reviewed the videotapes of the interview and taking into account Jackson's emotional state and demeanor, the court found that under the totality of the circumstances, the interview was not coercive. (3 RT 1303-1304.)

police could return to question appellant a short time after he invoked his right to silence. As was stated in *Miranda* itself:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; *any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise.* Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. (*Miranda v. Arizona* (1966) 384 U.S. 436, 473-474 (emph. added; fn. omitted.)

This, of course, does not mean that interrogation may never continue. The question is, under what circumstances? *Michigan v. Mosley* (1975) 423 U.S. 96 is instructive, and provides a sharp contrast to the facts in this case. Mosely was arrested for a series of robberies, and invoked his right to remain silent regarding those robberies. He was returned to the jail portion of the building. Over two hours later, a different detective brought him to a different location, and, after giving him a fresh set of *Miranda* warnings, questioned him about a homicide case, to which he eventually confessed. At issue before the Supreme Court was a state court holding that the passage from *Miranda* quoted above created a *per se* bar to further questioning. It did not, the court explained. Rather, "the admissibility of

statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his 'right to cut off questioning' was 'scrupulously honored.'" (*Mosley, supra*, 423 U.S. at p. 105.) It was, the Supreme Court held, because the first detective immediately ceased questioning, and the second detective, over two hours later, took him to a different location and questioned him about another case, and *gave him the full Miranda warnings again*! "He was thus reminded again that he could remain silent and could consult with a lawyer, and was carefully given a full and fair opportunity to exercise these options." (*Id.* at pp. 104-105.)

The contrast with this case could not be more stark: While the detectives ceased questioning and left the room, appellant was left there after he had clearly expressed the desire to be returned to jail. He made clear to Officer Sutton that what he wanted to know was when he was going to get back to his cell and gain access to his medications. That is the clear – and nearly sole – import of his statements to Sutton. He wanted out of that room!

In his responses, Sutton only increased appellant's agitation. Whether unable or unwilling to respond, Sutton repeatedly claimed ignorance, and deferred to the detectives. Finally, Sutton implies that the only way appellant will be able to get what he wants is to talk to the

detectives again: "Okay so you wanna talk to 'em again . . . . I'll get them here and then you can talk to 'em some more and tell 'em everything you need to tell 'em okay, okay? Is that a yes or a no? Okay." (14 CT 3880.) In his agitated state, appellant could well have interpreted this to mean, "you have to talk to the detectives, and you have to tell them enough for them to release you from this room." Accordingly, when the detectives returned a few minutes later and said, "OK what's up?" – which appears to be neutral – it is clear that the totality of the circumstances had accomplished what *Miranda* and *Mosley* cautioned against: "any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise." (*Miranda v. Arizona, supra*, 384 U.S. at p. 474; *Michigan v. Mosley*, *supra*, 423 U.S. at pp. 103-104; see also *Maryland v. Shatzer* (2010) ___U.S.___, 130 S. Ct. 1213, 1223, 175 L.Ed.2d 1045 [prescribing 14-day minimum break between invocation of right to counsel and re-interrogation with new *Miranda* warnings and waiver].) In this case, as soon as the detectives became aware that the "the coercive pressures of the custodial setting" (*Mosley*, 423 U.S. at p. 104), had led appellant to confess, it was their duty to stop him long enough to re-warn him.

The trial court also erred in focusing on the state of mind of the detectives. It is the suspect's, rather than the interrogator's, state of mind which is at issue. In *Arizona v. Roberson* (1988) 486 U.S. 675, 684-688, the entire discussion proceeds from the point of view of the suspect. Thus, the court says, "to a suspect who has indicated his inability to cope with the pressures of custodial interrogation by requesting counsel, any further interrogation without counsel having been provided will surely exacerbate whatever compulsion to speak the suspect may be feeling." (*Id.* at p. 686.) That is what happened here. Officer Sutton's exchange with appellant, while seemingly innocent, was nothing but frustrating – he refused to convey the status of Jackson's girlfriend, and couldn't tell him when he was going to get back to the jail or get access to his medications, thereby "further exacerbat[ing] whatever compulsion to speak the suspect may be feeling. (*Ibid.*) Moreover, the *Roberson* court added, "we attach no significance to the fact that the officer who conducted the second interrogation did not know that respondent had made a request for counsel."[97] (*Id.* at p. 687.)

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[97] *Arizona v. Roberson* concerned the right to counsel rather than the right to remain silent. Even if there can be said to be less stringent safeguards in the case of the right to silence than there are for the right to an attorney, there is nothing regarding an officer's good faith which has been (continued...)

Finally, with regard to whether appellant in this case could be said to have re-initiated the questioning, the answer is "no." It is clear from the exchange with Officer Sutton that appellant was *seeking* information from the detectives, not seeking to *impart* information about the case. Moreover, he did not blurt out his admission – he did so in response to a question, however neutral, from Detective Barnes: "Okay, what's up?" (14 CT 3881.) Accordingly, in this case, his Fifth Amendment right to cut off questioning was anything but "scrupulously honored." Given that the re-initiation occurred minutes after appellant invoked his right to silence; that he was seeking information from, rather than to impart information to, the detectives; and that they failed to renew his *Miranda* warnings, appellant's Fifth Amendment right to silence was violated.

The prejudice is clear: Everything appellant said to the detectives which led them to suspect his involvement in the Myers case, and everything the jury heard which they could have considered to be an admission, occurred following the re-initiation of questioning following appellant's decision to cut of questioning. While there was additional evidence – the dog-sniffs, principally, which were also erroneously

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[97] (...continued)
imported into Fifth Amendment right-to-silence jurisprudence.

admitted – it was only after he invoked his right to silence and the detectives returned that he began to speak of a red-headed woman whom he removed from her residence, references clearly not applicable to Mason and highly suggestive of Myers. As the first jury's hanging on the question of death indicates, even with the dog-sniff evidence and his seeming admissions being discussed here, there remained at least some lingering doubt. In that context, absent this erroneously admitted evidence, the State could not show beyond a reasonable doubt that the error was harmless. (*Chapman v. California, supra,* 386 U.S. 24.)

V. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF AN EXPERIMENT THAT DID NOT DUPLICATE THE CONDITIONS TO WHICH IT PURPORTED TO APPLY

During the initial testimony of state criminalist Mark Traughber, he mentioned that a portion of the stained carpet from Myers' hallway was submitted to him, but was negative for presumptive blood. (12 RT 2628.) Similarly, at the scene, and using only Hemastix, he found no positive indications for blood except for the spot on the hallway heater grate. (13 RT 2687.) On cross-examination, Traughber acknowledged that Hemastix can show a false positive with bleach, and that he had never tested to see if the active ingredient in bleach created a false positive on Hemastix. (13 RT 2697-2698.) He also, however, did another test, known as the Kastle-Meyer presumptive blood test on the stained piece of Myers' carpet in his laboratory, and that also tested negative. (13 RT 2701-2702.) Traughber was asked to, and read from a forensic handbook a portion which suggested that bleach creates false positives with Hemastix, so that it would have done so if the carpet stain was caused by bleach. (13 RT 2686-2687.)

The prosecution asked Traughber to conduct further experiments, and the defense objected to the admission of these experiments on Evidence Code sections 210 (relevance), 352 (probative value outweighed by danger of causing undue prejudice and confusing jury), and due process grounds.

(16 RT 3112.) After the court overruled the objections (16 RT 3115), Traughber described his experiment: He took some carpet – not Myers' – that had been used in training in the laboratory and poured some undiluted bleach onto it to see what color changes occurred and to see if, after two days' evaporation, it would test positive or negative with Hemastix. (16 RT 3119.) By the next day, the color had changed to what it looked like when he showed it in court, and the bleach smell had disappeared by the second day. (16 RT 3120.) When he tested a portion of the carpet with Hemastix "after the first day," he got a slight positive reaction; but after the second day, the reaction was negative. (16 RT 3121.) He concluded that sodium hypochlorite, the active ingredient in bleach, is very reactive, but all of it gets consumed reacting with something in the carpet, or decomposing over time, or both. (16 RT 3123.) He also experimented by putting one drop of his own blood and two drops of bleach onto butcher paper and mixing them together, after which the blood turned turning black and then disappeared altogether. (16 RT 3123; see Ex. 124.) By sixty seconds, the black was almost gone. (16 RT 3123-3124.) Thus, he concluded, bleach destroys bodily fluids such as blood. (16 RT 3124.)

The admission of this experiment suffered from the same error as the trial court's admission of Lowry and Harvey's ninhydrin experiments.

"Admissibility of experimental evidence depends upon proof of the following items . . . (2) the experiment must have been conducted under substantially similar conditions as those of the actual occurrence [citation] . . . ." (*People v. Bonin, supra,* 47 Cal.3d at p. 847.) The actual occurrence was in Myers' house, not the lab, and on her carpet, not the random remnant Traughber found to use. Indeed, it remains unknown whether or not the stain on the carpeting in Myers' house was even caused by bleach, so the entire experiment was irrelevant and inadmissible.

The prejudice arises in two ways: first, because it likely misled the jury by appearing to provide confirmation of the prosecution theory that the perpetrator used bleach to wash away blood stains on the carpet, which in turn helped confirm the prosecutor's theories that a violent crime occurred in the residence and that appellant, who had holes on his shirt which, according to the prosecutor, may have been caused by bleach, was the perpetrator. This, in turn, lent undue weight to the remaining paucity of evidence that appellant was the perpetrator. The strands of the prosecution's case consisted of the questionable dog-scent identification, the ambiguous and uncorroborated admissions he made to the police, the shoeprint which matched shoes he (along with several thousand other southern Californians) may or may not have had; the supposed bleach stain

discussed here; and the holes in his shirt which may or may not have been caused by bleach. In that setting, the removal of any one of these strands meets the standard for prejudice, of "merely a reasonable chance, more than an abstract possibility" that the error affected the outcome of the trial. (*People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 918; *College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715; *People v. Watson, supra*, 46 Cal.2d at p. 836.) Further, in combination with the myriad other evidentiary, instructional, and procedural errors which occurred in appellant's case, the introduction of this irrelevant but misleading evidence undermined appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to a fair trial, to due process, and to the reliable determinations of guilt and sentence mandated in a capital case.

VI. AS TO THE MYERS COUNTS, THERE WAS INSUFFICIENT EVIDENCE OF WHEN THE INTENT TO STEAL WAS FORMED, EXACERBATED BY THE COURT'S FAILURE TO INSTRUCT THE JURY THAT IT MUST DETERMINE WHEN IT WAS FORMED, AND ACCORDINGLY THE ROBBERY CONVICTION AND SPECIAL CIRCUMSTANCE MUST BE SET ASIDE

There was no direct evidence upon which the jury could have found that the perpetrator entered the Myers house with the intent to rob her, or that he formed that intent prior to her death. While the fact that the perpetrator appears to have stolen money may support an inference regarding an intent to steal, the prosecutor argued that his primary intent was sadistic and sexual. (22 RT 1045) Whether or not there was sufficient evidence, however, the trial court's failure to instruct the jury that the intent to steal had to have been formed while Myers was still alive requires reversal of the robbery conviction and special circumstance finding.

A. THE COURT FAILED TO GIVE A DEFENSE-REQUESTED INSTRUCTION REQUIRING THAT JURY DETERMINE WITHER THE INTENT TO STEAL AROSE WHILE THE VICTIM WAS STILL ALIVE

When the perpetrator formed the intent to steal is crucial, because if the intent to steal was formed after Myers was dead, the offense was only theft, not robbery. (*People v. Bolden* (2002) 29 Cal.4th 515, 556 [discussing CALJIC Nos. 8.21, 9.40] ; *People v. Kelly* (1992) 1 Cal.4th 495,

528 [if intent to steal arose only after force was used, the offense is theft and not robbery; *People v. Green* (1980) 27 Cal. 3d 1, 53-54, harmonized on other grounds in *People v. Guiton* (1993) 4 C.4th 1116 [if taking of property from deceased occurred as afterthought there is no robbery, although grand theft or petty theft may have been committed], overruled on other grounds by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3 and *People v. Martinez* (1991) 20 Cal.4th 225, 236-237.) The jury, however, was never instructed to determine when the intent to steal was formed, despite a defense request that such an instruction be given. (15 CT 4197, quoted below.) That, in combination with the lack of evidence of when the intent to steal was formed, means that due process was violated by appellant's conviction for robbery and the finding of a robbery special circumstance.

There was little circumstantial evidence upon which the jury could determine when the intent to steal from Myers was formed – that is, whether it was while she was still alive or not. On the one hand, appellant's purported Myers-related admissions to the detectives described a scenario in which the victim may still have been alive when he supposedly left her home with her in her car, but he explicitly was describing a dream he had, in the context of questions about the Mason case. Moreover, little of what

he said about the red-haired woman was corroborated by other evidence, and some of it made little sense.[98] The perpetrator did seem to have taken some money from the manila envelope found on Myers' bed (assuming that the envelope indeed contained money); on the other hand, there was no evidence of appellant's ever having had that money. Moreover, if the perpetrator did enter Myers' residence with the intent to rob, then how does one explain the fact that another envelope filled with cash was left in her purse (8 RT 1837), and over eight thousand dollars in cash was left in the other bedroom's closet in her house. (7 RT 8108.) In other words, a properly instructed jury might well have concluded that the prosecution had not shown beyond a reasonable doubt that the intent to steal was formed while Myers was still alive.

Indeed, the prosecutor himself in closing argument, relying on a propensity-based theory that if appellant committed the Mason crimes he must also have committed the Myers crimeS and committed them in the same way and with the same motivation, barely mentioned robbery as a motivation for entering Myers' residence and instead emphasized a different alleged motivation, i.e., "violent, vicious sexual assault." (22 RT

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[98] Appellant, for example, described himself driving down the freeway, and grabbing the red-haired woman by the hair and tossing her out the window – a physically very implausible scenario. (14 CT 3891-3892.)

4045, 4056.) The prosecutor contended that theft nonetheless played a role, but only as a "secondary motivation." (22 RT 4045.) A jury, if it credited the prosecutor's inflammatory propensity-based theory, could have wondered whether theft played any role in what motivated the perpetrator's entry into Myers' residence and any assault he may have committed upon her.

What was not addressed in the prosecutor's argument, and missing from the court's instructions, was the necessary temporal component: if the intent to steal was formed *after* Myers was dead, there was no robbery. The court did give CALJIC 8.21.1 (Robbery–When Still in Progress/Felony-Murder) (15 CT 4127). The effect of this instruction, however, was to *extend* the time during which the robbery might have continued, *without* reference to *when* the intent was formed in the first place.

The defense sought an instruction to fill the instructional gap, a modification of CALJIC 8.81.17 to be given in the context of the robbery special circumstance, which was refused:

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

infliction of the fatal wound. (15 CT 4197; 21 RT 3965-3966.)

It is true that a more standard version of CALJIC NO. 8.81.17 was given, as set forth in the margin.[99] (14 CT 4135.) It may be argued that the language of that instruction is sufficient, as it includes the temporality of "while" and "committed in order to carry out." (*Ibid.*) That instruction, however, specifies that its application is to the special circumstance charge, which the jury presumably did not even reach until determining – without proper instruction – that there had been a robbery.

In addition to refusing the defense-proffered instruction, an instruction emphasizing the temporal aspect of the formation of the intent to rob should have been given *sua sponte*. It was closely and openly

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[99] As modified, the version of CALJIC No. 8.81.17 given to the jury read as follows:

> To find that the special circumstance referred to in these instructions as Murder in the Commission of Robbery is true, it must be proved:
>
> 1a. The murder was committed while the defendant was engaged in the commission or attempted commission of a Robbery; and
>
> 2. The murder was committed in order to carry out or advance the commission of the crime of Robbery or to facilitate the escape therefrom or to avoid detection. In other words, the special circumstance referred to in these instructions is not established if the Robbery was merely incidental to the commission of the murder. (15 CT 4135.)

connected with the facts before the court and necessary for the jury's understanding of the case. *(People v. Breverman* (1998) 19 Cal. 4th 142, 154.)

The error was of constitutional dimension. "Failing to instruct jurors about an essential element of a crime is constitutional error because it lets them convict without finding the defendant guilty of that element." (*United States v. Caldwell* (1993) 989 F.2d 1056, 1060, citing *Cabana v. Bullock* (1986) 474 U.S. 376, 384.) "[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." (*In re Winship* (1970) 397 U.S. 358, 364.). As in *People v. Cummings* (1993) 4 Cal.4th 1233, 1313-1314, this is not a case in which it can be said that the instruction would have been superfluous because the jury had found the facts necessary to constitute the elements of the offense.

Given the paucity of evidence regarding when the intent to steal was formed – indeed, given the paucity of *any* evidence connected to the Myers crimes – the court's error in failing to give the requested instruction and to give, sua sponte, instructions on when the intent to steal had to be formed with respect to her death, and the lesser included theft if it was formed after, was prejudicial under both the federal and the state standards of prejudice.

B. THERE WAS ALSO INSUFFICIENT EVIDENCE OF WHEN THE INTENT TO STEAL THE MONEY WAS FORMED TO SUSTAIN THE ROBBERY CONVICTION AND FINDING OF ROBBERY SPECIAL CIRCUMSTANCE

Even if the jury had been, or was, properly instructed, there was insufficient evidence regarding when the intention to rob was formed.

A claim of insufficient evidence requires a finding by the reviewing court that no rational trier of fact could have found the elements of the crime beyond a reasonable doubt, given the evidence presented at trial. (*People v. Kelly, supra,* 1 Cal.4th at p. 528.) *People v. Frye* (1998) 18 Cal. 4th 894, 956, holds that the fact the victim has been murdered does not preclude a finding of robbery, as long the intent to take the possessions was formed before the victim was killed. Here, however, there was no evidence on which the jury could have based such a finding. This is so even viewing the evidence in the light most favorable to the prosecution. (*People v. Rodriquez* (1999) 20 Cal.4th 1, 11; *Jackson v. Virginia* (1979) 443 U.S. 307, 317-320 [standard only impinges on jury discretion to extent necessary to guarantee due process of law].)

There is very little evidence of what happened in Myers' residence. The prosecutor, in arguing as to what happened, relied principally on his propensity-based theory that what happened to Myers is what happened to

Mason. But that theory, as we have seen, led the prosecutor to identify not theft, but "violent, vicious sexual assault" as the primary motivation for the perpetrator's entry into Myers' home. (22 RT 4054-4055.) And while the prosecutor argued that theft was a "secondary" motivation (*ibid.*), the prosecutor did not address, and had little basis for addressing, whether theft was not only secondary, but may not have arisen while Myers was still alive.

Even if, as the prosecutor insisted, the Mason incident could be viewed as a template for what happened to Myers, it provides no basis for a finding as to when an intent to steal from Myers arose. Mason herself was brutally assaulted, physically and sexually, before any actions were taken to steal from her. That scenario provides no basis for finding beyond a reasonable doubt that Myers' assailant formed an intent to steal while Myers was still alive. Myers, like Mason, may have been badly assaulted – and perhaps killed – before the assailant thought of taking property. We just don't know what happened. And in the Myers case, unlike Mason, the assailant did not proceed to steal lots of valuables, but instead apparently took only cash from one envelope and left other sums of money and a purse and other valuables untouched.

The only evidence which suggests that the intent to steal from Myers arose while she was still alive comes from appellant's rambling, nearly incomprehensible, and entirely uncorroborated statements to the police that he took threw a red-headed victim out of the car. Indeed, while appellant suggested she might have still been alive when he did so, she equally might not have been. Jackson did ask the detectives whether or not he had killed the lady he threw out of the car. (14 CT 3895.) And later stated that "she" was alive when he pushed her out of the car. (14 CT 3908.) These statements, however, completely conflate the Mason crimes (about which he was being asked) with crimes about an unidentified red-headed woman, and they were so totally uncorroborated that, even if considered comprehensible, cannot be considered substantial evidence upon which a reasonable jury could rely to determine whether the intent to steal was formed before or after Myers' death.

Accordingly, no rational jury on these facts, properly instructed, could have found beyond a reasonable doubt that appellant formed the intent to steal from Myers while she was still alive. Thus, appellant's conviction for robbing Ms. Myers and the robbery special circumstance finding must be set aside. The effect of setting aside the robbery conviction on appellant's determinate sentencing is argued, *infra*, at pages 331-335.

VII. THERE WAS ALSO INSUFFICIENT EVIDENCE OF AN INTENT TO KILL MYERS, AND THE FAILURE TO REQUIRE INTENT TO KILL VIOLATES THE EIGHTH AMENDMENT

Just as there was no evidence upon which the jury could determine whether an intent to steal from Myers was formed before or after she was dead, there was no evidence upon which they could determine the *mens rea* with which the perpetrator caused her death. It might have been accidental. It might have been a single blow, a reaction to her fighting back, with force the perpetrator had no idea could kill her. He might have been in a state of complete dissociation, a fugue state. It might have been entirely without malice. There is no way to know.

Under California law as it now stands, this makes no difference. The jury was instructed on the usual elements of first degree murder: CALJIC 8l.10 (Murder–Defined (Pen. Code, § 187); CALJIC 8.11 ("Malice Aforethought"–Defined); and CALJIC 8.20 (Deliberate and Premeditated Murder). (15 CT 4122-4124.) They were also instructed on second degree murder. (15 CT 4129-4132.) In addition, they were instructed that if they found that the murder occurred during the commission or attempted commission of a burglary or robbery, it was first degree murder, "whether intentional, unintentional, or accidental." (CALJIC 8.21 (First Degree Felony-Murder [Pen. Code § 189]; 15 CT 4126.) In addition, they were

instructed that, for the purpose of the special circumstance, if the murder took place during the commission of a robbery or burglary, "you need not find that the defendant intended to kill in order to find the special circumstance to be true." (CALJIC 8.80.1; § 190.2; 15 CT 4133.) California's law is, in this regard, a violation of the Eighth Amendment.

Before setting forth the legal argument, it is important to remember that this case involves a distinct absence of evidence of what occurred after the time that Geraldine Myers was last seen. Given the jury's verdict, we will assume for purposes of this argument that appellant was the agent of her demise. There was, however, simply no basis on which to determine what his intent was at the time she was killed. And the presence in the instructions of CALJIC 8.21 relieved the jury entirely of the burden of having to determine intent.

Under our law as it stands now, first-degree felony murder, "includes not only [premeditated murders], but also a variety of unintended homicides resulting from reckless behavior, or ordinary negligence, or pure accident; it embraces both calculated conduct and acts committed in panic or rage, or under the dominion of mental illness, drugs, or alcohol; and it condemns alike consequences that are highly probable, conceivably possible, or wholly unforeseeable." (*People v. Dillon* 1983) 34 Cal.3d 441, 477.)

Moreover, this strict rule of culpability applies not only to the question of guilt, but to the question of death-eligibility. Thus, a defendant who is the actual killer in a felony-murder is eligible for death even if the state does not prove that the defendant had any distinct *mens rea* as to the killing. (See, *e.g.*, *People v. Smithy* (1999) 20 Cal.4th 936 [rejecting defendant's argument that there had to be a finding that he intended to kill the victim or, at a minimum, acted with reckless indifference to human life]; *People v. Earp* (1999) 20 Cal.4th 826, 905, fn.15 (1999) [rejecting defendant's argument that the felony-murder special circumstance could not be applied to one who killed accidentally]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1264 [rejecting the defendant's argument that to prove a felony-murder special circumstance, the prosecution was required to prove malice].) As this Court has long made clear, if a defendant is the actual killer in a felony-murder, he is also death eligible under the felony-murder special circumstance. (See *People v. Hayes* (1990) 52 Cal.3d 577, 631-32.) Under the foregoing cases, and section 190.2, subdivision (b),[100] our felony

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[100] Section 190.2, subdivision (b), provides, in relevant part:

> Unless an intent to kill is specifically required under subdivision (a) for a special circumstance enumerated therein, an actual killer, as to whom the special circumstance has been found true . . . need not have had any intent to kill at the time

(continued...)

murder rule permitted the jury to find appellant both guilty of murder and eligible for death without proof that he harbored any culpable mental state as to the murder itself. This is a regime in which "[A] person can be executed for an accidental or negligent killing." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1152 [Broussard, J., dissenting].)

In a series of cases beginning with *Gregg v. Georgia* (1976) 428 U.S. 153, the United States Supreme Court recognized that the Eighth Amendment embodies a proportionality principle, and it has applied that principle to hold the death penalty unconstitutional in two general circumstances. First, the Court has held death disproportionate for a particular type of crime. (See *Coker v. Georgia* (1977) 433 U.S. 584 [death penalty disproportionate for rape of an adult woman]; *Enmund v. Florida* (1982) 458 U.S. 782 [death penalty disproportionate for aider and abettor to felony-murder].) Second, the Court has held death disproportionate for a particular type of defendant. (See, e.g., *Atkins v. Virginia* (2002) 536 U.S. 304 [death penalty disproportionate for mentally retarded defendant]; *Roper v. Simmons* (2005) 543 U.S. 551 [death penalty disproportionate for

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[100] (...continued)
of the commission of the offense, which is the basis of the special circumstance in order to suffer death or confinement in the state prison for life without the possibility of parole.

defendant under 18 years old].) In evaluating whether the death penalty is disproportionate for a particular crime or criminal, the Court has applied a two-part test, asking (1) whether the death penalty comports with contemporary values and (2) whether it can be said to serve one or both of two penological purposes, retribution or deterrence of capital crimes by prospective offenders. (*Gregg v. Georgia*, supra, 428 U.S. at p. 183.)

The Court first addressed the proportionality of the death penalty for felony-murders in two cases: *Enmund v. Florida, supra*, 458 U.S. 782 and *Tison v. Arizona* (1987) 481 U.S. 137. In *Enmund*, the Court held that the Eighth Amendment barred imposition of the death penalty on an aider and abettor – the "getaway driver" to an armed robbery murder – because he neither took life, attempted to take life, nor intended to take life. (458 U.S. at pp. 789-793.) In *Tison*, the Court addressed whether proof of "intent to kill" was an Eighth Amendment prerequisite for imposition of the death penalty in connection with an aider and abettor to felony-murder. The Court held that it was not, and that the Eighth Amendment would be satisfied by proof that such a defendant had acted with "reckless indifference to human life" and as a "major participant" in the underlying felony. (481 U.S. at p. 158.)

Both *Tison* and *Enmund* involved felony-murder defendants who were not actual killers, but only aiders and abettors. The question here is whether *Tison* established a minimum *mens rea* solely for aiders and abettors, or whether it also established a minimum *mens rea* requirement applicable to actual killers. That question was decided in *Hopkins v. Reeves* (1988) 524 U.S. 88. Defendant Reeves was the actual killer in a felony-murder. He contended that the state court had erred in refusing to instruct on lesser offenses which focused on his mental state: second degree murder and manslaughter. In defending the trial court's refusal to provide such instructions, the state argued that the lesser offenses were inapplicable because felony-murder under Nebraska law did not require any culpable mental state as to the murder itself. In response, Reeves relied on *Enmund* and *Tison* for the proposition that because proof of a more culpable mental state was required by the federal constitution, the lesser-offense instructions were required. Although *Hopkins* involved an actual killer (as opposed to an aider and abettor), the Supreme Court made quite clear that, at some point in the case, the state had to establish that defendant satisfied the minimum *mens rea* required under *Enmund* and *Tison*. (524 U.S. at p. 99; see also *Graham v. Collins* (1993) 506 U.S. 461, 501

[Stevens, J., concurring][stating that an accidental homicide (like the one in *Furman*)

may no longer support a death sentence.].)

The lower federal courts that have considered the issue -- both before and after *Reeves* – have uniformly read Tison to establish a minimum *mens rea* applicable to *all* defendants. (See, e.g., *Lear v. Cowan* (7th Cir. 2000) 220 F.3d 825, 828; *Reeves v. Hopkins* (8th Cir. 1996) 102 F.3d 977, 984-85, rev'd on other grounds, 524 U.S. 88 (1998); *Loving v. Hart* (C.A.A.F. 1998) 47 M.J. 438, 443; *Woratzeck v. Stewart* (9th Cir. 1996) 97 F.3d 329; *United States v. Cheely* (9th Cir. 1994) 36 F.3d 1439; see also *State v. Middlebrooks* (Tenn. 1992) 840 S.W.2d 317, 345.)

The Supreme Court's two-part test for proportionality likewise compels the conclusion that the Eighth Amendment requires a finding of intent to kill or reckless indifference to human life in order to impose the death penalty. In *Atkins*, the Court emphasized, the "the clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures." (536 U.S. at p. 312.) An analysis of legislation in the felony-murder area confirms the unconstitutionality of a scheme that permits a death sentence for felony-murder without any culpable intent as to the murder itself.

As of mid-2012, 17 states and the District of Columbia do not put people to death – an increase of five since 2007. (Rather than list statutes, for simplicity, and because we expect further changes by the time this case is before the Court for argument, appellant relies here on the website of the Death Penalty Information Center, <http://www.deathpenaltyinfo.org/ states-and-without- death-penalty> (as of May, 2012).) Of the 32 remaining states, 16 of them do not permit death on the basis of simple felony murder, or require either an intent to kill, reckless indifference, or some comparable *mens rea* in order to impose death.[101] Two other states – Wyoming and Nevada – have felony murder statutes on their books, but their appellate courts have decided that duplicate consideration of the underlying felony at both the guilt and sentencing phases does not adequately narrow the class of death-eligible murderers such that the death penalty would be reserved for the "worst" murderers. (See *Engberg v. Wyoming* (Wyo. 1991) 820 P.2d 70); *McConnell v. Nevada* (Nev. 2004) 102

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[101] See Code of Ala. § 13A-5-40(b) (2005); Ark. Code Ann. § 5-10-102(a)(1) (2005) [killing must be at least reckless]; 11 Del.C. § 636(a)(2) (2005) [at least reckless]; Kans. Stats.Ann. § 21-3439 (2005); La. R.S. 13:30(a)1 (2005); R.S.Mo. § 565.021 (2005), *Ginnings v. State* (Mo. 1974) 506 S.W.2d 422; New Hampshire RSA 630:1, 630:1-b [at least reckless] (2004); Ohio ORC Ann. 2903.01(b) (2005) [at least reckless]; Or.Rev.Stats. § 163.095 (2003); *Commonwealth v. Rollins* (Pa. 1999) 738 A.2d 435; Tex. Pen. Code § 19.03 (2004); Utah Code Ann. § 18.2-31 (2005); Rev. Code Wash. § 10.95.020 (2005).

P.3d 606.) Finally, the federal death penalty statute does not recognize simple felony murder as a basis for death. (18 U.S.C. § 3591(a)(2).) In sum, 35 states, the District of Columbia, and the United States, reject reject felony-murder *simpliciter* as a basis for death eligibility. This reflects a "current legislative judgment" comparable to the one the Court found sufficient to trigger Eighth Amendment protection in *Atkins* (30 states and the federal government) and is close to that found sufficient in *Enmund* (41 states and the federal government).

Not only is the imposition of the death penalty on one who has killed negligently or accidentally contrary to evolving standards of decency, it fails to serve either of the penological purposes -- retribution and deterrence of capital crimes by prospective offenders -- identified by the Supreme Court. With regard to these purposes, "[u]nless the death penalty . . . measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment." (*Enmund v. Florida, supra*, 458 U.S. at pp. 798-799.) With respect to retribution, the Court has made clear that retribution must be calibrated to the defendant's culpability, which in turn depends on his mental state with regard to the crime. "It is fundamental 'that causing harm intentionally must be punished more severely than

causing the same harm unintentionally.'" (*Ibid.* See also *Tison v. Arizona, supra*, 481 U.S. at 156 ["the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished."].) Plainly, treating negligent and accidental killers on a par with intentional and recklessly indifferent killers ignores the wide difference in their level of culpability.

Nor does the death penalty for negligent and accidental killings serve any deterrent purpose. As the Supreme Court has recognized, "it seems likely that 'capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation." (*Enmund v. Arizona, supra*, 458 U.S. at pp. 798-99; accord, *Atkins v. Virginia, supra*, 536 U.S. at p. 319.) The law cannot deter a person from causing a result he never intended and never himself foresaw.

In short, because imposition of the death penalty for felony-murder *simpliciter* is contrary to the judgment of a sizable majority of the states, it does not comport with contemporary values. Because it serves no penological purpose it "is nothing more than the purposeless and needless imposition of pain and suffering."

Accordingly, allowing the jury to find Mr. Jackson eligible for death based on two felony-murder special circumstances that required no culpable

mental state – in a case in which there is a complete lack of evidence of what actually occurred at the time of the killing – violated the Eighth Amendment.

VIII. THE PROSECUTOR COMMITTED PREJUDICIAL MISCONDUCT IN HIS CLOSING ARGUMENT, AND THE DEFENSE ATTORNEYS' FAILURE TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

The prosecutor's closing argument included several instances of improper and prejudicial argument. Specifically, he opened the argument with reference to other cases, such as the Polly Klaas and Semantha Runyan cases, to play on the fears and emotions of the jury. Thereafter, he repeatedly conflated the evidence of the sexual attack on Mason to suggest – without a scintilla of evidence – that sexual crimes were committed against Myers. He premised his assertions that Myers was sexually assaulted not on evidence but on an improper propensity theory, and then to make matters worse, in addition to improperly urging the jury to find that Myers had been sexually assaulted, he relied upon the asserted rarity of sexual assaults against elderly women to argue that appellant must have committed both offenses because it takes "a sick, sadistic, perverted predator" to commit such crimes.

Early in his argument, the prosecutor argued as follows:

> MR. MITCHELL: It's a gross understatement to say that we live in a violent world. Our newspapers and our TV news inundate us with a steady stream of violent stories: shootings, killings, robberies, rapes. It's become so commonplace we hardly pay attention to it anymore. We almost become numb to it.

> Against this backdrop of violence, not to mention the war on terrorism but on our home front, there are still certain crimes, certain horrendous crimes that impact on our lives with all the subtlety of a bomb going off. It shocks our sensibilities and shocks our conscience.
>
> Who among us did not gasp in horror and disbelief when you heard about what happened to 12-year-old Polly Klaas, stolen from her home during a slumber party while her mother slept in another room, raped and murdered by some psychopath. Or what was your reaction when you heard about 5-year-old Samantha Runyon, kidnapped from in front of her home in Orange County, raped and murdered and her little naked body left on a roadway? Or Anthony Martinez, a 10-year-old in Beaumont, similarly kidnapped in front of his home? The implications of these crimes affect us all. We should be safe in our homes. We want to believe that we are.
>
> Yet another type of crime, equally monstrous, equally horrendous, but far more rare, occurring far less frequently than these horrendous crimes against children. When was the last time you heard reports or stories of someone targeting elderly single women for sexual assault and murder? These crimes are far more rare. The Night Stalker perhaps may come to mind, perhaps the Boston Strangler. That's just the point. Years and years may pass, decades may pass before you hear reports of crimes like this. It takes a sick, sadistic, perverted predator to target innocent, vulnerable, elderly women living alone for vicious sexual assault. (22 RT 4041-4042)

Later, the prosecutor made three references conflating the sexual attack on Mason with a sexual attack on Myers, as to which there was no evidence whatsoever:

> The person who attacked Gerry Myers, like the person who attacked Myrna Mason, their primary motivation wasn't theft. It was a concurrent or secondary motivation, yes. The primary motivation was something else: violent, vicious sexual assault. (22 RT 4045.)

> 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 Mason during the vicious, violent sexual assault that was his primary motivation. (22 RT 4056.)

Thus, the prosecutor both flaunted the rules of evidence and reduced his burden by telling the jury that the facts surrounding the Mason attack proved that appellant committed the Myers crimes

> 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.)

In his final closing argument, the prosecutor added one more bit of hyperbole unsupported by the evidence: "Bailey Jackson, and no one else, attacked and slaughtered Gerry Myers in her home and disposed of her body." (22 RT 4127.) There was, of course, no evidence whatsoever that Ms. Myers was "slaughtered . . . in her home." And in concluding his argument, he closed with an explicit assertion of his propensity-based theory of guilt: "The one thing you have to recognize, the one thing that's

clear in this case, what that man's capable of, we know, what he did to Myrna Mason. When you put that together with all of the circumstantial and physical evidence, including [the dog sniff evidence] . . . . [t]here is one obvious and only one conclusion you can come to. He is guilty of special circumstances first-degree murder." (22 RT 4158-4159.)

A. THE PROSECUTOR'S IMPROPER ARGUMENTS VIOLATED CONSTITUTIONAL AND STATE LAW

A prosecutor's wide latitude in argument includes fair comment on the evidence, including reasonable inferences, but matters not in evidence are restricted to those which amount to "'common knowledge or . . . illustrations drawn from common experience, history or literature.'" (*People v. Hill, supra*, 17 Cal. 4th 800, 819, citing *People v. Williams* (1997) 16 Cal. 4th 153, 221; *People v. Wharton* (1991) 53 Cal. 3d 522, 567-56.) The prosecutor may not misstate or mischaracterize the evidence. (*Hill, supra*, at p. 823; *People v. Purvis* (1963) 60 Cal. 2d 323, 343.) Similarly, the prosecutor may not misstate the law, "'and particularly to attempt to absolve the prosecution from its prima facie obligation to overcome reasonable doubt on all elements. (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1215 [].)' (*People v. Marshall* (1996) 13 Cal. 4th 799, 831 [].)" (*Hill, supra*, at p. 829-830.) Nor can the prosecutor refer to facts not in evidence, thereby becoming an unsworn witness. (*Hill, supra,* at pp.

827-828, and cases there cited.) Nor can the prosecutor argue in such a way as 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.) Finally, bad faith is not required. (*Hill, supra,* at p. 822; *People v. Bolton* (1979) 23 Cal. 3d 208, 213-214.)

In this case, the prosecutor violated these rules in several ways. In his opening remarks regarding other cases, he blatantly appealed to the passions and prejudice of the jury. Mentioning that Samantha Runyon's "little naked body [was] left on a roadway" (22 RT 4041-4042) could have had no other purpose or effect. It certainly had no legitimate connection to any issue in this case. In addition, to the extent that the jury was not familiar with the cases the prosecutor mentioned, he became an unsworn witness. Moreover, all of the cases he cited involve children, irrelevant in a case involving elderly women. Such unsworn " testimony . . . can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence. [Citations.] ([*People v.*] *Bolton* [1979] 23 Cal.3d [208,] 213; *People v. Benson* [1990] 52 Cal. 3d [754,] 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal. 3d

57, 108 []; *People v. Kirkes* (1952) 39 Cal. 2d 719, 724 [].)" (*People v. Hill, supra,* 17 Cal.4th at p. 828; some internal quotation marks omitted.)

Even more serious was his importation of the sexual attack against Mason into the Myers case. There was absolutely no evidence that Gerri Myers was sexually attacked. None. Yet thrice he conflated the facts of the two cases to further inflame the passions of the jury. "'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' (5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550.)" (*People v. Hill, supra,* 17 Cal.4th at p. 828; some internal quotation marks omitted.)

Finally, the prosecutor flaunted the rules of evidence and thereby attempted to reduce his burden of showing each element of the crime beyond a reasonable doubt by stating, in effect, that the facts of the Mason case proved the Myers case beyond a reasonable doubt. (22 RT 4046.) As the prosecutor must have known, Evidence Code section 1101 bars the admission of evidence of a defendant's purported disposition to commit criminal acts in order "to prove his or her conduct on a specified occasion," and hence prohibited reliance upon the propensity-based theory the prosecutor was urging the jury to embrace.

B. THE FAILURE OF DEFENSE COUNSEL TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL ON THE BASIS OF THIS RECORD

Defense counsel did not object to any of the prosecutor's improper argument. However, even without the assistance of a habeas corpus proceeding, this court can consider ineffective assistance of counsel when there is no reasonable tactical or strategic reason for the failure to object. (*People v. Pope* (1979) 23 Cal.3d 412, 426.)

That is certainly the case here, as there was indeed no possible tactical or strategic reason imaginable for failing to object to the prosecutor's serial improprieties. Under these circumstances, any failure to preserve any of the issues for appeal would amount to the ineffective assistance of counsel. (See *People v. Lewis* (1990) 50 Cal.3d 262, 282 [this Court considers otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton* (1998) 205 Cal.App.3d 87, 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].) Accordingly, if the prosecutorial misconduct issue or any facet of it is deemed forfeited, appellant was denied the effective assistance of counsel to which he was entitled under the Sixth and Fourteenth Amendments. (*Strickland v. Washington* (1984) 466 U.S. 668.)

Finally, to the extent that constitutional issues are raised (about which, see the prejudice argument which follows), they are not waived by inadequate objection. (See *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118, 133; *People v. Coddington* (2000) 23 Cal.4th 529, 632.)

In addition, this Court has the authority and the precedent to exercise its discretion to decide the issue despite the lack of an objection below. (*People v. Williams* (1998) 17 Cal.4th 146, 161, fn. 6.) It should do so here, where the representative of the State engaged in such blatantly improper argument in which the identity of appellant as the perpetrator was supported by such weak evidence. Who is to know but what any one of the eight jurors who found sufficient lingering doubt in their penalty deliberations to vote against death – or even all eight of them plus the four remaining – might not have found appellant not guilty but for the prosecutor's improper appeals to their passions and suggestions that Ms. Myers was sexually attacked.

C. THE PROSECUTOR'S MISCONDUCT WAS PREJUDICIAL

It is also an error of constitutional magnitude. "A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process." (*People v. Morales* (2001) 25 Cal.4th 34, 44;

Darden v. Wainwright (1986) 477 U.S. 168, 180-181, 91 L. Ed. 2d 144.) Short of that, there is ample law upon which to find the prosecutor's improper argument of constitutional dimension. The argument that the Mason facts proved the Myers case reduced the prosecutor's burden to prove every fact necessary to constitute the Myers crimes, a violation of the Fifth and Fourteenth Amendments. (*In re Winship* (1970) 397 U.S. 358, 364.) Moreover, a prosecutor "may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." *Cunningham v. Zant* (11 Cir. 1991) 928 F.2d 1006, 1020 [Sixth and Fourteenth Amendments]; accord, *People v. Pitts* (1990) 223 Cal.App.3d 603, 606; see also *Newlon v. Armontrout* (8 Cir. 1989) 885 F.2d 1328, 1337, *cert. denied*, 497 U.S. 1038 (1990) [violation of Due Process of Law]; *People v. Talle* (1952) 11 Cal.App.2d 650, 676.). Other federal cases hold that the prosecutor violates the constitution when he "seeks to obtain a conviction by going beyond the evidence before the jury." *Gomez v. Ahitow* (7 Cir. 1994) 19 F.3d 1128, 1136, *cert. denied*, 513 U.S. 1160 (1995), quoting *United States v. Vera* (11 Cir. 1983) 701 F.2d 1349, 1361.) Further, the prosecutor's spurious propensity argument invited reliance on a flawed theory of proof that undermined the reliability required by the Eighth and Fourteenth Amendments for a capital conviction

and sentence. (*Beck v. Alabama, supra*, 447 U.S. at pp. 637-638; *Zant v. Stephens, supra*, 462 U.S. at p. 879.) Under the federal standard, it would be impossible for the State to show a lack of prejudice beyond a reasonable doubt. (*Chapman v. California, supra*, 386 U.S. at p. 24).

Even under the state standard, the misconduct set forth here was prejudicial. A prosecutor's conduct violates state law when it involves "deceptive or reprehensible methods to persuade either the court or the jury," even if the conduct does not render the trial fundamentally unfair. (*People v. Frye* (1998) 18 Cal.4th 894, 969.) The standard for evaluating a prosecutor's improper remarks before a jury is whether there is a reasonable likelihood that the jury construed them in an "objectionable fashion." (*People v. Smithey* (1999) 20 Cal.4th 936, 960, quoting *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) The whole argument and the instructions must be taken into account, to determine whether there is a reasonable likelihood the jury construed the prosecutor's remarks in an objectionable manner. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Marshall, supra*, 13 Cal.4th 799, 831.) Reversal is required under the state standard if there is "merely a reasonable chance, more than an abstract possibility" that the error affected the outcome of the trial. (*People v. Superior Court (Ghilotti),*

supra, 27 Cal.4th at p. 918; *College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715; *People v. Watson, supra,* 46 Cal.2d at p. 836.)

In this case, there was no direct evidence of guilt with regard to the Myers crimes. The prosecution had to rely first on a dog trailing which involved a 40-day old scent item which had been chemically treated; testimony by a prosecution expert whose views diverted significantly from the views of most of the rest of the dog-sniff world; a carpet stain which may or may not have been caused by bleach, without reference to by whom, or when, it occurred; a hole in appellant's shirt which may or may not have been caused by bleach, without reference to when it occurred; rambling and disjointed "admissions" given in answer to questions about another crime; testimony that appellant may or may not have been to Las Vegas around the time of the crime (and the result of prosecutorial threats to gain a change from original stories); and the crucial one – the purported similarity to the Mason crime. With an insufficient signature to prove identity (two old women living four blocks apart, late at night, entering when they were outside), the prosecutor resorted to misconduct to connect the two, and it had its effect.

Whether evaluated under the federal or state standard, the prosecutor's argument was prejudicial and requires reversal of appellant's convictions for the Myers-related offenses and sentence of death.

IX. THE TRIAL COURT'S FAILURE TO GIVE CALJIC 2.50, SUA SPONTE, AFTER THE PROSECUTOR WITHDREW IT, GAVE FREE REIN TO THE PROSECUTOR TO IMPROPERLY CONFLATE THE MASON SEX CRIMES WITH THE MYERS COUNTS

Other crimes evidence "has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People* v. *Thompson* (1980) 27 Ca1.3d 303,314.) Such evidence "is to be received with 'extreme caution,' and all doubts about its connection to the crime charged must be resolved in the accused's favor." (*People* v. *Alcala* (1984) 36 Ca1.3d 604, 631, citations omitted; see also, *People* v. *Holt* (1984) 37 Ca1.3d 436, 451; *People* v. *Brown* (1993) 17 Cal.App.4th 1389, 1395.)

The prosecutor initially requested, and then withdrew, CALJIC 2.50.[102] (15 CT 4181-4182; 21 RT 3938.) While the defense did not object

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[102] As presented to the trail court by the prosecutor, CALJIC No. 2.50 read as follows:

> Evidence has been introduced for the purpose of showing that the defendant committed [a crime] [crimes] other than that for which [he/she] is on trial.
>
> [Except as you will otherwise be instructed,] [This] [this] evidence, if believed, [may not be considered by you to prove that defendant is a person of bad character or that [he/she] has a disposition to commit crimes. It may be considered by you [only] for the limited purpose of determining if it tends to show:
>
> [A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or

(continued...)

to its being withdrawn, or request it, it should have been given *sua sponte*, as closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. *(People v.*

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[102] (...continued)
scheme used in the commission of the offense in this case which would further tend to show [the existence of the intent which is a necessary element of the crime charged] [or] [the identify of the person who committed the crime, if any of which the defendant is accused] [or] [a clear connection between the other offense and the one of which the defendant is accused so that it may be inferred that if defendant committed the other offense[s] defendant also committed the crime[s] charged in this case];]

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

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

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

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

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

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

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

[The existence of a conspiracy].

For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case. [You are not permitted to consider such evidence for any other purpose.] (15 CT 4181-4182.)

Breverman (1998) 19 Cal. 4th 142, 154.) It especially should have been given after the prosecutor's closing arguments.

At first blush, this Court's jurisprudence appears to say otherwise. In general a trial court is under no duty to instruct *sua sponte* on the limited admissibility of other crimes evidence. (*People v. Padilla* (1995) 11 Cal. 4th 891, 950, overruled on other grounds, *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.) *Padilla* admits of an exception for an "'extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose.'" (*Ibid.*, quoting *People v. Collie* (1981) 30 Cal. 3d 43, 64.) *Padilla,* this Court determined, was not such a case; and neither was *Collie.* This case, however, is.

The best means of showing that is to contrast the facts of this case with those of a another in which the general rule was upheld against an assertion of the *Padilla/Collie* exception. In *People v. Hinton* (2006) 37 Cal.4th 839,

> [d]efendant's guilt was amply supported by the eyewitness testimony of [three witnesses]; the testimony of [another witness]; and defendant's own untruthful statements to police. Defendant's prior murder conviction was hardly a dominant part of the evidence in this case and, far from being minimally relevant to any legitimate purpose, was admissible for impeachment and essential to proving the prior-murder-conviction special circumstance. (*Id.* at p. 876.)

There is none of that here. There were no witnesses, and nothing else, other than the "testimony" of non-percipient dogs and the Mason-interrogation statements that the prosecution wanted the jury to believe were related to Myers, and, though not literally true, admissions to whatever crimes were committed against her.[103] In further contrast, the sex crimes were a major part of the trial, and the prosecutor, in his closing argument, improperly imported them into the Myers case. (See the quotes from the prosecutor's argument set forth above, at pp. 305-306.)

Even if the trial court had no duty to do so before, certainly following the prosecutor's closing arguments the court had a duty to instruct the jury with a modified version of CALJIC 2.50, explaining the limits of the use of the Mason sex-crimes evidence in the jury's consideration of the Myers crimes. While it may be true that some of appellant's statements during the questioning about the Mason crimes might have referred to the

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[103] The prosecutor, for example, argued that contrary to appellant's purported admissions, Myers was not stabbed but strangled to death (14 CT 3924, 3926 [appellant's interrogation concerning red-haired victim]; 22 RT 4056 [prosecutor's closing argument]); and never contended that appellant, as suggested in a purported admission, had grabbed Myers by the hair while driving down the freeway and thrown her out the window. (14 CT 3891-3892, 3894 [appellant's interrogation concerning red-haired victim].) Appellant insisted during the interrogation that he was at all points speaking about a single incident (*i.e.*, Mason). (14 CT 3897, 3914-3915.)

Myers crimes, the prosecutor clearly misled the jury as to the law in suggesting that the evidence of the Mason crimes could prove the Myers crimes beyond a reasonable doubt and that the jury could rely upon whatever propensity for criminal violence the Mason crimes may have demonstrated to convict appellant of the capital murder of Ms. Myers. The prosecutor's misleading arguments, and the central role in his arguments of the Mason-crimes evidence, created for the court a *sua sponte* duty to correct any misunderstandings that the prosecutor may have caused.

In such a close case, even under the state's *Watson/College Hospital* standard, there was certainly a reasonable chance, more than an abstract possibility that the error affected the trial outcome. (*People v. Superior Court (Ghilotti), supra,* 27 Cal.4th at p. 918; *College Hospital, Inc. v. Superior Court, supra,* 8 Cal.4th at p. 715; *People v. Watson, supra,* 46 Cal.2d at p. 836.) But the cumulative effect of the failure of the trial court to give the instruction and the prosecutor's improper conflation of the evidence of the sex crimes against Mason with the Myers counts, implicates appellant's due process and fair trial rights under the state and federal constitutions. The jury's improper consideration of inherently prejudicial other crimes evidence violated appellant's federal constitutional due process rights under the Fourteenth Amendment by undermining his right to a fair

and reliable adjudication of his guilt or innocence, as well as his Eighth and Fourteenth Amendment rights to the heightened reliability required for a capital conviction and sentence. (See *Dawson* v. *Delaware* (1992) 503 U.S. 159; *McKinney* v. *Rees* (9th Cir. 1993) 993 F.2d 1378, 1385; *Beck v. Alabama*, *supra*, 447 U.S. at pp. 637-638; *Zant v. Stephens*, *supra*, 462 U.S. at p. 879.) .) Applying the federal standard, it would not be possible for the government to show that error was not prejudicial beyond a reasonable doubt. Accordingly, appellant convictions for the Myers-related offenses and the sentence of death should be set aside.

X. THE PROSECUTOR PRESENTED THE JURY WITH A FALSE THEORY ON WHICH TO CONVICT APPELLANT OF SEXUAL PENETRATION WITH A FOREIGN OBJECT UPON AN UNCONSCIOUS VICTIM

Appellant was charged in Count Ten with sexual penetration of Myrna Mason by a foreign object (the rake handle) upon an unconscious person. (Pen. Code § 289, subd. (d).[104]) The prosecutor's argument, however, allowed the jury to convict appellant of this count on a theory beyond the elements of the crime.

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[104] Penal Code section 289, subdivision (d), reads as follows:

> (d) Any person who commits an act of sexual penetration, and the victim is at the time unconscious of the nature of the act and this is known to the person committing the act or causing the act to be committed, shall be punished by imprisonment in the state prison for three, six, or eight years. As used in this subdivision, "unconscious of the nature of the act" means incapable of resisting because the victim meets one of the following conditions:
>
> (1) Was unconscious or asleep.
>
> (2) Was not aware, knowing, perceiving, or cognizant that the act occurred.
>
> (3) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraud in fact.
>
> (4) Was not aware, knowing, perceiving, or cognizant of the essential characteristics of the act due to the perpetrator's fraudulent representation that the sexual penetration served a professional purpose when it served no professional purpose.

As explained to the jury in the instruction (CALJIC No. 10.33),

> In order to prove this crime, each of the following elements must be proved:
>
> 1. A person committed an act of sexual penetration upon another person;
>
> 2. The alleged victim was at the time unconscious of the nature of the act; and
>
> 3. The unconsciousness was known to the person committing the act; and
>
> 4. The penetration was done with the purpose and specific intent to cause sexual arousal, gratification, or abuse. (15 CT 4154.)

The term "specific intent to cause sexual abuse" is defined in the instruction as "a purpose to injure, hurt, cause pain or cause discomfort. It does not mean that the perpetrator must be motivated by sexual gratification or arousal or have a lewd intent." (*Ibid.*) The prosecutor's argument, however, suggested to the jury that they could find appellant guilty under this count even if appellant believed Mason was dead at the time of the act of sexual penetration.

Initially, the prosecutor's comments with regard to this count eliminated sexual gratification as appellant's intent:

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

> defendant's part. He was done with his sexual gratification. This was an act designed for abuse, defilement, and hate. (22 RT 4071)

Later in his argument, however, the prosecutor muddied the waters:

> The evidence indicates, and it's undisputed, he left her for dead. He strangled her until her ears bled. And then he positioned her body and put a rake in her for her to wake up with that when he lives four doors down? (22 RT 4138)
>
> Except Myrna Mason was still alive, and the defendant got caught by surprise. (22 RT 4139.)

The prosecutor's argument that appellant had strangled Mason and left her for dead no doubt served the prosecutor's contention that appellant had committed attempted murder, but it was not consistent with appellant's guilt of violating section 289, subdivision (d). If appellant believed Mason was dead, he could not have had the intent to "injure, hurt, cause pain or cause discomfort." In other words, by his argument, the prosecutor was inviting a conviction under Count Ten even if the jury believed that appellant thought Mason was dead at the time he inserted the rake handle into her vagina.

"[W]hen the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand."

(*People v. Green* (1980) 27 Cal.3d 1, 69, overruled on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 237; see also *People v. Morgan* (2007) 42 Cal.4th 593, 612 [confirming continuing validity of principle].)

That is the case here. The prosecutor's argument allowed the jury to convict appellant of sexual penetration by a foreign object even if they believed that appellant thought her to be dead at the time – a theory that would remove the requisite intent. Nothing in the court's instructions would have disabused them of that notion. The ensuing verdict, based on a finding of less than all the elements of the charged offense, violated appellant's Sixth Amendment and Fourteenth Amendment rights to trial by jury. (*United States v. Caldwell, supra,* 989 F.2d at p. 1060; *In re Winship, supra,* 397 U.S. at p. 364; *People v. Cummings, supra*, 4 Cal.4th at pp. 1313-1314.). Accordingly, the Count Ten conviction and sentence should be reversed.

XI. THE PRE-TRIAL AND GUILT-PHASE ERRORS, TAKEN TOGETHER, CONSTITUTE A FAILURE OF DUE PROCESS AND THE OPPOSITE OF A FAIR TRIAL

This Court and others have held that the cumulative effect of several errors can infect a trial with such unfairness as to constitute a denial of due process. (*Thomas v. Hubbard* (9th Cir. 2001) 273 F.3d 1164, 1179; *People v. Hill, supra*, 17 Cal.4th 800, 844, 847; *People v. Buffam* (1953) 40 Cal.2d 709, 726; *People v. Cardenas* (1982) 31 Cal. 3d 897, 907.) The Court of Appeal has described the test as follows: "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' (*People v. Kronemyer* (1987) 189 Cal. App. 3d 314, 349 [].)" (*People v. Cuccia* (2002) 97 Cal. App. 4th 785, 795.) In this case, the cumulative error resulted in a mockery of due process.

Here, appellant has identified numerous errors that occurred before and during the guilt phase of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right not to be subjected to unlawful custodial interrogation, of the right to confront the witnesses against him, of the right to trial by a fair and impartial jury which has been adequately instructed on the elements of the offenses and the evaluation of the evidence, of the right to a trial free from inflammatory and misleading

prosecutorial argument, and of the right to a fair and reliable guilt and penalty determination, all in violation of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments.

The Myers counts should never have been tried with the Mason counts, pairing a weak death penalty murder case with a very strong, sexual assault, burglary and robbery case. It not only prejudiced the jury against appellant, it allowed the prosecutor to repeatedly conflate the two cases, importing the evidence regarding Mason into the Myers case.

The dog-scent identification was improperly admitted without any serious testing of its reliability, either under *Kelly* or Evidence Code section 402. The overwhelming view of the research, and of the courts of this state and other states, is the dog-scent identifications, as opposed to tracking and trailing, has not been shown to have been reliable enough to provide the principal evidence of identity, as it was here. Given the likelihood that jurors would nonetheless credit such evidence, and the prosecutor's extensive reliance upon it in closing argument, here the prejudice and the threat to the reliability of the verdicts is manifest.

These errors were exacerbated by the trial court's failures to properly instruct the jury, on the proper degree of corroboration needed for the dog-sniff evidence; on the temporal aspect of the formation of the intent to rob;

and on the limitations they must place on using the Mason evidence to convict Myers.

Each of the errors set forth above in this brief is, by itself, sufficiently prejudicial to warrant reversal of appellant's convictions and his death sentence. Insofar as this Court may disagree and believe that any of the errors set forth above may alone be harmless, cumulatively they resulted in prejudice under any standard and require reversal.

XII. THE TRIAL COURT MADE SEVERAL ERRORS IN IMPOSING DETERMINATE SENTENCES, REQUIRING CORRECTION BY THIS COURT OR REMAND TO THE TRIAL COURT

Following the guilty verdicts on Counts 2-10, the parties agreed to postpone sentencing on those counts until the Count 1 murder penalty was determined. (27 RT 4693-4694.)

At the sentencing hearing following the penalty re-trial, the court found that the separate Myers and Mason robbery counts should be stayed pursuant to section 654, and agreed with the defense that the torture count regarding Mason and its related enhancement (Count 7) should also be stayed. (46 RT 7408-7409.) The court made no other explicit findings, but imposed the following determinate sentences:

Count 1	Myers murder	death
Count 2	Myers burglary	25-life – consecutive to count 10
Count 3	Myers robbery	25- life – stayed pursuant to section 654
Count 4	Mason attempted murder [3 strikes] 12022.7 (GBI)	25-life – consecutive to count 9 5 years – consecutive to count 4
Count 5	Mason burglary [3 strikes]	25-life – consecutive to count 4
Count 6	Mason robbery [3 strikes]	25-life – stayed (section 654)

Count 7	Mason torture [3 strikes]	25-life – stayed (section 654)
	12022.7 (GBI)	5 years – stayed (section 654)
Count 8	Mason rape [3 strikes]	25-life – consecutive to count 5 – 667.61(d)(3) (involved torture) – 667.61(d)(4) (involved burglary) – 667.61(e)(3) (involved GBI)
Count 9	Mason forced oral copulation.[1 strike sentence] tripled per 3 strikes]	75-life – consecutive to count 1 – 667.61(d)(3) (involved torture) – 667.61(d)(4) (involved burg) – 667.61(e)(3) (involved GBI)
Count 10	Mason penetration w/ foreign object while unconscious unconscious [3 strikes]	25-life – consecutive to count 8
	Total	200-life + 5 years

Prison priors added at the end:

667.5(b) prison prior	1
667.5(b) prison prior	1
667.5(a) serious prior	5
667/5(a) serious prior	5

Total: 12 years consecutive to the life sentences.

(46 RT 7414-7416, 7432.)

The court made an apparent arithmetic error, stating that the total for the determinate-sentencing counts was 175 years to life, plus the 12 years added for the prior convictions. (46 RT 7416.) The abstract of judgement,

however, indicates that the sentence should have been 200 years to life plus the additional 12 years, for a total of 212 years to life. (24 CT 6905-6907.) Adding up the foregoing years on the chart, it appears it should have been 200 years to life plus 17 years.

If appellant is correct in Argument X, regarding the charge of penetration with a foreign object, the 25 years to life imposed on Count 10 should be reversed. As will be explained below, beyond the arithmetic errors, other errors were made in the sentencing which require either additional adjustment by this Court or remand to the trial court.

A. IF APPELLANT IS CORRECT THAT THE EVIDENCE WAS INSUFFICIENT TO SUPPORT THE COUNT 3 ROBBERY CONVICTION, THEN THE BURGLARY SENTENCE MERGES WITH THE COUNT 1 MURDER AND MUST BE STAYED PURSUANT TO SECTION 654

The trial court sentenced appellant to 25 years to life for Count 2, the Myers burglary, and stayed the Count 3 robbery conviction pursuant to section 654. Appellant has argued, *ante* at pages 290-292, that there was insufficient evidence of appellant's forming an intent to steal prior to Ms. Myers' death, as well as a prejudicial instructional error on this question, rendering his robbery conviction invalid. If appellant is correct that the robbery conviction cannot stand, then the only way that appellant can have been convicted of burglary is pursuant to an implied finding that appellant

entered Myers' house with the intent to do physical harm to her, which resulted in her death. If that is so, then the burglary should also be stayed pursuant to section 654.

Section 654 provides in pertinent part:

> (a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

Errors regarding the applicability of section 654 are correctable on appeal regardless of whether the point was raised below. (*People v. Perez* (1979) 23 Cal.3d 545, 550, fn. 3, and cases there cited.)

The purpose of section 654's prohibition against punishment for more than one violation arising out of an act or omission is to insure that a defendant's punishment will be commensurate with his or her culpability. (*People v. Perez, supra,* 23 Cal.3d at p. 550) It is well settled that section 654 applies not only to instances where there was one act in the ordinary sense, but also where there was a course of conduct which violated more than one statute, but nevertheless constituted an indivisible transaction. (*Ibid.*) As explained in *Perez*, if all of the offenses were incident to one objective, the defendant may not be punished for more than one. (*Id.*, at p. 551.)

In this case, assuming that there was insufficient evidence to support the robbery conviction, and since there was no evidence whatsoever of sexual assault, the perpetrator could be guilty only for having entered Myers' house with the intent to commit what the jury found to be a murder. If that was the intent with which he entered, and there is no evidence of when the murder took place – that is, before or after she was removed from the house – then there was here a single course of conduct, making section 654 applicable to stay the sentence on the burglary count, Count 2. (*People v. Miller* (1977) 18 Cal.3d 873, 886; cited with approval, *People v. Deloza* (1998) 18 Cal. 4th 585, 594.)

Even if, however, this Court finds that there was evidence to support the Count 3 robbery with regard to Myers and no prejudicial instructional error as to that count, the separate sentence for the burglary count nevertheless requires remand. This is because the trial court made it consecutive to Count 10 – one of the sex crimes against Mason. (46 RT 7432; 24 CT 6896.) This, in effect, was bootstrapping the Myers burglary count onto the Myers murder without the court's making any findings with regard to whether the burglary was separate from the murder, and, accordingly, the subject of a separate sentence under section 654.

Another reason for remand is that the trial court made no explicit findings that the burglary and other Myers counts were committed on separate occasions, or otherwise viewed as separate incidents. As this court explained in *People v. Lawrence* (2000) 24 Cal.4th 219, consecutive sentencing generally requires that the crimes not be committed on the same occasion. The term "committed on the same occasion" generally refers to a close temporal and spatial proximity between two more events, along with such factors as whether the criminal activity was interrupted, whether there was an intervening event, or whether one offense could be considered to have been completed before the commission of new criminal acts. (*Id.*, at pp. 226-229, 233.) In this case, as in *Lawrence*, the burglary, robbery, and murder were all close in time and against the same victim, and the trial court made no explicit findings otherwise.

Alternatively, remand is unnecessary and perhaps inappropriate, because there is simply no evidence on which to base findings regarding any of the factors set forth in *Lawrence*. All we know is that someone apparently entered Myers' house, took some money, and that she thereafter disappeared. Everything else is sheer speculation, and the imposition of the consecutive 25 years to life sentence for Count Two should be reversed

because there is no evidence on which to base a finding that the crimes were committed on other than a single occasion.

B. PURSUANT TO THE PRE-2006 VERSION OF SECTION 667.61, THE SEX CRIMES SHOULD NOT HAVE BEEN PUNISHED SEPARATELY

The trial court imposed consecutive sentences for counts 8-10, the rape, forced oral copulation, and penetration with a foreign object of Myrna Mason, under Section 667.61. Before 2006 amendments to that section, however, former subsection (g) read as follows:

> The term specified . . . shall be imposed on the defendant once for any offense or offenses committed against a single victim during a single occasion. If there are multiple victims during a single occasion, the term specified . . . shall be imposed on the defendant once for each separate victim. Terms for other offenses committed during a single occasion shall be imposed as authorized under any other law, including Section 667.6, if applicable.[105]

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[105] The analogous provision of the current statute, following 2006 and 2010 amendments, is found as subsection (i), which reads as follows:

> For any offense specified in paragraphs (1) to (7), inclusive, of subdivision (c), . . . the court shall impose a consecutive sentence for each offense that results in a conviction under this section if the crimes involve separate victims or involve the same victim on separate occasions as defined in subdivision (d) of Section 667.6.

Section 667.6, in relevant part, provides:

(continued...)

The foregoing language was quoted in *People v. Jones* (2001) 25 Cal. 4th 98, 103. Under *Jones*, the three sex crimes should have been treated as occurring on one occasion, and sentenced concurrently.

In *Jones,* the defendant was convicted, *inter alia*, of forcible rape, sodomy, and oral copulation against a single victim, and was sentenced separately for each separate act. (*Id.* at p. 100.) The oral copulation consumed about 30 minutes, and the time between that act and the completion of the vaginal and anal assault was another hour and a half. (*Id.* at p. 101.) The trial court found that the oral copulation, rape, and sodomy were separate acts committed against a single victim under Section 667.6, subdivision (d), and sentenced Jones to three consecutive 25 years to life terms under section 667.61, subdivisions (a), (c), and (d)(2). (*Id.* at pp. 102-103. The Court of Appeal affirmed, relying on the language of section

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[105] (...continued)

In determining whether crimes against a single victim were committed on separate occasions under this subdivision, the court shall consider whether, between the commissin of one sex crime and another, the defendant had a reasonable opportunity to reflect upon his or her action and nevertheless resumed sexually assaultive behavior. Neither the duration of time between crimes, nor whether or not the defendant lost or abandoned his or her opportunity to attack, shall be, in and of itself, determinative on the issue of whether the crimes in question occurred on separate occasions.

667.6, subdivision (d) to give meaning to the language of section 667.61, subdivision (g).

This Court reversed, finding that the language of section 667.61, subdivision (g), referring to a "single occasion," was similar but not identical to the "separate occasion" language of section 667.6, subdivision (d). The Courts of Appeal had interpreted the latter provision to allow separate sentencing without a finding of a change of location or a break in the perpetrator's behavior. (*Id.* at p. 104-105.) *Jones* instead referred to other three-strike provisions, in particular the Court's finding that the terms "same occasion" in section 1170.12, subdivisions (a)(6) and (7) should be given their "'ordinary, generally understood meaning' of 'at least a close temporal and spatial proximity between two events, although it may involve other factors as well.'" (*Id.* at p. 106, quoting *People v. Deloza* (1998) 18 Cal. 4th 585, 594.) Accordingly, the Court ruled that for the purposes of Penal Code section 667.61, subdivision (g), sex offenses occur on a single occasion if they were committed in close temporal and spatial proximity. (*Jones, supra*, 25 Cal.4th at p. 107.)

Applying *Jones* in this case, it is clear that the sex crimes against Mason occurred over no more, and probably substantially time, than the two hours involved in *Jones*, and that they occurred "in close temporal and

spatial proximity." Mason testified at the preliminary hearing that she was first attacked at 1:30 a.m., that she had been passed out an unknown amount of time during which the perpetrator left, and cleaned herself up before she called 911 at about 4 a.m. (16 RT 3044, 3063.) Accordingly, the consecutive 25 years to life for the Count 8 rape and the Count 10 penetration with a foreign object should be reversed and held to run concurrently with the 75 years to life sentence of the Count 9 forced oral copulation.

C. FOR THE FOREGOING REASONS, APPELLANT'S DETERMINATE-TO-LIFE SENTENCE SHOULD BE REDUCED BY 75 YEARS

For the foregoing reasons, the sentence of 25 years to life for the Count 2 burglary conviction (Myers) and the two 25 years to life sentences for the Counts 8 and 10 convictions (Mason), should be reversed, for a total reduction of 75 years to life from appellant's sentence.

PART TWO: PENALTY PHASE

INTRODUCTION

This argument focuses almost exclusively on the penalty phase re-trial which took place because the original jury hung on the question of death after it returned guilty verdicts on all counts of the guilt-phase trial. There will be references, however, to *in limine* motions which were decided prior to the first guilt trial, the rulings on which were carried forward to the penalty re-trial.

The second trial involved to a substantial extent a re-trial of the guilt phase – with crucial instructional exceptions, described below – because the defense was trying to re-create, and the prosecution was seeking to overcome, the lingering doubt expressed by members of the first-trial jury. The prosecution was allowed, over defense objection, to introduce two new items of evidence which were not introduced at the first trial. The first was two more canine trailings and scent-identifications, conducted between the trials by Dr. Harvey, which purportedly led to at least one of the dogs (and, she said, the other, too) "alerting" on appellant. The second was evidence regarding Detective Barnes testifying to an interview with appellant, in the detectives' car as they looked for the location of Myers' body on the afternoon of appellant's arrest. Barnes asked Jackson what he would do if

he were involved in a homicide, and he answered that the first thing he would do would be to get rid of the body, clean up the scene, and throw down some bleach if there were blood. (33 RT 5781; 24 CT 6757-6760.) The latter statement was very damaging, and a principle link to the Myers crimes, as the criminalists opined that the stains on both Myers' carpet and on appellant's pants were caused by bleach.

XIII. UNDER THE CIRCUMSTANCES OF THIS CASE, AND IN ANY CASE IN WHICH THE FIRST JURY HANGS ON THE BASIS OF LINGERING DOUBT, THE PENALTY RETRIAL VIOLATES CONSTITUTIONAL STANDARDS OF DUE PROCESS AND A FAIR TRIAL

In this case, it was determined by appellant's trial counsel that at least for some of the eight first-trial jurors who were unwilling to vote for death, their reason was lingering doubt about appellant's guilt. (16 CT 4477.) While the state of the law in California, as discussed below, allows penalty retrials in such cases, this case involves circumstances which offend the Due Process and Double Jeopardy Clauses of the federal and state constitutions. In particular, in this case, the prosecution was allowed, between the failed first penalty trial and the second one, to conduct further dog-trailing experiments for the specific purpose of overcoming the first jury's lingering doubt.

In such a case, a penalty retrial is inherently unfair and unreliable because, first, it is impossible to re-create in a second penalty trial the evidentiary circumstances which led to the first-trial jurors' lingering doubt. Second, giving the prosecution a "second bite at the apple" when something as ephemeral as lingering doubt was the basis for the first jury to hang violates constitutional principles of due process, a fair trial, and the Eighth Amendment. And third, in this case, allowing the prosecution to introduce

newly-created evidence to bolster its case runs directly counter to the core principles of the Double Jeopardy Clause.

A. THE CURRENT STATE OF THE LAW ALLOWS PENALTY RETRIALS IN CALIFORNIA

Appellant recognizes that this Court recently, in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634, rejected the argument that subjecting a defendant to a penalty retrial after the first jury deadlocked violates the Eighth Amendment's proscription against cruel and usual punishment. Appellant will not repeat, therefore, the "lengthy string citation to statutes of other jurisdictions that mandate a sentence of life without parole if the penalty jury deadlocks." (*Id.* at p. 633.)

Because the United States Supreme Court has not clearly ruled for or against second penalty trials, either in general or where the first trial jury hangs on the issue of lingering doubt, appellant would ask this court to revisit the issue in the context of lingering-doubt cases. While not revisiting the string cites the court referenced in *Taylor*, *supra*, it is clear that the vast majority of states (and the federal government) prohibit penalty re-trials following a first trial in which the jury hangs on the question of death. "[Retrial] is not the prevailing rule for capital penalty-phase proceedings. (*Jones v. United States* (1999) 527 U.S. 379, 419 (Ginsburg, J., dissenting).) Should this court be ready to reconsider its more general

holding in *Taylor* and its predecessors, appellant stands ready to fully brief the issue, string cites and all. The remainder of this argument will focus on the particular circumstances of this case.

B. THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS ARE VIOLATED WHEN THE FIRST JURY HUNG ON THE BASIS OF LINGERING DOUBT, AND THE PROSECUTION IS ALLOWED TO BOLSTER ITS CASE BEFORE THE SECOND PENALTY TRIAL COMMENCES

1. It is Fundamentally Unfair to Allow a Second Penalty Trial When the First Jury Hangs on the Basis of Lingering Doubt

In general, a capital defendant is said to only have to be "forced to run the gauntlet once" on death (*Green v. United States* (1957) 355 U.S. 184, 190), and there is a general prohibition against a second trial "thereby subjecting him to embarrassment, expenses and ordeal and compelling him to live in a continuing state of anxiety and insecurity." (*United States v. Scott* (1978) 437 U.S. 82, 95.) Moreover, the Supreme Court has held that the Double Jeopardy Clause applies to capital-sentencing proceedings that "have the hallmarks of [a] trial on guilt or innocence." (*Bullington v. Missouri* (1981) 451 U.S. 430, 439.) Insofar as a sentencing proceeding "explicitly requires the jury to determine whether the prosecution has 'proved its case,'" the Double Jeopardy Clause applies. (*Id.* at p. 444.)

Given the degree to which the retrial here substantially recreated the earlier guilt trial, *Bullington* should apply to invalidate the penalty retrial.

Nevertheless, this Court has relied on the principle of "manifest necessity" to justify penalty retrials. (*E.g., United States v. Difrancesco* (1980) 449 U.S. 117, 130; *Arizona v. Washington* (1978) 434 U.S. 497, 514-516.) It has also rejected, in *Taylor*, reliance on "evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86 , 101; *Taylor, supra*, 48 Cal.4th at p. 634.) Instead, California jurisprudence has identified only two circumstances under which the California Constitution's double jeopardy clause bars retrial following the grant of a defendant's mistrial motion: (1) when the prosecution intentionally commits misconduct for the purpose of triggering a mistrial; and (2) when the prosecution, believing in view of events that unfold during an ongoing trial that the defendant is likely to secure an acquittal at that trial in the absence of misconduct, intentionally and knowingly commits misconduct in order to thwart such an acquittal – and a court, reviewing the circumstances as of the time of the misconduct, determines from an objective perspective, the prosecutor's misconduct in fact deprived the defendant of a reasonable prospect of an acquittal. (Citations.)" (*People v. Batts* (2003) 30 Cal.4th 660, 680-681.)

Appellant now proposes a third such circumstance: when a capital jury at the first trial is unable to reach a verdict of death because one or more jurors, following the trial, have clearly indicated that they harbored lingering doubt about the defendant's guilt. This is because lingering doubt is an inherently ephemeral matter, even "amorphous and slight" (*People v. DeSantis* (1992) 2 Cal.4th 1198, 1239), and not truly capable of duplication absent an exact replication of the first trial. If, on the basis of the prosecutions best efforts at the first trial, it has not succeeded in convincing all of the jurors, some of whom have lingering or residual doubt about the defendant's guilt, how many times will the State be able to return to the well to create more evidence and to find a jury willing to impose death?

2. Allowing the Prosecution to Bolster its Case in the Penalty Retrial to Overcome the Lingering Doubt of the First Jury Violates the Core Principles of the Double Jeopardy Clause

While this Court has upheld death penalty sentencing retrials against constitutional challenges (*e.g., Taylor, supra*), it has also held that lingering doubt can survive in a penalty-phase retrial. "We have consistently held that accurate reminders of separate penalty jury's limited role do not eliminate the defendant's ability to litigate lingering doubt." (*People v. Montiel* (1993) 5 Cal.4th 877, 912, and cases there cited.)

In this case, however, the lingering doubt was not only relitigated, it was relitigated with additional evidence that the prosecution specifically created for the purpose of overcoming the lingering doubt of the first jury. Suppose, however, that the second jury had again deadlocked on the basis of lingering doubt. There is nothing in this court's jurisprudence to prevent still another penalty retrial, before which the government could conduct still more dog trails, perhaps with new dogs and in new situations, before yet another penalty re-trial, and so on, *ad infinitum*, until the death penalty had finally been gained. At what point does *double jeopardy* finally call a halt?

Appellant is aware of no cases like his own, in which the lingering doubt is based on questionable scientific evidence – questionable as shown by the first jury's lingering doubt, even if this Court finds it is not legally so – and the prosecution was allowed to conduct further similar experiments, adding to the evidence until they convinced all 12 jurors on the second jury. This was not new evidence discovered at the scene, it was not new charges or additional prior crimes found to have been committed by the defendant; it was not further crime-scene evidence simply not presented at the first trial. It was instead evidence manufactured specifically for the purpose of overcoming the lingering doubt. And this is what offends the Double Jeopardy Clause.

Under the doctrine of "manifest necessity," there is simply no standard under which a defendant, subject to repeated penalty retrials because of repeated prosecution efforts to overcome persistent lingering doubt, could call a halt to the proceedings. And there is no standard, if the procedure used in this case gains approval, to limit the prosecution's further attempts to create evidence which will finally gain it what it seeks.

If this is the state of the law, then the principles underlying the Double Jeopardy Clause become a nullity.

In cases such as this, where the defense can show that post-trial discussions with jurors make clear that lingering doubt is what led to the hung jury, either a second penalty trial ought to be disallowed, or the prosecution prevented from adding to the evidence presented at the first trial.

XIV. THE JURY VOIR DIRE WAS DESIGNED ENTIRELY FOR SPEED AND EFFICIENCY, RATHER THAN TO GENUINELY CHOOSE AN UNBIASED AND DEATH-QUALIFIED JURY

It is basic to a defendant's trial rights under the Fifth, Sixth, and Fourteenth Amendments that a defendant – and in particular a capital defendant – be afforded an impartial jury, one "capable and willing to decide the case solely on the evidence before it". (*Smith v. Phillips* (1982) 455 U.S. 209, 217; *Ristaino v. Ross* (1976) 424 U.S. 589, 595, fn. 6.) In capital trials, of course, there is the additional requirement of death-qualification – that the jury not be so biased in favor of or against imposition of the death penalty that either the defendant or the state cannot obtain a fair hearing in the penalty stage of the proceedings. (*Wainwright v. Witt* (1985) 469 U.S. 412, 414-426; *People v. Ghent* (1987) 43 Cal.3d 739, 767.)

In this case, appellant filed motions before both trials for individualized, sequestered death-qualification voir dire. (4 CT 1081 *et seq.*; 16 CT 4582.) Both motions were denied. (12 CT 3432; 16 CT 4629.) In addition, the court precluded – at least at the second penalty trial – questions directed to the specific facts of the case. As a result, in both the first trial and the penalty retrial, the entire voir dire, including death-

qualification and peremptory and for-cause challenges, took less than one court day.

A. THE DENIAL OF INDIVIDUALIZED *VOIR DIRE* FOR DEATH-PENALTY QUALIFICATION LEADS TO UNTRUSTWORTHY, AND THEREFORE UNCONSTITUTIONAL, RESULTS

In both trials, the trial court denied defense motions for sequestered death-qualification questioning pursuant to *Hovey v. Superior Court of Alameda County* (1980) 28 Cal.3d 1, 80-81. (4 CT 1081; 12 CT 3432; 3 RT 1320-1321[1st trial]; 16 CT 4582; 16 CT 4629; 27 RT 4883 [2d penalty trial].) The court relied on its interpretation of the statutes, and its experience:

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

> people maintain their opinion, whatever it is. So at any rate, that request will be denied. (3 RT 1320-1321.)

Notwithstanding the judge's description of his experience, that "people maintain their opinion, whatever it is[,]" there is more than ample social science research to the contrary. Indeed, that prospective jurors do or not maintain their opinion is not the point of individualized void dire; rather, it is to determine what that opinion truly is. Research, described in detail below, shows that the most likely result of group *voir dire* is that prospective jurors questioned later in the process will conform their answers to what they perceive is what the attorneys, and in particular, the judge, want to hear, rather than to disclose their true views.

1. The Law Regarding Group and Individualized Death Qualification

In this case, appellant made timely motions for individualized death qualification voir dire. "[A] defendant who has made a timely objection to group voir dire and proposed that the trial court question prospective jurors individually has done all that is necessary" to preserve the issue on appeal, regardless of what the record discloses regarding for-cause challenges or the exhaustion of peremptory challenges. (*People v. Taylor, supra,* 48 Cal. 4th at p. 606; citing *People v. Ramos* (2004) 34 Cal.4th 494, 513, fn. 6.)

Section 223, which abrogated the former rule requiring individualized death qualification, has been upheld against numerous constitutional challenges. (*E.g., People v. Taylor, supra*, 48 Cal.4th at pp. 604-605, and cases there cited [Equal Protection challenge]; *People v. Lewis* (2008) 43 Cal.4th 415, 494 [no federal constitutional right to individualized, sequestered voir dire]; *Lewis, supra,* and *People v. Waidla* (2000) 22 Cal.4th 690, 713-714 [no right under state constitution or statutes]. The standard of review for the denial of a motion for individual, sequestered voir dire is abuse of discretion. (*Waidla, supra*, at pp. 713-714.) And the showing must be that there was "actual, rather than merely potential, bias." (*People v. Vieira* (2005) 35 Cal.4th 264, 288.)

All of these opinions, however, proceed from the assumption that, except for unusual circumstances, group voir dire is as effective in discovering possible grounds for a challenge for cause as individualized voir dire. Alas for the capital defendants in this state, and for appellant herein, it is just not so.

2. Social Science Research Has Found That Group Voir Dire Is Uniquely Unsuited to Uncovering Bias

There are well-documented studies which raise serious questions about the limits of group voir dire in uncovering biases held by prospective jurors.

> Unfortunately, this heavy reliance on jury selection overlooks the limitations of a process in which prospective jurors are queried publicly about their own biases. . . . [J]urors often are asked only whether they think they can remain impartial in light of the information they already have about the case. [Footnote omitted.] Whatever its legal rationale, this doctrine is based on several psychologically untenable assumptions. These assumptions include the notion the persons are aware of all of their biases, that they are willing to admit to them in open court and in front of authority figures who expect them to be unbiased, and that they are capable of predicting whether and how much those biases will affect their future decision making.
>
> . . . To most psychologists, the opposite predictions seem much more defensible; that is, it is often the case that those who are most biased are least aware of their prejudices, least willing to admit to others that they have them, and are the least reliable judges of whether they can and will set them aside.[106]

(Craig Haney, Death by Design (2005; Oxford Univ. Press) [hereafter cited simply as "Haney"], p. 98 [fn. on p. 275].)[107] The courtroom setting, Haney

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[106] "Social psychologists have long understood that many of the persons who harbor the greatest bias and deepest prejudice believe their views to be normative or commonsensical. Others may be aware that they hold problematic counternormative views but are defensive about expressing them. Finally, there is much evidence that people are unaware of whether and how their beliefs shape and affect their judgments, decision, and behavior. For example, see R. Nisbett and T. Wilson, Telling More Than We Can Know: Verbal Reports on Mental Process, 84 *Psychological Review* 231 (1977)." (Haney, cited in text, at p. 275, n. 17.)

[107] The foregoing footnote, as well as others, *post*, in which the footnote designator is within super-scripted brackets (thus: [n]), are quoted directly from the endnotes accompanying the text in the quoted source. The pages on which those endnotes appear are also cited, as in the parenthetical at the end of the previous note.

explains, works against candor and self-disclosure by prospective jurors who know they are supposed to appear fair and impartial. The phenomenon is documented in many social science studies. In one such study, for example, Haney and a colleague found that jurors who survived the voir dire process and sat on felony juries did so even though they held opinions contrary to the basic tenets of American criminal law jurisprudence (i.e., the presumption of innocence) – beliefs about which they had been asked during voir dire. Moreover,

> nearly half of the actual jurors in several felony cases said in posttrial interviews that they had *not* been able to 'set aside' their personal opinions and beliefs even though they had agreed, during jury selections, to do so.[108] Another study that relied on posttrial interviews of persons who sat on criminal cases estimated that between a quarter to nearly a third of jurors were not candid and forthcoming in accurately and fully answering questions posed during the voir dire process.[109]

Why does this happen? Haney references a number of psychological and social-psychological forces at work simultaneously in a courtroom during voir dire. Haney summarizes it thus:

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108 "C. Johnson and C. Haney, Felony Voir Dire: An Exploratory Study of Its Content and Effect, 18 *Law and Human Behavior 487* (1994)." Haney, *op. cit. supra,* at p. 275, n. 19.)

109 "R. Seltzer, M. Venuti, and G. Lopes, Juror Honesty During the Voir Dire, 19 *Journal of Criminal Justice* 451 (1991)." (Haney, *op. cit. supra,* at p. 275, n. 20.)

People who are placed in unfamiliar situations, like the courtroom, tend to be more sensitive and responsive to the social pressures of others.[110] They also may experience what has been termed "evaluation apprehension" when they feel they are being judged by persons in authority or high-status positions.[111] What prospective jurors learn about the expectations of others—particularly powerful others or authority figures—can influence the candor with which they express their own views.[112] Thus, it is not uncommon for jurors to adopt what is called a "social desirability response set"[113] in which they attempt to respond during voir dire in a socially appropriate manner instead of one that is entirely forthcoming or revealing. Although certain kinds of voir dire conditions and procedures can help to overcome the

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110 "For example, S.E. Asch, The Effects of Group Pressure Upon the Modification and Distortion of Judgments, in H. Guetzkow (Ed.), *Groups, Leadership and Men,* Pittsburgh, PA: Carnegie Press (1951)." (Haney, *op. cit. supra,* at p. 275, n. 21.)

111 "One study of persons who actually had served as jurors concluded that precisely these psychological pressures—evaluation apprehension, expectancy effects—led some of them to give the answers that they thought were expected of them in voir dire, irrespective of their actual true beliefs. See L. Marchall and A. Smith, The effects of Demand Characteristics, Evaluation Anxiety, and Expectancy on Juror Honesty During Voir Dire, 120 *Journal of Psychology* 205 (1986). For . . . more general discussions of evaluation apprehension, see . . . [four additional articles cited]." (Haney, *op. cit. supra,* at p. 275, n. 22.)

112 "On how knowledge about the beliefs of others affects our own attitudes and beliefs, see Craig Haney, *Consensus Information and Attitude Change: Modifying the Effects of Counter-Attitudinal Behavior With Information About the Behavior of Others,* doctoral dissertation, Department of Psychology, Stanford University, 1978." (Haney, *op. cit. supra,* at p. 275, n. 23.)

113 "D. Marlowe and D. Crowne, Social Desireability and Response to Perceived Situational Demands, 25 *Journal of Consulting Psychology* 109 (1968)." (Haney, *op. cit. supra,* at p. 275, n. 24.)

> difficulties prospective jurors may have with candor—studies show that individual, sequestered voir dire . . . is most effective—*there is no jury selection process that can completely neutralize these psychological reactions and the way they limit the effectiveness of the jury selection process itself.*[114] (*Id.* at 99; emphasis added)

There is a kind of learning that takes place during the group voir dire process, producing a "danger that potential jurors would be prejudiced by comments made by other potential jurors during voir dire." (*Berryhill v. Van Zant* (11th Cir. 1988) 858 F.2d 633, 641 (Clark, J., specially concurring).) Similarly, there is research that suggests prospective jurors

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[114] "Michael Nietzel and Ronald Dillehay found that individual sequestered voir dire appeared to produced [sic] the most honest responses from prospective jurors. See M. Nietzel and R. Dillehay, The Effects of Variations in Voir Dire Procedures in Capital Murder Trials, 6 *Law and Human Behavoir* 1 (1982), and M. Nietzel, R. Dillehay, and M. Himelein, Effects of Voir Dire Variations in Capital Trials: A Replication and Extension, 11 *Law and Human Behavoir* 467 (1987). See also N. Vidmar and J. Melnitzer, Juror Prejudice: An Empirical Study of a Challenge for Cause, 22 *Osgoode Hall Law Journal* 487 (1984), who found that individual sequestered examination of prospective jurors was far more successful in eliciting canded information than panel questioning of the entire group. Federal judge Gregory Mize reported that he was able to elicit much more candor from prospective jurors when he interviewed them individually, in a separate room, than when he posed questions in standard, open-court, group voir dire. See G. Mize, On Better Jury Selection: Spotting Unfavorable Jurors Before They Enter the Jury Room, 36 *Court Review* 10 (1999). However, another study suggested that, in general, judges are not especially adept at eliciting candor from prospective jurors. See S. Jones, Judge- Versus Attorney-Conducted Voir Dire: An Empirical Investigation of Juror Candor, 11 *Law and Human Behavior* 131 (1987)." (Haney, *op. cit. supra,* at p. 276, n. 25.)

may watch the way that certain kinds of responses that are given by others are received or reacted to by the judge or trial attorneys, and may tailor their answers accordingly. (N. Bush, *The Case for Expansive Voir Dire* (1976) Law and Psychology Review 9, cited in Haney, *op cit. supra*, at p. 117, endnote 6.)

The foregoing studies suggest that there is a real danger in group death qualification that the answers elicited will reflect not the true feelings of the prospective jurors but rather a psychologically understandable tendency to tailor their answers to what they believe they should say. The result is an inevitably skewed process which does not comport with principles of due process and the Sixth and Eighth Amendments requirements of a fair trial and unbiased-toward-death jury. Accordingly, to the extent that it applies to death qualification in death penalty cases, section 233 is unconstitutional.

B. THE TRIAL COURT'S LEADING QUESTIONS FURTHER UNDERMINED THE LIKELIHOOD OF OBTAINING A FAIR AND ACCURATELY DEATH-QUALIFIED JURY

The jury selection process was further skewed by the trial court's obviously leading questions, which more than signaled to both the juror's being asked and the remainder of the venire what the right and appropriate answers should be.

Examples abound. The prospective juror who became Juror No. 1 was connected to law enforcement through his father, who was a retired Los Angeles Police officer, and a cousin in the FBI. The following colloquy took place between the court and the juror:

> Q Based upon your family connection with law enforcement, and obviously based upon your plans to be an FBI agent, nonetheless, do you feel you could be a fair judge to both the parties in this case?
>
> A Yes, sir.
>
> Q All right. Police officers will be testifying in this case. Actually, at this point, if you recall the witness list and the questionnaire, there are a number of police officers who will be testifying.
>
> And as a judge in this case, you will be called upon to basically evaluate the credibility of all witnesses that testify, whether it be a defense witness or a prosecution witness, a police officer or a layperson, or anyone else, it's up to you as a judge in the case to judge their credibility, which means you may believe them, you may not. You may accept part of their testimony; you may reject other parts. It's entirely within your discretion to do that. Under the law we expect you to do it fairly and not be biased because what a particular witness does for a living. That includes a police officer.
>
> If a police officer testifies, you can't give that individual any additional credibility simply because he or she is a police officer. Obviously, common sense tells you, you can evaluate their training, their education, their on-the-job experience, the presence of a bias, absence of a bias, all of those things, in evaluating testimony of a police officer, as well as any other officer.

But you can't automatically say, "Well, I'm going to be an FBI agent. My father is retired LAPD, so I'm going to probably adopt their testimony simply because they are a police officer." Would you do that in this case?

A No, sir. (29 RT 5316-5317.)

The court gave the prospective juror the answer in several ways: "If a police officer testifies, you can't give that individual any additional credibility simply because he or she is a police officer." And, "You can't automatically say . . . ." When the question is finally asked, the *only* appropriate answer, except for a juror who wanted to go home, was "no."

Juror No. 6 followed a prospective juror who had indicated strong feelings in favor of the death penalty, going so far as to say "an eye for eye" and explaining that to him that meant the death penalty for anyone who killed another. (29 RT 5324.) That juror was asked if he could set tht view aside and said no, and was soon excused. (29 RT 5324-5325.) Juror No. 6 had indicated in his questionnaire that he was strongly in favor of the death penalty. (29 RT 5325.) The judge, while acknowledging his right to his opinions, carefully explained why the prior juror's answers would prevent the empaneling of a jury. (*Ibid.*) There followed this:

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

But as far as your personal opinion is concerned, you are entitled to have any personal opinion you think is appropriate, as long as that personal opinion doesn't interfere with a juror following the law and participating in our trial.

[Juror No. 6], do you feel you could participate in our trial?

A Yes.

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

A Yes.

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

A Yes.

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

A Yes, sir. (29 RT 5325-5326.)

Now, it is entirely possible that Juror No. 6 would, indeed, make effort to be fair to appellant. But having carefully led the juror to those answers, how can the judge, or the attorney's, possibly know, especially when, as explained in the foregoing section, the open-courtroom setting and his sitting before a person of great authority would lead most civic-minded

jurors to answer precisely as Juror No. 6 did, whether or not it was actually so.

This Court has said, in a different context, that it is enough that the jurors said they could be fair. (See, *e.g., People v. Ramirez* (2006) 39 Cal.4th 398, 434-435 [affirming denial of change-of-venue motion].) That is not a sufficient indicator, however, for the simple reason that all of the jurors who are sworn will have said they could be fair; if they said otherwise, they would have been excused. This issue is whether, in an open court during death-qualification, in the psychological and psycho-social context described in the foregoing section, such assurances are reliable. When, as here, the person in the room with the greatest authority makes clear to the prospective jurors what answers are appropriate by his leading questions, such assurances are anything but reliable.

C. THE COURT ERRED IN PREVENTING THE DEFENSE FROM ASKING CASE-FACT-SPECIFIC QUESTIONS DURING DEATH QUALIFICATION *VOIR DIRE*

The trial court did not allow case-specific facts to be presented during the death-qualification *voir dire* of prospective jurors. While the record does not show when or how that decision was made, that it was made is clear: While questioning a juror who indicated that he would have trouble reaching death, the court explained that it was "not going to allow

the attorneys to give you specifically any facts in the case because I don't want the jury to start prejudging any of the facts[.]" (29 RT 5330.)

Either party in a death qualifying *voir dire* is "entitled to ask prospective jurors questions that are specific enough to determine if those jurors harbor bias, as to some fact or circumstance shown by the trial evidence, that would cause them not to follow an instruction directing them to determine a penalty after considering aggravating and mitigating evidence. (*People v. Cash* (2002) 28 Cal.4th 703, 720-721, discussing *People v. Kirkpatrick* (1994) 7 Cal. 4th 988, 1005 and subsequent cases.)

In other cases, however, this court has held that death-qualification should be based on prospective jurors' views of capital punishment in the abstract, without regard to the evidence to be produced at trial. (See, *e.g.*, *People v. Medina* (1995) 11 Cal.4th 694, 746.) The balance, as explained in *Cash*, was in avoiding either extreme:

> On the one hand, it must not be so abstract that it fails to identify those jurors whose death penalty views would prevent or substantially impair the performance of their duties as jurors in the case being tried. On the other hand, it must not be so specific that it requires the prospective jurors to prejudge the penalty issue based on a summary of the mitigating and aggravating evidence likely to be presented. (28 Cal.4th at pp. 721-722.)

In *People v. Vieira* (2005) 35 Cal.4th 264, the court distinguished *Cash* and upheld a trial court's refusal to allow modification of the

questionnaire to ask whether prospective jurors would automatically impose death if they convicted defendant of "two or more murders." (*Id.* at p. 284.) Neither did the trial court in *Vieira* ask about multiple murder during oral questioning about the death penalty, but this court affirmed, explaining that the trial court never ruled or otherwise suggested that prospective jurors could not be asked, during general voir dire, the multiple-murder question excluded from the written questionnaire. (*Id.* at p. 287.) "[R]efusal to include the question [in the written form] was not error so long as there was an opportunity to [orally] ask the question during voir dire." (*Ibid.*)

In *People v. Carasi* (2008) 44 Cal.4th 1263, the court rejected defense-proposed questions asking whether the two charged murders and the three special-circumstances would lead the prospective juror to automatically vote either not to convict, or for or against the death penalty. As distinguished from *Cash,* however, the trial court did not preclude any mention of these factors as part of the *voir dire*, and assured counsel that it would orally instruct the prospective jurors on the multiple murders and special circumstances prior to their completing the questionnaire. (44 Cal.4th at p. 1283.) This court upheld the trial court's rulings, finding the case closer to *Vieira* than to *Cash*, explaining that,

> The gravamen of *Cash* and *Vieira* . . . is that the defense cannot be categorically denied the opportunity to inform

> prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment. By definition, such an opportunity arises where the trial court instructs all prospective jurors on such case-specific factors before any death qualification begins. It is logical to assume that when prospective jurors are thereafter asked (orally or in writing) whether they would automatically vote for life or death regardless of the aggravating and mitigating circumstances, they have answered the question with those case-specific factors in mind, and are aware of the factual context in which the exchange occurs. This assumption seems all the more reasonable where answers given orally in open court refer to the specific facts and charges contained in the court's instruction and indicate that they are being taken into account. (*Carasi*, *supra,* 44 Cal.4th at p. 1287.)

The instant case also may be said to fall between *Cash* and *Vieira*, but is much closer to the former than the latter, at least as to the second penalty-phase trial. Here, as in *Cash*, the record reflects the trial court's refusal to allow case-fact-specific questioning. (29 RT 5330.) Moreover, while the guilt-phase jury had a fair inkling of what the case involved, the penalty-phase jury was almost entirely shielded from what they were likely to hear. Thus, during the guilt phase voir dire, the court read the entire information to the prospective jurors in the guilt phase trial, which certainly alerted them to the many charges related to the sexual and assault-related crimes against Mason, and thus, arguably, was sufficient. (*E.g.*, 3 RT 989-994.) However, at the analogous point in introducing the case to the

prospective jurors in the second penalty trial, the court stated only the following:

> In the matter of People versus Bailey Jackson a jury has previously found the defendant guilty of the first degree murder of 82 year-old Geraldine Myers on or about the 13th of May, 2001, the date of the murder. The same jury further found true special circumstance allegations that the murder occurred during the commission of robbery and burglary.
>
> The same jury found the defendant guilty of the sexual assault and deliberate and premeditated attempt murder of 84-year-old Myrna Mason, crime occurring on or about June 22nd, 2001. (*E.g.*, 28 RT 5190.)

Since the court had ruled, at the least in the context of its comments to the venire that he would not allow the attorneys to question them about the details of the case, the second penalty jury was left in the dark. And this amounts to the categorical denial discussed in *Cash* and *Carasi*, *supra*, of "the opportunity to inform prospective jurors of case-specific factors that could invariably cause them to vote for death at the time they answer questions about their views on capital punishment." (*Carasi, supra*, 44 Cal.4th at p. 1287.)

As in *Cash*, while appellant cannot identify a particular biased juror, it is because of the error that denied an adequate voir dire, one that did not go beyond the bare facts of the guilty finding on the Myers count, and the court's inadequate summary of the facts underlying the Mason counts, "the sexual assault and deliberate and premeditated attempt murder of 84-year-

old Myrna Mason." Contrast this description with the prosecution's insistence on presenting nearly the entirety of the gruesome Mason facts in the second penalty trial. (See *ante* in the Statement of Facts at pp. 84-85, 87-88, 105-106) And, as was also the case in *Cash*, the trial court's error "'leads . . . to doubt' that the defendant 'was sentenced to death by a jury empaneled in compliance with the Fourteenth Amendment.'" (28 Cal.4th at p. 703, quoting *Morgan v. Illinois* (1992) 504 U.S. 719, 739.) Accordingly, and again as in *Cash*, the second penalty trial should on these grounds be reversed.

D. THE ERRORS WERE PREJUDICIAL

The errors discussed here go to the heart of the jury-selection process, and are of constitutional dimension. Hence, the federal *Chapman* standard should apply.

As noted in the previous argument, the very nature of the error prevents the showing of actual bias, but given that the first jury hung on the penalty, eight to four in favor of life, the state cannot show beyond a reasonable doubt that the errors were not prejudicial.

XV. THE TRIAL COURT'S ERRONEOUS FIFTH AMENDMENT RULING FROM THE FIRST TRIAL WAS REPEATED, WITH EVEN MORE PREJUDICIAL RESULTS

Appellant has argued, *ante* at pp. 267-272 , that the trial court erred in admitting appellant's admissions with regard to Myers because they followed invocation of his right to silence without a proper break and renewal of the *Miranda* warnings. Prior to the second penalty trial, appellant renewed his motion to suppress appellant's statements. (16 CT 4596 *et seq.*) The trial court again denied the motion. (27 RT 4582.) Worse, however, the court also allowed the prosecution to introduce the statements appellant made in the detective's car later that afternoon – statements which were far more devastating to his cause. (33 RT 5776-5779.)

To briefly review: On the day of his arrest for the Mason crimes, appellant, during the course of interrogation, cut it off with the statement: "Man just take me to jail man, I don't wanna talk no more." (14 CT 3878.) Four minutes later, Officer Sutton entered and offered appellant a drink of water, and they engaged in a conversation in which appellant sought information regarding when he was going to be returned to jail and obtain his medication. (14 CT 3878-3880.) Officer Sutton claimed ignorance and

told appellant he could ask the detectives, who returned and resumed questioning without taking a further *Miranda* waiver. (14 CT 3880-3881.)

In the first-trial *in limine* hearings, the prosecutor indicated that he would not be introducing appellant's statement, made to the detectives in the car, that if we were cleaning up a crime scene, he would "throw down" bleach to deal with blood. Appellant's statement regarding the Clorox came out in his polygraph statement, so, said the prosecutor, "the evidence regarding his statement regarding using Clorox is not something I would have the Court be considering." (3 RT 1280.)

By the time of the second penalty trial, eager to overcome the first jury's lingering doubt, the prosecutor had no such compunction. In the second-trial *in limine* motion hearing, no mention was made of the Clorox statement – that is, the prosecutor did not indicate that he intended to do anything different than was done in the first trial, and the trial court adopted its prior ruling and denied the suppression motion. (27 RT 4882.)

During the trial, however, while questioning Detective Barnes, the prosecutor asked: "At some point in time [while en route with the defendant to the locations where he said he had dumped the body out of the car], do you recall him stating whether or not – excuse me – did he make any statements as to what he would do if he was involved in the murder?"

After Barnes said "yes," the prosecutor asked what he said. Barnes started to respond – "Well, I remember him mentioning something about he would put bleach down to cover – " (33 RT 5776.) The defense objected, and a discussion ensued out of the presence of the jury. Counsel reminded the court of what had occurred prior the first trial, and that if the People wanted to introduce evidence other than those admitted at the first trial, it would be litigated at that time. (33 RT 5776.) The prosecutor disputed defense counsel's memory of the first-trial hearing on the issue, and asserted that appellant's statements in the car were part and parcel of the initial interview. It was one continuing transaction. (33 RT 5777.) The court sought an offer of proof from the defense regarding "any invocation or any threats made to coerce the defendant[.]" Neither the court nor counsel brought up the polygraph examination, and the court, hearing nothing regarding an offer of proof, overruled the objection. (33 RT 5778.) Detective Barnes was allowed to testify that appellant told him that to clean up a crime scene, "'or get rid of blood, he would throw done this bleach.'" (33 RT 5779.)

This was devastatingly prejudicial, for it provided additional and crucial corroborating evidence to what the first jury had heard and found insufficient to impose death. It was also error, for the same reasons argued

above regarding the admissions made following appellant invocation to his right to silence in the June 22, 2001 police interrogation. (See *ante* at pp. 273-279.) The car trip at issue took place later that same afternoon (33 RT 5768), but there is no indication that there were any new *Miranda* warnings, just as there were no new warnings or waiver when the detectives returned to the interrogation shortly after appellant invoked his right to silence.

The initial error in admitting the post-invocation admission was error; it was repeated in the second trial and exacerbated by appellant's statement in the car regarding bleach; and the prejudice, under any standard, is obvious: absent the error, there is more than a possibility, there is a probability that the jury would not have returned the sentence of death.

XVI. THE TRIAL COURT PREJUDICIALLY AND CONSTITUTIONALLY ERRED IN AGAIN FAILING TO HOLD A *KELLY* OR SECTION 402 HEARING REGARDING THE DOG-SCENT IDENTIFICATION EVIDENCE, IN DENYING A NEW MOTION TO EXCLUDE ALL OR MUCH OF DR. HARVEY'S RESEARCH BASED ON THE SCENT TRANSFER UNIT, AND IN ADMITTING THE TWO BETWEEN-TRIALS PURPORTED SCENT IDENTIFICATIONS

In the second penalty trial, the prosecution essentially duplicated the dog-scent evidence it presented in the guilt phase of the first trial. And, because with respect to that evidence the trial court made the same rulings in the second penalty trial, all of appellant's guilt-phase arguments, above, related to the dog-scent evidence are applicable to the second penalty phase.

In addition, however, between the penalty trials, the prosecution attempted two additional scent-identification procedures, and the defense raised new *in limine* objections, both to those trails and otherwise, which will be the focus of the arguments here.

Preliminarily, it should be noted that when the defense stated an intention to re-notice each of its first-trial *in limine* motions, which it did (16 CT 4566-4601, 4620-4625), the trial court indicated that, with the exception of the between-trials additional scent identifications, its previous rulings would stand. (27 RT 4852-4853.) Thus, as at the guilt phase, the

trial court erroneously permitted the prosecutor to introduce at the penalty retrial the evidence of the Orange Street station house trail (*e.g.*, 38 RT 6715 *et seq.*), and the ninhydrin experimental trails (37 RT 6502 *et seq.*; 38 RT 6626 *et seq.*) That evidence, for the same reasons that it was prejudicial on the issue of whether appellant's guilt had been established beyond a reasonable doubt (Argument II, J, 2, at pp. 234 -236), was prejudicial on the issue of lingering doubt, and hence on the issue of penalty. Further, its introduction at the penalty retrial, like its introduction at the guilt trial, violated appellant's constitutional rights to due process, a fair trial, and a reliable penalty determination. (Argument II, J, 1, *ante*, at pp. 232-234).

The prejudicial impact of that evidence, and the magnitude of its unconstitutional effects, were aggravated at the penalty retrial by additional errors concerning the admission of dog sniff evidence, including the admission of evidence of two dog trails conducted between the penalty trial and retrial, trails conducted for the specific purpose of trying to overcome lingering doubt.

The errors specific to the second penalty trial were (1) that the trial court rejected appellant's motion to exclude Dr. Harvey's testimony regarding her research, insofar as she used an unapproved device, the STU, in that research; and (2) that the trial court admitted the two additional dog-

scent identification trials without holding either a *Kelly* or a foundational hearing under Evidence Code section 402.

A. THE DEFENSE SOUGHT TO EXCLUDE MOST IF NOT ALL OF DR. HARVEY'S EXPERT TESTIMONY ON THE GROUNDS THAT HER RESEARCH INVOLVED THE USE OF AN UNAPPROVED DEVICE, THE SCENT TRANSFER UNIT, AND THE TRIAL COURT ERRED IN DENYING THAT MOTION

Between trials, appellant filed an extensive motion to exclude much of Dr. Harvey's testimony to the extent that it would replicate the testimony she gave in the guilt trial. (16 CT 4531 *et seq.*) The motion challenged Dr. Harvey's testimony on the grounds that most of her research relied on the STU, which was not an approved device in California under *Kelly*; that Dr. Harvey was not qualified to render an opinion regarding its reliability and acceptance; and that all evidence relating to it was therefore inadmissible. (*Ibid.*) At the hearing on the motion, defense counsel pointed out that close to 95 percent of Dr. Harvey's research and the training of her dogs involved the use of the STU. (27 RT 4890.) Given the appellate cases (*Mitchell, Willis*, both *supra*) which held that a *Kelly* hearing was required for the STU, the trial court was obligated to hold a hearing, or to exclude the evidence. (27 RT 4891.)

The trial court declined to do either, after obtaining assurance from the prosecutor that, as in the guilt trial, the prosecution would not be introducing any "primary" evidence of tracking based on the STU. (27 RT 4895.) And as in the guilt trial, the court stated that it was "aware of no cases which have applied [the] Kelly-Frye requirement on the background qualifications of an expert. And that's what [defense counsel] is requesting the Court to do." (27 RT 4896). That was the basis for the court's ruling, as it was in the guilt phase:[115] "At this juncture I'm relying on my prior comment. I'm not convinced that Kelly-Frye is necessary, as far as the actual qualifications of an expert." ". . . I think the District Court of Appeal has held the Kelly-Frye is necessary if it's going to be – if it's going to be primary evidence of tracking in a particular case. Of course, that's not the case here. (16 RT 4900.)

1. The Court's Failure to Exclude Dr. Harvey's STU-Based Experimental Evidence Was Error

As explained above, at pages 228-231, with regard to the trial court's similar refusal to permit questioning concerning the validity of the STU under *Kelly* during the guilt trial, the trial court's statement of law regarding

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[115] See Argument II, I, *ante* (trial court erred in not permitting questioning of Dr. Harvey concerning appellate approval of use of STU).

non-"primary" application of *Kelly* was, quite simply, wrong. "When the expert's opinion is based on tests of techniques which themselves are subject to *Kelly-Frye* analysis, the *Kelly-Frye* criteria must be met before the expert's opinion is admissible. (*People v. Parnell, supra*, 16 Cal.App.4th at p. 869 [psychologist's opinion based on defendant's hypnotically-induced statements inadmissible]; citing *People v. Bledsoe, supra*, 36 Cal.3d 236 at p. 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, supra,* 203 Cal.App.3d 385, at pp. 390-391 [child sexual abuse accommodation syndrome]. As stated in *Bowker*, "Evidence Code section 801 prescribes two specific preconditions to the admissibility of expert opinion testimony. The testimony must be of assistance to the trier of fact *and must be reliable.*" (203 Cal.App.3d at p. 390; emphasis added.)

At the time of the trial in this case, however, at least two courts of appeal had found the STU subject to *Kelly* analysis and, in its absence, unreliable. (*People v. Willis, supra,* 115 Cal.App.4th at pp. 385-386; *People v. Mitchell, supra*, 110 Cal.App.4th at p. 789.)

Viewed more generally, if the *Kelly* test is applied to the evidence which directly implicates the defendant, it makes no sense not to apply it to

the tests which the expert here claimed validated the technique used. Indeed, under the principles of *Kelly*, it is a distinction without a difference. Dr. Harvey testified to her use of a "scientific device" in order to validate dog scent identifications, and that scientific device was just as likely to impress the jury in ways that *Kelly* is intended to prevent as it would have been were it used directly against the defendant.

Nor can it be argued that Harvey's evidence, presented at the guilt trial, provided the basis for the trial court's approval of her methods – that is, that the results of her research provided its own validation. As explained in *Kelly* and *Leahy*, establishing general acceptance of scent identification techniques would require more than the testimony of a single witness alone. (*Leahy, supra*, 8 Cal.4th at p. 611; *Kelly, supra*, 17 Cal.3d at p. 37.)

2. Had the Court Held a *Kelly* Hearing on Either the Validity of the STU or the Reliability of Dog-Scent Identification Evidence, Dr. Harvey's Testimony on These Matters Would Not Have Been Admissible

Had the court acceded to a *Kelly* hearing before the second penalty trial, either specifically on the reliability of the STU, or more generally on dog-scent identifications, Dr. Harvey's testimony on these subjects would not have been admissible. Appellant's motion *in limine* made that very point. (16 CT 4540-4541.)

Kelly established that in order for an expert to be "qualified" to give an opinion as to the reliability (in the sense of general acceptance) of a scientific process, she must not only have academic and professional credentials which equip her to understand the scientific principles involved and any differences of opinion on their reliability. She must also be "impartial," in the sense of not being so personally invested in establishing the technique's acceptance that she might not be objective about disagreements in the scientific community. (*People v. Kelly, supra,* 17 Cal.3d at pp. 37-40.)

Dr. Harvey was anything but disinterested. The entire thrust of her research had been to validate what she considered to be the unique ability of bloodhounds to scent-discriminate and scent-identify. (17 RT 3327 [bloodhounds can scent-discriminate; 17 RT 3333 [contamination does not seem to affect bloodhound]; 18 RT 3351 [Schoon research irrelevant because she does not use bloodhounds] ; *and see* 18 RT 3384 [doesn't know any other scientists in her field, hasn't read any scientific findings on contamination related to bloodhounds].) In addition, Harvey has maintained a close relationship with law enforcement, even to the extent of being called upon in this case to conduct both the ninhydrin experiment and the between-trials San Bernardino purported scent identifications of

appellant. Thus, in a *Kelly* hearing, Dr. Harvey's testimony would have been inadmissible.

That the prosecution's principal expert witness on dog-scent identifications would not have even been heard at a *Kelly* hearing, and yet was presented to a lay jury, only enhances the enormity of the trail court's errors here.

3. The Error Was Prejudicial Because it Allowed Dr. Harvey to Validate Dog-Scent Identifications in General and the Canine Identification of Appellant in Particular

The trail court's failure to exclude the STU-based studies described by Dr. Harvey was prejudicial.

Dr. Harvey's testimony was intended to validate scent-identifications in general. To that end, she described the studies which led to her one peer-reviewed article, *Reliability of Bloodhounds in Criminal Investigations* (2003) 48 J. Forens. Sci. 811. In those studies, an STU-created gauze pad was used as the scent item, and the target person and another were instructed to go out at least a quarter mile and then split off from each other. They were then picked up at the end of the trail, and returned there two days later. (37 RT 6481-6482.) She located the trails in well-traveled locations – indeed, in one local park, over 1,000 people attended a trout-fishing contest in between the initial laying of the trail and the experimental trails.

37 RT 6482-6484.) Eighteen dogs were brought in, and the dogs and their handlers were asked to find the target persons two days after the trials had been laid. The older dogs were successful in 95 percent of the trails; the younger dogs were successful 60 percent of the time or less. (37 RT 6481-6482.) In addition, further bolstering the bloodhound's mythical abilities, the tests were conducted in Winter, and there was harsh, windy weather during some of the two-day periods between when the trails were set and when the tests were conducted (37 RT 6485.)

This was highly prejudicial testimony, because it was introduced to validate the scent-discrimination abilities of bloodhounds, in order to bolster the results of the Orange Street Station basement scent-identification and of Dr. Harvey's later San Bernardino test runs.

In addition, however, it was not only error to admit this testimony because of Dr. Harvey's use of the STU; it was also error because her experiments were tracking or trailing tests masquerading as validation of scent-identification. It is true that the dogs which were successful managed to find the target person rather than the decoy who split off from him or her. But it did not involve the two individuals standing side by side at the end, which was the heart of the scent identification trails involving appellant in this case. Neither did it involve a target who was differently attired than the

others near him, nor one who, uniquely, had been sniffed by the dog as recently as three days prior. As discussed *ante* at pages 224-226, and 282-282, this violated the rule of *People v. Bonin*, *supra*, that requires that "experimental evidence must have been conducted under substantially similar conditions as those of the actual occurrence . . . ." (47 Cal.3d at p. 847.)

The prejudice is this: While the appellant had been found guilty in the guilt trial, the lingering doubt and other factors which prevented the first jury from imposing death would have been amplified in the second trial had Dr. Harvey been prevented from presenting her validation studies to the jury, virtually assuring a different result.

B. THE BETWEEN-TRIALS SCENT IDENTIFICATIONS EMBODY MANY OF THE MARKS OF UNRELIABILITY DISCLOSED IN THE RESEARCH ON THE SUBJECT

The between-trials scent-identification runs conducted at the San Bernardino jail are fraught with many of the dangers of unreliability discussed in the guilt-phase argument set forth *ante* in Argument II. These include the dangers of unreliability in the handler's identification of an alert, in the dogs' prior knowledge of the surroundings, in the handler's knowledge of both the suspect and his location, and in possible intentional

or unintentional cuing. And like the Orange Street station house trail admitted at the guilt phase trial and readmitted at the penalty trial, the San Bernardino trails were erroneously admitted over objection, without a *Kelly* or an Evidence Code section 402 hearing. (16 CT 4592 [defense motion to suppress evidence of canine indentifications]; 27 RT 4852-4853 [court indicates that all prior rulings will apply].)

1. The San Bernardino Trails

(a) Dr. Harvey's Testimony and the Videotape Showing the San Bernardino Trails

The new trails were set up in the San Bernardino Police Station jail holding section, because appellant had never before been there. (37 RT 6510.) He was placed in a cell in the jail section in the back of the police station. While Harvey had been there before and knew how it was set up, she was not present when appellant was brought in and placed in one of the cells. (37 RT 6511.) She used as a scent item the gauze pad that had been placed inside the manila envelope found on Myers' bed, Exhibit 63. (37 RT 6512.)

Harvey used two dogs, Shelby and Dakota, and neither one made a clearly positive identification of appellant. (37 RT 6515, 6517-6518.) Starting outside, Shelby went first to the sally-port door, which Harvey

asked to be opened. (37 RT 6600.) Inside the sally port, Harvey said "show me" to get Shelby to paw the door she was in front of, looking at Harvey and the door intently. (37 RT6601.) After they entered the pod, the cell Jackson was in, number 7, was almost directly across from the entryway. (37 RT 6601-6602.) Shelby, however, first went to the left, which Harvey explained as resulting from the air conditioning and commingled smell, which the dog needed time to sort through. (37 RT 6602.) When she got to the other end of the hallway, Shelby did not go to Jackson's door, but sniffed the investigator standing between Cell 8 and the entry door. This, testified Harvey, indicated positive trailing but no identification. (37 RT 6602-6603.) As long as the dog did not completely stop, she was still looking for the scent on the article. (37 RT 6603.) Harvey, meanwhile, said "get to work," having made "the assumption," as she put it, that the police officer was "not who we were looking for." (37 RT 6604.) Harvey eventually let Shelby into Cell 8 and she appeared to follow the scent trail into that cell, but did not alert on anyone, and Harvey continued to say "show me." (37 RT 6604-6606.) Shelby ended up between cells 7 and 8, and Harvey asked for 7 to be opened, but Shelby did not alert on the occupant – appellant. (37 RT 6606, 6615.) Harvey concluded, nevertheless, that Shelby's failure to make a positive identification did not

eliminate appellant from having laid the trail. (37 RT 6607.) Indeed, earlier she averred that Shelby's trailing to the area of appellant indicated to her that "smell that [Shelby] was looking for was in that area, but for some reason she refused to make an identification." (37 RT 6522.)

Harvey then began a similar trail with Dakota. After she was already in the sally-port area, Dakota went back toward the entryway because the canine unit had just driven up, so she apparently wanted to smell them, but eventually went to the correct entrance. (She had been to that entrance many times before.) (37 RT 6608.) After entering the first entryway, Dakota went left, but Harvey did not follow her (perhaps providing a conscious, rather than unconscious, cue.) (37 RT 6608-6609.)

Once in the cell hallway, Dakota went directly to cell 7, and when admitted, went in and sniffed appellant and then walked back out without making a clear alert. (37 RT 6517.) Harvey did not observe an identification of Jackson. (37 RT 6609.) Instead, Dakota appeared to paw at the door of Cell 8. (37 RT 6610.) Nevertheless, Harvey was sure Dakota made an identification by the way she acted after she came out of appellant's cell. But Harvey could not say why Dakota didn't make a stronger identification, because, Harvey admitted, she doesn't speak bloodhound. (37 RT 6611.)

Thus, instead of a clear alert by either dog, Shelby sniffed the multiple detainees in cell eight, and then went in and sniffed defendant in cell seven, but and came back out without identifying anyone. (37 RT 6515.) Dakota went directly to cell 7, and when admitted, went in and sniffed defendant and then walked back out without making a clear alert. (37 RT 6517.) Nevertheless, the jury was shown a videotape of the trails, with Harvey providing running commentary, both on direct and on cross. (37 RT 6519 *et seq.*, 6596 *et seq.*)

The defense cross-examination focused, *inter alia*, on the need for, and apparent lack of, clarity in the dogs' alerts. Asked if an identification has to be very clear and unambiguous, Harvey answered: "I think that the identification has to be consistent with what the dog has done before, so that the handler can understand the dog, yes." Asked if it has to be clear and not subject to interpretation, she said, "I think it has to be clear to the handler, but it can be subject to interpretation by anyone around." (37 RT 6560.) Thus, even if trained to alert by jumping on people, bloodhounds can decide for themselves what kind of alert they are going to give, so the handler has to be aware of what the dog says. (37 RT 6561.) Moreover, each of her dogs' preferred method of alerting had changed over time. (37 RT 6561-6563.) Tellingly, she admitted that, *while her dogs are well-*

trained, they do not always do as they are trained. (37 RT 6590.) And dogs and their handlers can both make mistakes, including Cody Webb and her dog, Maggie Mae (the handler and dog involved in the Orange Street station house trail). (37 CT 6589.)

Still on cross-examination, the videotape of the San Bernardino police station trails involving appellant was again played, interspersed by questions from defense counsel: There was no negative control used that day, with either dog.[116] (37 RT 6596.)

(b) The Defense Expert's Comments

Before commenting on the San Bernardino trails, Dr. Myers explained the concepts of blinding and controls, and noted the absence of them in Harvey's experiments. (42 RT 7128-7130.) Without blinding, he said, "people with conscious or unconscious bias can alter the behavior of the dog and their own behavior . . . There [has] been experimentation done on this sort of thing for a lot of years. *It's very easy to cue a dog.*"[117] (42 RT 7130:12-16; emphasis added)

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[116] A negative control consists of presenting the dog with a scent item devoid of scent, to be sure that in the absence of scent, the dog will not trail. (37 RT 6503.)

[117] Just how easy it is to cue a dog was, of course, shown in the UC Davis study (Appendix K) described in Argument II, E, 2, *ante.*

Dr. Myers debunked Harvey's claim that if the dog begins to trail, that indicates a scent and, therefore, even if it does not give an unambiguous alert at the end of the trail, it can be said to have reached its target when it stops trailing. To the contrary, Dr. Myers explained, if a well-trained dog scents off an article and begins to trail, that in itself is not proof that there was a scent on the article, or that the scent belongs to any particular individual, without an unambiguous positive alert at the end. (42 RT 7133.) Even a well-trained dog might trail when there is no scent. (42 RT 7140.) Moreover, for reliability, you can't simply repeat the same exercise (such as Dakota's trail following Shelby's) because either the dog or the handler now has a bias. (42 RT 7136.)

Even with a well-trained dog and well-trained handler with a great record, you can, with respect to a single trail, only consider the result as a probability. For example, there might have been cuing by the handler; or any number of physiological conditions of the dog that will cause alterations in its sense of smell; or environmental effects, including the environment of the individual at the end of the trail. (42 RT 7138-7139.)

Dr. Myers commented on Dakota's less-than-positive "alert" at the end of the San Bernardino Police Station trail. Contrary to Harvey's testimony, there has to be an unambiguous recognizable alert; "it cannot be

an impression of a handler, that, gee I think my dog is interested in something." (42 RT 7141). Whether a jump-up, or an abrupt sit, or whatever it is, "you have to be able to articulate it in advance of any behavior of the dog." (42 RT 7141.) A dog just sniffing or wandering around a subject is not an alert. (42 RT 7141-7142.) Moreover, most of Lisa Harvey's training records on Dakota indicated a jump-up alert. (42 RT 7142.) There was nothing in these records indicating Dakota alerting by stopping and whining and crying. (42 RT 7142.)

Regarding cuing, it is usually not intentional, but it is common, and even teachers end up doing it. (42 RT 7143, 7145.) And it is not just the handler who might cue – it can be done by a bystander, even if the dog is trained to ignore distractions. And the target person can also inadvertently cue, for example, if he knows that if the dog alerts on him, he is going to be in a lot of trouble. He'll act differently than a decoy. (42 RT 7145.)

Turning to the specifics of the San Bernardino police-station trails, as seen on the video tape, Dr. Myers first commented on the trail by the dog Shelby. He noted that Shelby was on loose lead until it got to door seven, and then the lead tightened up and Harvey stopped, and that was a cue. (42 RT 7151.) The dog evinced interest in door eight, but was not allowed into it. Led around again, it was allowed loose leads near doors five and six,

and then returned to door eight where Harvey again stood. The dog was interested in eight again, and was let in, but wasn't interested in any of inmates. Harvey then asked for door seven to be opened, the dog entered and again showed no interest and departed. (42 RT 7151-7152.) Appellant, of course, was behind door seven.

With Dakota, Dr. Myers noticed almost exactly the same sort of cuing. Dakota showed a lot of interest in cell eight, but it was not opened; then Harvey stood next to door seven, asked that it be opened, the dog entered, Harvey stood next to the door preventing the dog's exit, Dakota showed no interest whatsoever in that room, then went around Harvey to get out of seven and go to door eight. (42 RT 7153.) All this cuing calls into question whether the dog was actually trailing the scent. (42 RT 7154.)

On cross-examination, Dr. Myers refused to accept the prosecutor's thesis that a positive and reliable identification absolutely meant that at some point in time the target left his or her scent on the article. More often that not, yes, but not in an absolute sense. Indeed, one of the experts in the field, Stockham, "indicates that dog evidence of this sort shouldn't be used as evidence in trials. It should be used to locate evidence and find additional evidence." (42 RT 7169.) The research, of course, bears this out.

2. The Flaws in the San Bernardino Trails

The research discussed in the guilt-phase argument, as well as Dr. Myers' comments, highlight the unreliability of the San Bernardino trails, and thus the magnitude of the trial court's error in admitting them without a *Kelly* hearing.

As Dr. Myers pointed out, we cannot know how much of Dakota's behavior involved cuing by the handler, or following Shelby's scent. Dr. Harvey by then of course knew the precise route to and location of appellant, and we know from the UC Davis study discussed *ante* at pages __-__ that cuing is a significant danger.

When Dakota, once in the inner corridor went directly to cell 7, and when the door was opened sniffed defendant and walked back out, we can't possibly know whether she sniffed defendant because (1) his was the strongest, or most distinctive scent; (2) Shelby had preceded Dakota into and near cell 7; (3) Dr. Harvey unconsciously cued Dakota toward cell 7 but, having sniffed Jackson, the dog found nothing of interest, or (4) Dakota genuinely tracked to appellant and gave an alert. (See discussions of the research *ante*, at pp. 200-204.)

All this is further complicated by the nature of the "alert": Harvey opined that Dakota had identified appellant, because she had trailed from

the sally-port area all the way into appellant's cell and sniffed him. (37 RT 6517-6518) This was notwithstanding the fact that Dakota then left cell 7. As Dr. Myers pointed out, this hardly constituted the sort of clear alert that avoids what Weiner and Homan explained are the dangers in the doubly-subjective roles of the dog handler. (Weiner and Homan, Appendix I, at 12.)

3. The Between-Trials Scent Identifications Highlight the Confrontation-Clause Dangers Related to Scent Identifications

Appellant has argued that the dog-scent identification conducted at the Orange Street Station on June 25, 2001, violated appellant's Confrontation Clause rights under *Crawford v. Washington, supra*, 541 U.S. 36, and its progeny. (See *ante*, at pp. 208-212.) The application of those cases to canine scent-identifications is even more clear for the between-trials scent-identifications conducted by Dr. Harvey at the San Bernardino Police Department jail holding cells.[118]

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[118] Appellant's "Notice of Motion and Motion to Suppress Evidence Relating to Canine Identification," filed before the second penalty phase trial, includes as a grounds for exclusion that the evidence of the dogs' alerts presented through the testimony of both Deputy Webb and Dr. Harvey were inadmissible hearsay, and in violation of the defendant's right of confrontation. (16 CT 4594.)

Second, the ambiguity of the dogs' "alerts" puts into stark relief the Confrontation Clause problems associated with this type of evidence. Thus, commenting on Dakota's failure to make a clear alert, even after Harvey asked her to "show me again, Dr. Harvey related that:

> Instead what she did, she began to cry and whine. Bloodhounds are very stubborn. And although I asked her to make a particular identification, they pick sometimes their identification. And Dakota would not go back into the cell. [¶] She would not have anything to do with it. And from my training, experience with her, that was an indication she had already made the ID. I missed it and that was just too bad for me." (37 RT 6517-6518.)

In Harvey's opinion, Dakota had made the identification, she had trailed from the sally-port area all the way into Mr. Jackson's cell. (37 RT 6518.)

So, too, with Shelby. In Harvey's opinion, Shelby, despite the lack of a clear alert, at least had made an identification of appellant's scent in the area. (37 RT 6522.) Shelby's form of identification, Harvey explained, is not a jump-up, but a crotch-sniff. "She actually puts her nose in the individual's crotch[.]" (37 RT 6524-6525.) Dakota will either jump up or do what she did on the videotape – go to the individual's location and cry if asked to identify. ((37 RT 6526, 6517.)

The problem, for Confrontation Clause purposes, is that even if the person who *is* on the stand is accurately reporting her *impressions* of

whether the dog alerted, there is simply no way to know. We know from the research that dogs may be following the freshest scent (which explains both dogs trailing to the cell holding area); or they may be following cues from the handler. In addition, we know from the research that scent degrades, and the scent pad here was exposed to the envelope in June, 2001, while the trails were run in 2005, yet there is no way to *verify* that the scent was still on the pad. Indeed, the second dog, Dakota, was moving much faster through the trail. (17 RT 6253.) We don't know, however, if that was because Dakota was better at it, or because Harvey at that point knew the way and was unconsciously cuing the dog, or because Dakota could smell where Shelby had been.

Analogizing to *Crawford* and its progeny, we might say that the dog's olfactory abilities are the "machine" that does the test; the dog's behavior is similar to the analyst's report, and Dr. Harvey is the lab director whose testimony, according to *Bullcoming,* does not meet the requirements of the Confrontation Clause. (*Bullcoming v. New Mexico, supra,* 131 S.Ct. at p. 2716.)

Put another way, the dog is engaged in a communication that not only involves the dog, which has its own desires and appetites, but the human handler and trainer, who has her own biases and interests. This

renders the evidence highly problematical for purposes of courtroom use, where precision and exactitude in establishing the truth is the normative goal.

At a more fundamental level, the question is this: if, under *Bullcoming*, the results of an automated device, which can be tested and calibrated, must be reported by the analyst who set up the tests and recorded the results, then, when we cannot truly know why the dog did what he or she did, and, as a sentient being, may have any number of reasons to exhibit the behavior exhibited; and when the handler, who has a relationship with law enforcement that rewards positive results, is allowed to interpret at best ambiguous behavior by the dogs, then how is the heightened concern for a defendant's Confrontation Clause rights enshrined in *Crawford* and its progeny vindicated by what occurred here? In the context of dog-sniff identifications, it cannot be.

C. THE FAILURES TO EXCLUDE THE EVIDENCE WERE PREJUDICIAL ERROR

The purpose of *Kelly* hearings, as of section 402 hearings, is to keep from the jury unreliable information that they might otherwise rely upon.

It is not enough, in this case, to say that, if the evidence is of such little value, the jury would have given it little weight. Viewing only the transcripts on appeal, it is impossible to gauge the impact of the respective

personalities of Dr. Harvey and Dr. Myers. Dr. Harvey's, we know, was engaging enough to have led several jurors in the guilt trial to violate their oaths and engage with her in off-the-record conversation.

Appellant had a due process right to admission against him only of reliable and valid evidence. Dr. Harvey's research involved a device, the STU, which has not yet passed the *Kelly* reliability test, and a scent-identification procedure rife with flaws. Yet, the jury was allowed to hear this evidence which may well have provided the difference between the outcomes of the first and second penalty phase trials. This evidence could have been the precise evidence which tipped the scales from the eight-to-four vote against death in the first penalty trial to the death verdict in the second. Moreover, admission of this evidence violated appellant's due process and fair trial rights, and his right to a reliable determination of sentence, under the Fifth, Sixth, and Fourteenth Amendments. Under any standard, state or federal, the penalty must be reversed.

XVII. THE COURT ERRED IN ALLOWING A POLICE DETECTIVE TO TESTIFY THAT HE WAS AWARE OF NO OTHER SIMILAR CASES

Riverside Police Sergeant Stephen Johnson testified for the prosecution. He was, at the relevant time, a detective in the homicide unit. (35 RT 6125.) He was "one of the many assisting detectives" working the Myers homicide case. (*Ibid.*) He was aware of her description and had seen the photographs of her that had been disseminated. (35 RT 6126.) He was also award of the statements that appellant made to Detective Barnes regarding taking an elderly red-haired lady in her car and dumping her body out of the car somewhere. (35 RT 6127.)

The prosecutor asked Johnson if he was aware of any homicide cases, or abduction cases, in Riverside city or county matching those facts, other than the Myers case. Appellant objected, "relevance, 352 and due process." The court overruled the objection. (35 RT 6127-6128.) Appellant was correct: this was objectionable on both relevance and Evidence Code section 352 grounds.

At issue, in this second penalty phase, was not the existence or lack of existence of other, similar victims; rather, it was whether or not there was some lingering doubt that Bailey Jackson committed whatever crimes occurred, if any, against Geraldine Myers. It could be said that if Jackson

did indeed kill an elderly red-headed lady, it must have been Myers. The flaw which renders its probative value minimal is that there is no foundation for Johnson truly knowing whether or not there had been another such victim. We do not know how many detectives were in the homicide unit, or how many homicide units there were in Riverside County, although the record reflects that there are at least two separate police stations in the city, the Orange and the Spruce Street stations. Neither was a foundation laid regarding any such victims not in the city but nearby to it. Indeed, given this lack of foundation, there is a dangerous invitation here for juror speculation – that if Jackson indeed abducted and dumped the body of a red-haired elderly woman, who was not Myers, there still could be another potential victim for which Jackson is responsible.

Evidence Code section 352 requires the exclusion of evidence when its probative value is substantially outweighed by its prejudicial effect. "Evidence is substantially more prejudicial than probative [citation] [only] if, broadly stated, it poses an intolerable `risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Tran* (2011) 51 Cal. 4th 1040, 1047, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 724.) Given the lack of foundation, rendering the evidence of little

value at all, the prejudice here substantially outweighed the probative value, and the evidence should have been excluded.

XVIII. THE PROSECUTOR COMMITTED MISCONDUCT IN THE CLOSING ARGUMENT, AND THE FAILURE OF DEFENSE COUNSEL TO OBJECT CONSTITUTED INEFFECTIVE ASSISTANCE OF COUNSEL

As in the guilt phase, the prosecutor committed misconduct in his closing arguments in the second penalty phase of the trial. Also as in the guilt phase, defense counsel failed to object. However, appellant raises the issues here (as opposed to in habeas corpus) because he believes both that any objections would have been futile, and that, if not, the failure to object cannot be explained by any plausible strategic or tactical reason and constituted ineffective assistance.

A. THE PROSECUTOR'S IMPROPER ARGUMENTS CLEARLY VIOLATED CONSTITUTIONAL AND STATE LAW

1. The Applicable Law

Because some of the prosecutor's arguments fall into more than one category of misconduct, it is well to begin with a summary of the applicable law: A prosecutor's wide latitude in argument includes fair comment on the evidence, including reasonable inferences, but matters not in evidence are restricted to those which amount to "'common knowledge or . . . illustrations drawn from common experience, history or literature." (*People v. Hill, supra,* 17 Cal. 4th at p. 819, citing *People v. Williams, supra,* 16 Cal. 4th at p. 221; *People v. Wharton, supra,* 53 Cal. 3d at pp. 567-568.)

The prosecutor may not misstate or mischaracterize the evidence. (*Hill, supra*, at p. 823; *People v. Purvis, supra,* 60 Cal. 2d at p. 343.) Nor can the prosecutor refer to facts not in evidence, thereby becoming an unsworn witness. (*Hill, supra,* at pp. 827-828, and cases there cited.) Nor can the prosecutor argue in such a way as to inflame the passion or prejudice of the jury. (*People v. Young*, *supra*, 34 Cal. 4th at p. 1195; *People v. Pinsinger*, *supra*, 52 Cal.3d at p. 1251.) Finally, bad faith is not required. (*Hill, supra,* at p. 822; *People v. Bolton, supra,* 23 Cal. 3d 208, 213-214.)

2. The Prosecutor's Opening Words Consisted of Improper Testimony Intended to Appeal to the Fears and Emotions of the Jury

As in the guilt phase, the prosecutor, in his first closing argument, committed two-fold misconduct with his inflammatory opening remarks:

> When we experience evil either as victims of crime or witnessing a tragic or horrendous event, sometimes simply learning about an evil event occurring it effects us. And the closer we are to it, the more it effects us, the deeper, the stronger.
>
> Who among us did not really gasp in horror when we learn of what happened to five-year old Samantha Runyon snatched from her front yard by a sadistic, child molester, tortured, killed, left posed naked on a roadway.
>
> Which of us did not similarly gasp in horror when we learned what happened to teenager Polly Glasp (sic, Klass), snatched from her own bedroom in the middle of the night, parents sleeping in another room by a pervert, career criminal, brutally murdered.
>
> Ten-year old Anthony Martinez snatched from his front yard by another sick, pervert child molester. These

> horrendous crimes shock us deeply, disturb us, and they cause us to realize a number of things: One, there are evil predators that exist in our community. Exist to do us harm. Two, we are not safe in our own homes. And, number three, we must condemn these crimes and these criminals with every fiber of our being.
>
> As equally horrendous and shocking as these crimes against children are the crimes you heard about in this case, far more rare. It takes a unique, uniquely sadistic and perverted and evil predator to target elderly women living alone for murder and vicious sexual assault.
>
> When was the last time you heard reports of crimes like these occurring? The Boston strangler maybe. The rarity of the occurrence of these types of crimes is but one of the compelling circumstances upon which we can condemn Bailey Jackson. (43 RT 7309-7310.)

With these words, the prosecutor both improperly became a witness and did so to appeal to the fears and prejudices of the jury. To begin with, only the Polly Klass case could be considered common knowledge. With regard to the other cases he mentioned, the prosecutor improperly testified as to their facts. Those facts, moreover, had nothing to do with this case: all of the cases recited involved the death and/or sexual abuse of children, not a factor in this case or any other related to the defendant. Rather, they were included solely to appeal to the fears, emotions, and prejudices of the jurors, and had the additional effect of encouraging a sentence choice not based on this defendant or the facts of the case, but on an inchoate appeal to protect the public against such evil predators. Indeed, the prosecutor made this explicit at the end of his second closing:

> [W]e have a right to take predators like that and impose upon them the most severe punishment that the law can provide, because we have a right to be free and safe in our homes. [¶] We have a right to be free from predators like him. Our loved ones to be protected from people like him. (43 RT 7383.)

3. The Prosecutor Again Became an Unsworn Witness and Argued Facts Not in Evidence by Presenting His Unfounded Speculation as to the Capital Crime Itself and as to the Purported Rarity of Such Crimes

Part and parcel with the prosecutor's attempt to paint appellant as the very embodiment of evil was the extent to which he played fast and loose with the facts of the case.

Shortly after his opening words quoted in the foregoing section, the prosecutor, to support his claim that appellant was a career criminal, stated the following:

> Actions speak louder than words. Bailey Jackson did what he wanted, when he wanted, to who he wanted for his own personal satisfaction. Monetary gain. As it turns out in May and June of 2001 for sadistic and perverted sexual pleasure. (43 RT 7318-7319.)

The reference to May is a clear reference to Geraldine Myers. There was, however, neither any sexual assault charges nor any evidence of a sexual assault against Myers.

The same erroneous mischaractarization of the evidence was combined with further prosecutorial "testimony" immediately following the above-quoted argument:

> As equally horrendous and shocking as these crimes against children are the crimes you heard about in this case, far more rare. It takes a unique, uniquely sadistic and perverted and evil predator to target elderly women living alone for murder and vicious sexual assault.
>
> When was the last time you heard reports of crimes like these occurring? The Boston strangler maybe. The rarity of the occurrence of these types of crimes is but one of the compelling circumstances upon which we can condemn Bailey Jackson. (43 RT 7310.)

Again, there is no evidence on the record concerning the frequency of sexual-assaults and homicides against elderly women, or in comparison with those of children. Moreover, the relative rarity of a type of homicide is neither a statutory nor a rational aggravating factor. And, again, there is no evidence of a sexual assault against Myers. Yet, the prosecutor brought up both themes later in his first closing argument:

> The rarity of the crimes. I spoke to that briefly. The rarity of the crimes for a perpetrator, a sadistic perpetrator, targets elderly women living alone. Vicious sexual assault and murder is so rare. (43 RT 7337.)

The prosecutor returned to conflating the known facts of the Mason case with the unknowable facts about Myers elsewhere in his argument.

Thus, after describing the "overwhelming evidence" of appellant's guilt of the assault on Myrna Mason (43 RT 4375), he referred to,

> "The manner in which he committed these crimes. Crimes against Gerry Myers, crimes again[st] Myrna Mason describe a high degree of viciousness, callousness, cold-heartedness and just down right cruely."
>
> And that is something that is above and beyond the commission of the crime itself. He didn't just rob. He didn't just burgle. He didn't just rape. He did more. (43 RT 7327.)

Again, there is no evidence of what, if anything, appellant – or other perpetrator – did to Ms. Myers other than apparently take some of her money, cause her death in some unknown way, and dispose of her body. The rest is simply speculation.

The prosecutor repeated the speculation in his rebuttal argument: "Why [referring to the crime against Gerri Myers]? Perverted, sadistic sexual gratification and monetary gain." (43 RT 7375.) And later: "Why? Money and sex."[119] (43 RT 7377.)

While the prosecutor has "wide latitude" to argue from the evidence

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[119] The prosecutor sought to support his speculation regarding a sexual attack on Geraldine Myers with the fact that her dress was found on the bedroom floor. (43 RT 7376.) But that also involves mere speculation: there is no evidence of *when* the dress was removed or *who* removed it or *why*. There was neither blood nor semen on the dress. The perpetrator could have surprised her in her bedroom just as she was removing it, but committed no sexual assault.

that has been adduced at trial, he may neither present "facts" which are not in evidence, nor become an unsworn witness regarding facts entirely beyond the common experience of the jurors. (*People v. Hill, supra,* 17 Cal.4th at p. 828; citing *People v. Pinholster* (1992) 1 Cal.4th 865, 948.) Such unsworn " 'testimony . . . can be dynamite to the jury because of the special regard the jury has for the prosecutor, thereby effectively circumventing the rules of evidence.[Citations.] ([*People v.*] *Bolton, supra,* 23 Cal.3d at p. 213; *People v. Benson* [1990] 52 Cal.3d [754,] 794 ["a prosecutor may not go beyond the evidence in his argument to the jury"]; *People v. Miranda* (1987) 44 Cal.3d 57, 108 []; *People v. Kirkes* (1952) 39 Cal. 2d 719, 724 [].) 'Statements of supposed facts not in evidence . . . are a highly prejudicial form of misconduct, and a frequent basis for reversal.' (5 Witkin & Epstein, Cal. Criminal Law (2d ed. 1988) Trial, § 2901, p. 3550.)" (*People v. Hill, supra,* 17 Cal.4th at p. 828; some internal quotation marks omitted.)

If speculation, even when consistent with the proven facts, is not sufficient to constitute substantial evidence (*People v. Marshall, supra,* 15 Cal.4th at p. 35), it ought not to be allowed as an underlying premise of an entire penalty-phase closing argument in a capital trial.

4. Other Instances of the Prosecutor Overstepping the Bounds of Propriety During Argument

In addition to the blatantly inappropriate comments referred to in the foregoing subsections, there are a number of other instances of overreach in the prosecutor's argument.

Thus, the prosecutor informed the jury what they were to look at in determining punishment in a very misleading and incomplete way:

> You're here to determine punishment. The evidence that has been presented to you falls under three categories. I spoke about these in my opening statement. To the defendant's crimes. Of course, your opinion to the defendant's punishment has to take into consideration what he did to get himself here. The circumstances of his crimes. Why he is here.
>
> You're also going to hear, you have heard, evidence of his background. Background in aggravation. His criminal background, which reflects his character, which is the third category you should take into consideration. His crimes, his background, and his character.
>
> Within his character you're to consider whatever it is the defendant wanted to present to you. Every killer, murderer, who commits a special circumstances murder is eligible for the death penalty. But not every special circumstances murderer receives the death penalty.
>
> Why is that? Because it is not mandatory. It is not automatic. We leave it up to 12 individuals selected at random from the community to sit as representatives of the community. And to determine from among those that are eligible for the death penalty, does this individual defendant deserve it.
>
> And the determination as to whether or not an eligible killer like Bailey Jackson deserves it, you take into consideration not just that crime that brought him here that made him eligible for the death penalty, but everything else

that he has done. (43 RT 7311-7312.)

The prosecutor then proceeded to list the crimes against Myrna Mason, appellant's prior crimes, his adult life, "continually a crime in progress," culminating in his "set[ting] out to become a serial killer." (43 RT 7312.)

Nowhere in the calculus presented by the district attorney, for whom the jury has a "special regard," is any mention of mitigating circumstances. Nor is there any indication that the defendant's background itself could be a mitigating circumstance, as it certainly was in this case. It's these three things, the prosecutor says, the capital crime, background aggravation and the defendant's character. But that was not so. And a short while later, the prosecutor tells the jury this:

> You need to make a reasoned, well-thought-out judgment in this case. Not a gut reaction. Recognize obviously the weight you attach to a particular aggravating fact and circumstance as to what he did to these victims cause an emotional reaction and you can recognize that.
>
> And that equates to the weight that you would give that particular fact or circumstance. Your overall determination of the appropriate penalty should be a well-reasoned judgment of weighing aggravating against mitigating circumstances. (43 RT 7314-7315.)

Thus, in the midst of purporting to tell the jury to make a "reasoned, well-thought-out judgement in this case," the prosecutor invites them to use their emotional reactions to determine the weight to be given to the fact or

circumstance to which they are reacting: "*And that equates to the weight you would give that particular fact or circumstance.*" (43 RT 7315; emph. added.)

Similarly, and while not strictly improper during a penalty phase argument, the prosecutor's requests of the jury that they put themselves in the victim's shoes again appealed directly to their emotions and fear. Thus, with regard to Myrna Mason, he invited the jurors to take themselves to the night of the crime, and, with their "eyes closed . . . to fully and truly appreciate the horror . . . humiliation, and . . . pain. . . . [O]nly then can you truly appreciate why . . . he deserves the death penalty." (43 RT 7329.) Later, he repeated the request with respect to Gerri Myers: ". . . consider, close your eyes, the circumstances . . . ." (43 RT 7333.)

The law in this state, while disapproving such argument in the guilt phase, has approved it in penalty phase argument. (*People v. Jackson* (2009) 45 Cal.4th 662, 691; *People v. Leonard* (2007) 40 Cal.4th 1370, 1418; *People v Haskett* (1982) 30 Cal. 3d 841, 863.) Nevertheless, it *is* an appeal to the jurors passions and fears. (See, *e.g.*, *State v. Rhodes* (Mo. 1999) 988 S.W.2d 521, 528). Indeed, by going beyond "standing in their shoes" and leading the jury to do so with their "eyes closed" so they could "fully and truly appreciate the horror . . . humiliation, and . . . pain . . ." the

prosecutor was clearly trying to evoke an emotional response, not a reasoned moral decision. (*Dean v. Commonwealth* (Ky. 1989) 777 S.W.2d 900, 904; *Lycans v. Commonwealth* (Ky. 1978) 562 S.W.2d 303, 306 [error for prosecutor to cajole or coerce jury to reach verdict].) Even if, standing alone, these words might not constitute misconduct, it falls into a disturbing and indeed objectionable pattern of misconduct and overreaching by the prosecutor.

Finally, the prosecutor committed something akin to *Caldwell* error. (*Caldwell v. Mississippi* (1985) 472 U.S. 320.) Rather than directly shifting the burden for imposing the death penalty onto an appellate court (472 U.S. at pp. 328-329), or shifting the burden in the abstract to the law or other state actors (*People v. Milner* (1988) 45 Cal.3d 227, 257 [the law]; *People v. Farmer* (1989) 47 Cal.3d 888, 924-931 [voters]), the prosecutor sought to minimize to the jury what they would be doing in voting for death:

> You are not killing the defendant when you render a verdict of death. You are sentencing him to death, yes, and he should be executed for what he did, yes. But it is not a killing. A brutal taking somebody out in the backyard and shoot him without giving his him his fair day in court. (43 RT 7383.)

This is the converse of the situation in *People v. Stanley* (1995) 10 Cal.4th 764. In that case, this court approved the prosecutor's response to *defense counsel's* repeatedly telling the jury that they would be killing the

defendant by imposing the death penalty. (*Id.* at pp. 827-828.) In this case, the prosecutors remarks were in response to nothing of the sort, and the suggestion that a death sentence did not involve a killing, as the prosecutor surely understood, was entirely misleading. A death sentence carried out may be a lawful killing, but it is clearly a killing, and a sentencer should not be encouraged to forget that fact. As the United States Supreme Court stated in *Caldwell*, its "Eighth Amendment jurisprudence has taken as a given that capital sentencers would view their task as the serious one of determining whether a specific human being should die at the hands of the State." (*Caldwell v. Mississippi, supra*, 472 U.S. at p. 329.)

The pattern here is clear: The prosecutor repeatedly over-stated the permissible inferences, went beyond the facts, and overstepped the lines of proper argument. The result was to undermine the fairness and reliability of the sentencing determination in violation of appellant's rights under the Eighth and Fourteenth Amendments.

B. THE FAILURE OF THE DEFENSE TO OBJECT SHOULD NOT RESULT IN FORFEITURE ON APPEAL

There remains the fact, however, that defense counsel raised no objection to the several instances of prosecutor misconduct just recited. Normally, that would result in a forfeiture of the issue on appeal. (*People v.*

Hill, supra, 17 Cal.4th at p. 820.) There are, however, exceptions to the general rule: (1) when an objection or a request for an admonition would be futile, or if (2) if an admonition would not have cured the harm. (*Ibid.*) In this case, it was ineffective assistance of counsel, for which there is no plausible strategic reason. In addition, this Court has the authority took take up the issue regardless of the lack of objection.

Defense counsel's failures to object can be considered on appeal as ineffective assistance of counsel if there were no reasonable tactical or strategic reason that might be advanced to justify such failures. (*People v. Pope* (1979) 23 Cal.3d 412, 426.) That was certainly the case here. There could be no strategic or tactical reasons for counsel's failure to object to the prosecutor's repeated transgressions, and any failure to preserve any of the issues for appeal would amount to the ineffective assistance of counsel. (*People v. Lewis, supra,* 50 Cal.3d at p. 282 [this Court considers an otherwise forfeited "claim on the merits to forestall an effectiveness of counsel contention"]; *People v. Stratton, supra,* 205 Cal.App.3d at p. 93 [Sixth Amendment violated by failing to preserve meritorious claim for review].) In addition, these transgressions affected appellant's constitutional rights, as set forth in subsection (C), below. To that extent, they are not waived by inadequate objection. (*People v. Yeoman, supra,* 31

Cal.4th 93, 117-118, 133; *People v. Coddington, supra,* 23 Cal.4th 529, 632.)

Further, this Court has the authority, in the exercise of its discretion, to decide the issue despite the lack of objection below. (*People v. Williams, supra,* 17 Cal.4th at p. 161, fn. 6.) In this case, the prosecutor's misconduct should not go unnoticed; it was reprehensible, and the case was close enough that it was very likely prejudicial. The first jury hung 8-4 in favor of life; there were ample reasons for lingering doubt: There was a lack of any real evidence as to precisely what happened, including the absence of evidence as whether the killing was intentional; there was nothing on the scene or in appellant's possession directly linking him to the crime; and significant mitigation in the form of a seriously deprived and abusive childhood.

"Misconduct of the prosecuting attorney may not be assigned as error on appeal if it has not been assigned at the trial unless, the case being closely balanced and presenting grave doubt of the defendant's guilt, the misconduct contributed materially to the verdict or unless the harmful results of the misconduct could not have been obviated by a timely admonition to the jury. . . ." (*People v. Bryden* (1998) 63 Cal.App.4th 159, 182, quoting *People v. Meneley* (1972) 29 Cal.App.3d 41, 58-59; internal

quotation marks omitted). This is just such a case. There was no physical evidence tying appellant to the Myers crime – whatever it was – and his admissions to the detectives, if they amounted to admissions, were less than coherent or compelling. Absent the dog evidence, there was nothing to corroborate his rambling to the police, and the dog evidence itself was based on a ninhydrin-contaminated scent object and marred by a lack of adequate scientific basis and questionable procedures.

There is, accordingly, ample grounds upon which to adjudicate this issue, and ample prejudice. Indeed, the prosecutor's remarks are so egregious as to elevate them to a constitutional violation, under the Fifth, Sixth, and Fourteenth Amendment rights to due process and a fair trial. Even if this could not be considered governed by *Chapman v. California*, it meets the essentially identical state test, as set forth in the following section.

C. THE PROSECUTOR'S SERIAL MISCONDUCT AND OVERREACHING WERE PREJUDICIAL

When a claim of misconduct is based on the prosecutor's comments before the jury, "'the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.'" (*People v. Smithey, supra,* 20 Cal.4th at p. 960, quoting *People v. Samayoa, supra,* 15 Cal.4th at p. 841.) California cases hold that penalty phase errors that do not involve federal constitutional error

are adjudged under the standard set forth in *People v. Brown* (1988) 46 Cal.3d 432: "[W]e will affirm affirm the judgment unless we conclude there is a reasonable (i.e., realistic) *possibility* that the jury would have rendered a different verdict had the error or errors not occurred." (*Id.* at page 448, emphasis added; see also *People v. Ashmus* (1991) 54 Cal.3d 932, 983-84 [quoting *Brown*, and stating: "we must ascertain how a hypothetical 'reasonable juror' would have, *or at least could have*, been affected" (emphasis added)].)

In this case, the prosecutor made a blatant attempt to inject irrelevant matters into the case, in a direct appeal to the passions and prejudice of the jurors. This is, to begin with, misconduct of constitutional dimension. A prosecutor "may not make an appeal to the jury that is directed to passion or prejudice rather than to reason and to an understanding of the law." *Cunningham v. Zant* (11 Cir. 1991) 928 F.2d 1006, 1020 [Sixth and Fourteenth Amendments]; accord, *People v. Pitts, supra,* 223 Cal.App.3d at p. 606; see also *Newlon v. Armontrout, supra,* 885 F.2d at p. 1337 [violation of Due Process of Law]; *People v. Talle, supra,* 11 Cal.App.2d at p. 676.). Other federal cases hold that the prosecutor violates the constitution when he "seeks to obtain a conviction by going beyond the evidence before the

jury." *Gomez v. Ahitow, supra,* 19 F.3d at p. 1136, quoting *United States v. Vera, supra,* 701 F.2d at p. 1361.)

In addition, the prosecutor here misrepresented the facts by conflating the Myers and Mason facts, stating that both cases were indicative of appellant's seeking "perverted sexual pleasure." (43 RT 7318-7319.)

> Misrepresenting facts in evidence can amount to substantial error because doing so "may profoundly impress a jury and may have a significant impact on the jury's deliberations." *Donnelly v. DeChristoforo*, 416 U.S. 637, 646, 40 L. Ed. 2d 431, 94 S. Ct. 1868 (1974). For similar reasons, asserting facts that were never admitted into evidence may mislead a jury in a prejudicial way. See *Berger v. United States*, 295 U.S. 78, 84, 79 L. Ed. 1314, 55 S. Ct. 629 (1935). This is particularly true when a prosecutor misrepresents evidence because a jury generally has confidence that a prosecuting attorney is faithfully observing his obligation as a representative of a sovereignty. See *id.* at 88. (*Washington v. Hofbauer* (6th Cir. 2000) 228 F.3d 689, 700.)

The prosecutorial misconduct in the second penalty phase meets both the state and federal standards of prejudice. The second penalty phase was tried by both sides with lingering doubt in mind. Indeed, the prosecutor's appeals to the jurors' fears and emotions appear to have been designed specifically to overcome whatever lingering doubt they might otherwise have entertained. Accordingly, if viewed from the state standard, there is more than a "reasonable possibility" that the result would have been

different. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) And assuming, as appellant does, that the violations described above rose to federal constitutional standards, it follows that the state cannot show beyond a reasonable doubt that the violations were not prejudicial. (*Chapman v. California, supra*, 386 U.S. at p. 24).

XIX. THE COURT'S REFUSAL TO GIVE SEVERAL DEFENSE-REQUESTED INSTRUCTIONS IMPORTANT TO APPELLANT'S LINGERING DOUBT DEFENSE IN THE SECOND PENALTY TRIAL REQUIRES REVERSAL

As previously explained, the jury which convicted appellant of capital murder hung eight to four for life, at least for some of them on the basis of lingering doubt as to his guilt. (16 CT 4477.) Not surprisingly, given the result of the first penalty trial and the circumstantial nature of the state's case on the murder count, lingering doubt was a principal theme of the case for life at the penalty retrial. The defense vigorously litigated issues relating to appellant's culpability and devoted most of its closing argument to lingering doubt. (See 43 RT 7347-7374, and 7383-7397 [defense principal and rebuttal closing arguments].) The prosecution, as has been explained, re-presented much of its guilt phase evidence. Further, seeking to eliminate the lingering doubt that precluded a death sentence at the first penalty trial, the prosecution conducted additional dog trail experiments prior to the penalty retrial and introduced evidence of those additional dog trails and of an additional purported admission not previously presented. The prosecution also devoted much of its closing argument to arguing the certainty of appellant's guilt. (See 43 RT 7309-7347, 7325-7343.) Lingering doubt -- its existence or nonexistence -- was thus a central issue at the penalty retrial.

In order to guide the jury's consideration of evidence bearing on the lingering doubt issue, defense counsel requested a series of instructions commonly given at a trial on guilt or innocence, and several special instructions. The trial court refused to give the instructions on the repeated ground that it did not want to invite the jury to relitigate guilt. The trial court was wrong. The instructions were as relevant to the penalty jury's determination of whether lingering doubt existed as they were to the first jury's determination of whether guilt had been proven beyond a reasonable doubt. The failure to give the instructions – necessary to guide the jury's consideration of the evidence – undermined appellant's Sixth, Eighth, and Fourteenth Amendment rights to due process, to present a defense, and to a fair and reliable penalty determination.

A. IT WAS PREJUDICIAL ERROR FOR THE COURT NOT TO INSTRUCT THE JURY WITH AT LEAST A MODIFIED VERSION OF CALJIC 2.16 RELATING TO DOG-TRACKING EVIDENCE

In the second penalty trial, the court refused a defense request to instruct the jury regarding the corroboration needed for dog-tracking evidence. (CALJIC No. 2.16 [Oct. 2005 ed.].)[120]

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[120] CALJIC No. 2.16 ("Dog-Tracking Evidence") read, in 2005, as follows:

(continued...)

The instruction was given at the guilt trial, and its flaws are fully discussed *ante*, at pages 255-265. Whatever its flaws, the defense requested it be given in the second penalty trial. (42 RT 7257.) In stating its refusal to give the instruction, the trial court stated:

> . . . I believe [giving the instructions] would be encouraging the jury to relitigate and evaluate the issue of guilt. Obviously, Mr. Aquilina is free to argue any of this; however, to give them a pinpoint instruction on the sufficiency of dog tracking evidence this pertains only – goes to reasonable doubt in [the] original conviction. (43 RT 7257-7258.)

This was error because the second penalty trial was focused in large part on the reason the first trial jury hung on the issue of penalty – lingering doubt. The importance of the dog tracking to the lingering doubt issue is

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[120] (...continued)

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

shown by the prosecution's decision to conduct and introduce the findings of additional dog trails in the second penalty trial. Accordingly, encouragement of an evaluation of guilt was not a reason to refuse the instruction. Such evaluation was unavoidable and central to the penalty trail. Indeed, it was the prosecution's case itself which relitigated guilt in order to eliminate the lingering doubt that led the first jury to hang eight to four for life.

In *People v. Gay* (2008) 42 Cal.4th 1195, the trial court rejected defense attempts to introduce new evidence of a defendant's innocence at a penalty retrial. This Court reversed, noting that despite the first jury's guilt finding, such evidence was relevant and admissible under section 190.3 as a "matter relevant to . . . mitigation, and sentence." (*Id.* at p. 1217.) The circumstances surrounding the crime (section 190.3, factor (a)) encompass evidence relating to "'defendant's version of such circumstances surrounding the crime or of his contentions as to the principal events of the instant case in mitigation of the penalty.'" (*Id.* at p. 1218, quoting *People v. Terry* (1964) 61 Cal.2d 137, 146.) The *Gay* opinion also quotes the following from *Terry*:

> "Indeed, the nature of the jury's function in fixing punishment underscores the importance of permitting to the defendant the opportunity of presenting his claim of innocence. The jury's task, like the historian's, must be to discover and evaluate

> events that have faded into the past, and no human mind can perform that function with certainty. Judges and juries must time and again reach decisions that are not free from doubt; only the most fatuous would claim the adjudication of guilt to be infallible. The lingering doubts of jurors in the guilt phase may well cast their shadows into the penalty phase and in some measure affect the nature of the punishment." (*Terry*, *supra*, 61 Cal.2d at p. 146.) "If the same jury determines both guilt and penalty, the introduction of evidence as to defendant's asserted innocence is unnecessary on the penalty phase because the jury will have heard that evidence in the guilt phase. If, however, such evidence is excluded from the penalty phase, the second jury necessarily will deliberate in some ignorance of the total issue. [¶] . . . [¶] The purpose of the penalty trial is to bring within its ambit factors such as these." (*Ibid.*) (*Gay*, *supra*, 42 Cal.4th at pp. 1218-1219.)

Therefore, it was not enough for the trial court to simply reject, as relitigation of guilt, the dog-tracking instruction. As the use note to the instruction in CALJIC states: "This instruction must be given sua sponte when dog tracking evidence is relied upon in part to prove identity." (Use Note, CALJIC 2.01 (October 2005 Ed.) citing *People v. Malgren, supra.*) In light of the prosecution's introduction of not only the pre-guilt-phase, but also the post-guilt-phase additional dog-scent experiments which purported to point to appellant as the perpetrator, it is difficult to imagine how that does not qualify as relying upon "dog tracking evidence . . . to prove identity."

While the cases establishing that CALJIC No. 2.16 must be given *sua sponte* involved findings of guilt rather than penalty (*Malgren, supra,*

139 CAl.App.3d at p. 242; *People v. Craig, supra,* 86 Cal.App.3d at p. 917), there is nothing about the standards for *sua sponte* instructions which would change the result here: the trial court in criminal cases must instruct on the general principles of law relevant to the issues raise by the evidence; i.e., those principles closely and openly connected with the facts before the court and which are necessary for the jury's understanding of the case. *(People v. Breverman, supra,* 19 Cal.4th at p. 154.) In this case, and despite the trial court's hesitance, the caution with which dog tracking evidence should have been considered, in this second penalty trial in which it was central to the prosecution's presentation, was "closely and openly connected with the facts before the court" and was, even more importantly, "necessary for the jury's understanding of the case."

The prejudice in not giving this instruction goes to the heart of lingering doubt. Members of the first jury, who had heard the instruction's cautions regarding dog tracking evidence and its requirement of corroboration, came away with lingering doubt. The second jury, without the benefit of the instruction, did not. To the extent that any of the dog trails introduced may have appeared to display certainty, the instruction was a necessary cautionary note, and its absence was prejudicial. This is

particularly true in light of the court's refusal to give CALJIC 2.01. discussed next.

B. THE COURT'S REFUSAL TO GIVE CALJIC 2.01 REGARDING SUFFICIENCY OF CIRCUMSTANTIAL EVIDENCE EXACERBATED THE ERROR IN NOT GIVING THE DOG-SNIFF INSTRUCTION

The same reasons set forth above regarding the dog-sniff instruction – it's close ties to lingering doubt – apply also to the court's failure to give CALJIC No. 2.01 (Sufficiency of Circumstantial Evidence–Generally). While the trial court did, at defense request, give No. 2.00 (Direct and Circumstantial Evidence–Inferences) (24 CT 6838), it agreed with the prosecutor that it ought not to "encourag[e] the jury to relitigate the actual convictions in this case." (43 RT 4257.)

The text of CALJIC 2.01, as submitted by the defense, read as follows:

> However, a finding of guilt as to any crime may not be based on circumstantial evidence unless the proved circumstances are not only (1) consistent with the theory that the defendant is guilty of the crime, but (2) cannot be reconciled with any other rational conclusion.
>
> Further, each fact which is essential to complete a set of circumstances necessary to establish the defendant's guilt must be proved beyond a reasonable doubt. In other words, before an inference essential to establish guilt may be found to have been proved beyond a reasonable doubt, each fact or circumstance on which the inference necessarily rests must be proved beyond a reasonable doubt.

> Also, if the circumstantial evidence [as to any particular count] permits two reasonable interpretations, one of which points to the defendant's guilt and the other to [his/her] innocence, you must adopt that interpretation that points to the defendant's innocence, and reject that interpretation that points to [her/her] guilt.
>
> If, on the other hand, one interpretation of this evidence appears to you to be reasonable and the other interpretation to be unreasonable, you must accept the reasonable interpretation and reject the unreasonable. (24 CT 6880.)

As with the dog-sniff instruction, the court's refusal to give this instruction left the jury with no guidance regarding how to handle conflicting and less-than-clear circumstantial evidence. If the jurors agreed with the defense that the dog-sniff evidence – as a whole or as to any one experiment – was at best ambivalent, they were left without the tools to understand how to apply that ambivalence. And, again, in the context of a lingering doubt case, this went to the heart of the defense.

The use notes accompanying the 2005 version of the instruction indicate that it must be given on the court's own motion "where the case of the People rests substantially or entirely on circumstantial evidence." (Use Note, CALJIC 2.01 (October 2005 Ed.), citing *People v. Yrigoyen* (1955) 45 Cal.2d 46, 49; *People v. Bender* (1945) 27 Cal.2d 164, 175.) In this case, the People's case rested almost entirely on circumstantial evidence, and the defense rested on lingering doubt that the dog-sniff evidence was

strong enough to send appellant to his death. By refusing to give the instruction, the trial court left the defense to signal the lingering doubt with its hands tied.

C. THE COURT'S REFUSAL TO GIVE CALJIC 2.71 DEFINING ADMISSIONS WAS CONTRARY TO SETTLED LAW AND WAS PREJUDICIAL

The defense requested, and the trial court refused, CALJIC No. 2.71 (Admission–Defined).[121] The court's reasons were similar to those given for its refusal to give No. 2.16:

> . . . Again, I think this goes to the People's burden of proof beyond a reasonable doubt to prove the elements charged against the defendant, doesn't apply at this stage of the case. 2.71 will not be given. Defense objection is noted. (43 RT 7259.)

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[121] The version of CALJIC 2.71 presented by the defense reads as follows:

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

(24 CT 6882)

Well before the trial in this case, however, this Court held that at the penalty phase, while 2.71 need not be given sua sponte, it must be given when requested by the defense. (*People v. Livaditis* (1992) 2 Cal. 4th 759, 782-783 [distinguishing guilt phase sua sponte requirement].) *Livaditis* also explained that, at the penalty phase, while guilt was already established, a defendant's extrajudicial statements may be relevant as either aggravating or mitigating evidence. (*Id.* at p. 783.) Here, of course, the purported admissions were relied upon by the prosecution as evidence to show the certainty of guilt and eliminate lingering doubt, and the defense appropriately requested the cautionary instruction.

The prejudice in the trial court's refusal to give CALJIC No. 2.71 is similar to that of the trial court's refusal to give the two instructions previously discussed. It, like them, goes to the heart of the prosecution's proof of guilt in the second penalty trial in a case in which the first jury hung on the issue of lingering doubt.

The only substantial corroboration of the canine evidence was appellant's purported admissions. As with the dog-trailing, the prosecution in the second penalty trial upped the ante by introducing, over defense objection, not merely the original guilt phase evidence of appellant' taped police interrogation, but additional apparent admissions appellant made to

the detectives in the car on June 22, 2001. (24 CT 6757 *et seq.*; see *ante* at pp. 339-340 for a short description of this interview.)

Thus, as with the dog-trailing, appellant's admissions formed an important part of the prosecution's attempt to overcome the lingering doubt which prevented the first jury from returning a death sentence, and the court's failure to give the requested cautionary instruction, clear error under this Court's jurisprudence, was necessarily prejudicial in preventing the jury from entertaining the same lingering doubt.

D. THE COURT ERRED IN REJECTING DEFENDANT'S SPECIAL INSTRUCTION REGARDING THE LACK OF ACCEPTANCE OF THE SCENT TRANSFER UNIT IN THE APPELLATE COURTS OF THE STATE

As set forth ante, the scent transfer unit (STU) is and was at the time of trial an unapproved device pursuant to *People v. Kelly, supra*, 17 Cal.3d 24. (*People v. Willis, supra*, 115 Cal.App.4th 379, 385-386; *People v. Mitchell, supra,* 110 Cal.App.4th 772, 789-793.) As appellant has argued at the afore-cited pages, admission of the Harvey studies based on experiments conducted with the STU was error. The error was compounded when the court refused Defense Special Instruction L.

The proposed instruction read as follows:

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

> The "scent transfer unit" device or STU-100 constitutes a novel scientific technique, which no appellate court in the State of California has found to have been accepted as legally reliable or generally accepted in the relevant scientific community. (24 CT 6884.)

If appellant is correct that the Harvey STU-based studies should not have been admitted, then certainly the failure to instruct as the defense requested left the jury with not even a minimizing instruction.

Even if appellant is not correct regarding the admission of the Harvey studies, however, the instruction – or some version of it – still should have been given. The very purpose of *Kelly* and its progeny would be at least partially vindicated by putting evidence which relied on unproven "scientific" devices in a context in which the evidence they produced caould be fairly evaluated by the lay jurors. The fact that the STU was an unproven device was necessary information for the jury to have in order to evaluate the validity of Dr. Harvey's experiments purporting to validate dog-sniff identifications.

E. THE INSTRUCTIONAL ERRORS WERE PREJUDICIAL AND CONSTITUTED A DEPRIVATION OF DUE PROCESS

Whether viewed separately or in combination, the trial court's four instructional errors had the prejudicial effect of undercutting a core facet of appellant's lingering doubt defense. Given the nature of the evidentiary

record, there was certainly room for lingering doubt as to appellant's guilt of the capital crime, and if guilty, as to precisely what transpired. Denial of the defense-requested instructions concerning the consideration of dog-scent evidence, evidence of purported extrajudicial admissions, and circumstantial evidence in general left the jury without adequate guidance for its evaluation of the evidence bearing on appellant's guilt or innocence and his lingering doubt defense. The erroneous denial of these instructions, individually and all the more clearly collectively, undermined appellant's Sixth, Eighth and Fourteenth Amendment rights to due process, to present a defense, and to a fair and reliable determination of sentence. On this record the error cannot be deemed harmless beyond a reasonable doubt. Appellant's death sentence should be set aside.

Even under the state *Brown* standard, however, the errors were prejudicial. (*People v. Brown, supra,* 46 Cal.3d at p. 448.) There is more than a "reasonable possibility" that the errors affected the trial outcome. (*Ibid.*) The prosecution's case consisted only of (1) references to a red-head whose body may have been dumped, in vague ramblings in response to questions about the Mason case; (2) a later reference to bleach, which could have been poured by anyone on Myers' rug; and (3) the entirely suspect dog-sniff evidence. The first jury was deadlocked on lingering doubt; that

the second jury was not may well be, to more than an reasonable possibility, a result of the instructional errors set forth above.

XX. IF THE ROBBERY CONVICTION IS REVERSED, THEN SO, TOO, MUST BE THE ROBBERY SPECIAL CIRCUMSTANCE, THROWING DOUBT ON THE PENALTY DETERMINATION

If appellant is correct, as argued *ante* at pages 284-292, that the robbery conviction with respect to Myers cannot stand, then the robbery special circumstance must also be reversed. And if the robbery special circumstance is invalid, than the entire premise upon which the second penalty trial proceeded, and upon which the second jury imposed death, was flawed.

The second penalty jury was instructed that the defendant was found guilty of the murder of Geraldine Myers, and that true findings had been made regarding the special circumstances both of robbery and burglary. (24 CT 6854; see also 30 RT 5495 [reading of guilt-trial verdicts to second penalty jury].)

The second penalty trial, it must be remember, was focused on lingering doubt. Given the eight-to-four split of the first jury in favor of life without parole, it would not take much in the way of error to have tipped the scales in appellant's favor on the question of death. So too with this issue: The penalty jury was instructed that aggravation included the two special circumstances. (24 CT 6855.) If appellant is correct regarding the invalidity of the robbery special, then one of the two most important – and

most directly connected to Myers – aggravators is removed. Given the closeness of the case, and the first penalty jury's eight-to-four split in favor of life without parole, there is at least "a reasonable possibility" that the error affected the trial outcome. (*People v. Brown, supra,* 46 Cal.3d at p. 448.)

XXI. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at p. 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at p. 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at p. 304.)

Appellant has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[122] appellant identifies the following

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[122] See, e.g., *People v. Taylor*, *supra,* 48 Cal.4th at p. 660-663; (continued...)

systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. Factor (a): Section 190.3, subdivision (a) – which permits a jury to sentence a defendant to death based on the "circumstances of the crime" – is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (24 CT 6855.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance

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[122] (...continued)
People v. McWhorter (2009) 47 Cal.4th 318, 377-379.

had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[123] and appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 260-261; *People v. Mills* (2010) 48 Cal.4th 158, 213-214; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts which involved the express or implied use of violence. (24 CT 6855.) Evidence supporting this instruction had been admitted at the guilt phase, and the jury was authorized to consider such acts at the penalty phase pursuant to section 190.3, subdivision (b). The jurors were

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[123] *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

not told that they could rely on this factor (b) evidence only if they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, *supra*, 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Taylor* (2009) 47 Cal.4th 850, 898; *People v. Zembrano* (2007) 41 Cal.4th 1082, 1181-1182.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated

appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (c): During the penalty phase, the state introduced evidence that appellant had suffered prior felony convictions. (36 RT 6460 *et seq.*; 15 CT 4308, 4319; 4325; 4395-4396.) This evidence was admitted pursuant to section 190.3, subdivision (c). The jurors were instructed they could not rely on the prior conviction unless it had been proven beyond a reasonable doubt. (24 CT 6859.) The jurors were never told that before they could rely on this aggravating factor, they had to unanimously agree that defendant had suffered

this prior conviction. In light of the Supreme Court decisions in *Ring v. Arizona* (2002) 536 U.S. 584 and its progeny, the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Id.* at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable and non-arbitrary penalty phase determination. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 261; *People v. Schmeck*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without providing any guidance as to when this factor could come into play. (24 CT 6856.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court

has repeatedly rejected this argument. (See, e.g., *People v. Mills* (2010) 48 Cal.4th 158, 213, citing *Tuilaepa v. California* (1994) 512 U.S. 967, 977.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (24 CT 6855-6857.) This instruction was constitutionally flawed in the following ways: (1) it contained vague and ill-defined factors, particularly factors (a) and (k), (2) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (3) it failed to specify a burden of proof as to either mitigation or aggravation. (*Ibid.*) These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel

and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson* (2010) 49 Cal.4th 79, 144; *People v. Taylor* (2010) 48 Cal.4th 574, 662; *People v. D'Arcy* (2010) 48 Cal.4th 257, 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez* (2010) 47 Cal.4th 911, 968; *People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray* (1996) 13 Cal.4th 313, 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Failure to Narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra,* 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra,* 47

Cal.4th at p. 967; *People v. Schmeck*, *supra,* 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

7. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all (except as to a prior conviction and/or other violent criminal conduct). These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial,

to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at pp. 260-261; *People v. Taylor*, *supra,* 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra,* 47 Cal.4th at p. 967; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8 Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected

these arguments. (See, e.g., *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

9. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, *supra*, 47 Cal.4that p. 379; *People v. Carrington* (2009) 47 Cal.4th 145, 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

10. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances that death is warranted (24 CT 6868) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, *supraI,* 47 Cal.4th at p. 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza* (2000) 24 Cal.4th 130, 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

11. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to

reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at pp. 261; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308; *People v. D'Arcy*, *supra*, 48 Cal.4th at p. 308-309; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez*, *supra,* 47 Cal.4th at p. 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual

punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, *supra*, 49 Cal.4th at p. 462; *People v. Mills*, *supra*, 48 Cal.4th at p. 214 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968 ; *People v. Ervine* (2009) 47 Cal.4th 745, 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

13 International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at p. 462; *People v. Taylor*, *supra*, 48 Cal.4th at p. 663; *People v. D'Arcy*, 48 Cal.4th, *supra,* at p. 308; *People v. Mills*, *supra*, 48 Cal.4th at p. 213 ; *People v. Martinez*, *supra*, 47 Cal.4th at p. 968; *People v.*

Carrington, *supra*, 47 Cal.4th at pp. 198-199; *People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of federal law and the Constitution.

14. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, *supra*, 49 Cal.4th at p. 144; *People v. McWhorter*, *supra*, 47 Cal.4th at p. 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

15. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the Supreme Court has stated, "[t]he constitutionality of a

> State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6. See also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few offenders subjected to capital punishment.

To the extent respondent hereafter contends that any of these issues is not properly preserved because, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

XXII. THE TRIAL COURT'S ERRORS CUMULATIVELY RESULTED IN A TRIAL THAT WAS FUNDAMENTALLY UNFAIR

"Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair." (*Walker v. Engle* (6th Cir. 1983) 703 F.2d 959,963; *People v. Hill, supra*, 17 Cal.4th at p. 844 ["a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error"]; *People v. Herring* (1993) 20 Cal.App.4th 1066, 1074; *People v. Pitts, supra*, 223 Cal.App.3d at p. 815.) In such cases, "'a balkanized, issue-by-issue harmless error review' is far less effective than analyzing the overall effect of a the errors in the context of the evidence introduced at trial against the defendant." (*United States v. Frederick* (9th Cir. 1996) 78 F.3d 1370, 1381.)

Here, appellant has identified numerous errors that occurred during the guilt and penalty phases of his trial. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of the right to confront the evidence against him, of a fair and impartial jury, and of fair and reliable guilt and penalty

determinations in violation of appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself, is sufficiently prejudicial to warrant reversal of appellant's conviction and/or death sentence. Even if that were not the case, however, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

CONCLUSION

The trial court's uncritical view of dog-scent evidence, its failure to sever the Myers from the Mason counts, its many other errors, and the prosecutor's shameful misconduct during both the guilt and penalty phase closing arguments, resulted in a manifestly unfair trial. Accordingly, the Myers-related counts should be reversed, as should Count 10, and the determinate sentencing modified to correct the errors set forth above.

DATED: June 26, 2012

Respectfully submitted,

RICHARD I. TARGOW
Attorney at Law

Attorney for Appellant

CERTIFICATION

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 100,257 words, within the limits for the opening brief set forth in rule 8.630(b)(1)(A).

_____

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

Office of the Attorney General
P.O. Box 85266-5299
San Diego, CA 92186-5266

Steven Parnes, Staff Attorney
c/o CAP Docketing Clerk
California Appellate Project
101 2nd Street, Suite 600
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 June ___, 2012, 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.

DATED: June ___, 2012

RICHARD I. TARGOW
Attorney at Law