RICHARD I. TARGOW

APPELLATE ATTORNEY

SUPREME COURT COPY

Post Office Box 1143
Sebastopol, California 95473
707 829 5190 (Voice & FAX)

June 18, 2015

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

Re: *PEOPLE V. BAILEY JACKSON*, No. S197103
Appellant's Supplemental Letter Brief

Dear Mr. McGuire:

The Court, by its order filed May 17, 2015, has sought simultaneous supplemental letter briefs on four questions related to appellant's Argument I regarding the trial court's failure to sever the counts related to Geraldine Myers from those related to Myrna Mason.

Appellant will set forth each question in turn, followed by his answer.

1. In light of the amended information (CT 713-714) and the jury instruction given in this case on the elements of burglary (CALJIC No. 14.50; CT 4138), was defendant accused of a sexual offense against Geraldine Myers within the meaning of Evidence Code section 1108 and *People v. Story* (2009) 45 Ca1.4th 1282, 1294?

The defendant was not accused of a sexual offense within the meaning of Evidence Code section 1108 and *People v. Story, supra,* 45 Ca1.4th 1282, 1294, notwithstanding the mention of sexual crimes in CALJIC 14.50, which were clearly related to the Mason crimes.

DEATH PENALTY

First, none of the three counts related to the Myers crimes (Counts 1-3 in the Amended Information) accuse appellant of a sexual crime. (3 CT 713-714.) Nor could they, for there was no evidence upon which such a charge could rest. Thus, to the extent that felony murder might have been involved, the underlying felonies mentioned in Count 1, the murder count, were robbery (Penal Code secs. 211, 192, subd. (a)(17)(A)) and burglary (secs. 459, 192, subd. (a)(17)(G). Count 2 separately alleged Burglary (sec. 459); and Count 3 alleged robbery in the first degree (sec. 212.5(a)).

Insofar as burglary can be an entry to commit any felony, including presumably a sexual felony, there was, again, no evidence upon which the jury could have found an intent to enter to commit such a felony. Thus, *People v. Story*, *supra*, is distinguishable, on several grounds. First, in *Story*, the felony-murder conviction was sought explicitly on the theory of rape and burglary as the underlying felonies. (45 Cal.4th at pp. 1285, 1291.) The charging document in *Story*, in contrast to Count 1 in the instant case, "specifically alleged that defendant 'did with malice aforethought and during the perpetration and attempt to perpetrate rape and burglary, kill [the victim].'" (*Id.* at p. 1290.)

Second, in *Story* there was actual evidence of a sexual crime – the presence on the bed where the victim was found of a bloody tampon (consistent with her having

been menstruating at the time) and semen without sperm on the bed sheet (linked to defendant by his having had a vasectomy). (*Id.* at pp. 1285-1286.) In this case, there was no evidence whatsoever of sexual assault on Geraldine Myers. None on her body, which was never found; none in her house, nor on her bed.

Story seems to suggest that *any* murder charge "adequately notifies the defendant of the possibility of conviction of first degree murder on a felony murder theory, including rape felony murder." (45 Cal.4th at p. 1285, citing *People v. Geier* (2007) 41 Cal.4th 555, 59.) In *Geier*, however, as in *Story*, the defendant was "amply aware that the prosecution was proceeding on a felony-murder theory . . . [because] the information charged defendant with rape as well as alleging rape-murder special circumstances." (*Geier, supra*, 41 Cal.4th at p. 592.)

It cannot be that, consistent with due process, *any* defendant charged with felony murder can be considered put on notice that he faces charges of sexual felonies when there is neither any evidence to support such a theory *nor* anything in the charging document that makes such a charge. To read *Story* in this way would be to turn on its head the notice requirement inherent in the notion of due process. (U.S. Const., Amends. VI and XIV; *Lankford v. Idaho* (1991) 500 U.S. 110, 126 [notice of issues to be resolved by adversary process is fundamental to fair procedure]; *People v. Seaton* (2001) 26 Cal.4th 598, 640-641 [both 6th Amendment and due process

guarantees of state and federal constitutions require that defendant receive notice adequate to give meaningful opportunity to defend); *People v. Geier, supra,* 41 Cal.4th at pp. 591-592, citing *People v. Silva* (2001) 25 Cal..4th 345, 368 [information charging murder without elaboration may not provide notice sufficient to afford due process under 14th Amendment].) To repeat, in this case, there was absolutely nothing to put defendant Jackson on notice that he was charged with sexual crimes against Geraldine Myers, and no possible method (other than to note the absence of evidence) of defending against such charges.

Nor does the inclusion of sexual crimes in CALJIC 14.50 change the calculus. The burglary instruction given at trial instructed the jury that in order to prove the crime of burglary, the elements to be proved included that the defendant, at the time of entry, "had the specific intent to commit a felony, such as Robbery, Rape, Sodomy, or Forcible Oral Copulation." The sexual crimes mentioned, however, were supported by evidence only as they related to the Mason crimes, not the Myers crimes, because, again, there was *no evidence of any such crimes having been committed against Myers*. The form version of CALJIC 14.50 leaves blank the felonies allegedly committed: "[2. At the time of the entry, such person had the speecific intent to commit the crime of _____.]" In a separate trial of the Myers charges, the sexual crimes could not have been inserted there, because they were not charged and were not supported by any evidence.

The prosecutor's improper conflating of the Mason sexual evidence into the Myers case in his closing argument (22 RT 4045, 4055-4056) was the first notice to defendant that such a theory existed, even though *there was no evidence that any such crime was committed.* Appellant cannot imagine a due process regime in which a burglary felony-murder charge, without more, provides a free-floating license for the admission of uncharged sexual crimes, *People v. Story* notwithstanding.

Therefore, given the complete absence of evidence of what took place at the Myers residence suggesting any sexual misconduct, neither the charging document, nor the cases, nor CALJIC 14.50, can be read to have accused defendant a sexual crimes against Geraldine Myers withing the meaning of Evidence Code section 1108 or *People v. Story*.

2. What evidence, other than the Mason sexual offenses, would support a jury finding that defendant entered Myers's home with the intent to commit a sexual offense? (See *People v. Falsetta* (1999) 21 Ca1.4th 903, 920, 923.)

The short answer, as noted repeatedly above, is that there was no evidence whatsoever that the defendant entered Myers' home with the intent to commit a sexual offense. Indeed, the Attorney General, in her respondent's brief, emphasized the similarity of the Mason and Myers crimes not by reference to sexual intent, but by reference to the fact that on both nights, Jackson had unsuccessfully sought a loan from his neighbor. (RB 25.)

People v. Falsetta, supra, is no more applicable to this case than was *Story*,

discussed above. The charges against Falsetta included forcible oral copulation and assault with intent to commit rape. (21 Cal.4th at p. 908.) And as that opinion describes Evidence Code section 1108, it was enacted to "expand the admissibility of disposition or propensity evidence *in sex offense cases.*" (*Id.* at p. 911; emphasis added.) But Counts 1-3 of the charging document in this case contain no sexual offense charges. The Myers case is not a sex offense case. Moreover, as *Falsetta* points out, section 1108, subdivision (b) requires pretrial notice to defendant of the other sexual offense or offenses to be offered. (*Id.* at p. 911.) There was no such notice given in this case.

There simply is no logical avenue, absent stretching logic and due process beyond recognition, by which to arrive at even a suggestion of evidence supporting a sexual offense committed against Ms. Myers. There was no body, no semen, no condom, no pubic hair, nothing. More important, to use the combination of *Story*, *Falsetta*, and section 1108 to manufacture out of whole cloth evidence of sexual intent is to force the defendant to shoulder the impossible burden of proving a negative.

Moreover, except for the prosecutor's salacious speculation in his closing-argument, the state has never asserted that there was any evidence of sex crimes against Ms. Myers. The prosecutor's opening statement, while specifically asserting that such crimes took place against Ms. Mason, made no such assertion with relation to Ms. Myers. (*Compare* 6 RT 6 RT 1574-1576 [Mason] with 6 RT 1567-1573 [Myers].) Indeed, in the introductory remarks of his opening statement, the prosecutor told the jury that the

defendant "robbed and murdered" Ms. Myers, while he "robbed, raped, tortured, and attempted to murder" Ms. Mason. (6 RT 1565.)

Neither did respondent assert such a thing in her respondent's brief in the instant appeal. In her argument suggesting that the similarities between the two attacks were sufficiently cross-admissible to defeat appellant's motion for severance, respondent mentioned some few common aspects of the two cases without mention, as there could not have been, of common sexual crimes or intent. (RB 24-25.)

The Court's question specifically references pages 920 and 923 of the *Falsetta* opinion. Appellant is at a loss to understand what material on either of those pages has any application to this case.

The answer to the question, then, of what evidence, other than the Mason sexual offenses, would support a jury finding that defendant entered Myers's home with the intent to commit a sexual offense, is that none existed at the time of the offense, at the time of trial, or now, and there is no legal legerdemain under which such supporting evidence could arise.

3. Assuming defendant was accused of a sexual offense against Myers, would the trial court have been required to exclude evidence of the Mason sexual offenses under Evidence Code section 352 in a separate trial of the Myers charges? *(Falsetta, supra,* 21 Cal.4th at pp. 916-919.)

As is surely clear by now, appellant rejects the premise that defendant was accused of sexual offenses against Mr. Myers. However, if, *arguendo*, such charges, even in the complete absence of evidence to support them, were leveled in a separate

case involving the Myers charges, the evidence of the sexual charges against Mason might survive an Evidence Code section 352 challenge. However, *Falsetta* does not provide the clear basis for the admission of the Mason sexual offenses, because *Falsetta* explicitly allowed admission only of the defendant's prior rape convictions, arising from guilty pleas, precluding his having to "defend" against those charges. (*Falsetta, supra*, 21 Cal.4th at p. 916.). That is precisely what appellant argued in the instant appeal though in the absence of Myers-related sexual charges – that in a separate trial, while the fact of his convictions of or the charges against him in the Mason case might be admissible, the details of the misconduct would not be. In addition, without knowing what possible sexual misconduct charges might be charged in a separate Myers case, it is impossible to assess what Mason-case evidence might be more probative than prejudicial under section 352.

Falsetta provides the following guidance:

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense. (*Id.* at pp. 916-917.)

Under this standard, the gruesome details of the Mason crimes – as opposed to

the charges or conviction regarding them – might still, under section 352, qualify as more prejudicial than probative. As noted, however, it is impossible for appellant to make the case one way or another in the absence of specifics about what such charges might be, how strong the evidence for them was in a separate Myers trial, how similar or different they were from what happened to Mason, or how probative the Mason crimes would be for such speculative and unspecified charges.

4. Do the provisions of Evidence Code section 1108 provide a basis to uphold the trial court's denial of defendant's motion to sever the Mason charges from the Myers charges?

The provisions of section 1108 cannot provide a basis to uphold the denial of appellant's motion to sever, for reasons which have already been mentioned. First, there was no evidence of sexual misconduct against Ms. Myers. Second, there were no charges of sexual misconduct against Ms. Myers. And third, there was no notice, as is required by subdivision (b) of section 1108, of what such evidence might be proffered. That subdivision provides in relevant part that, "In an action in which [evidence of the defendant's commission of another sexual offense or offenses] is to be offered under this section, the people shall disclose the evidence to the defendant . . . that is expected to be offered[.]" As no such notice was provided in this case, section 1108 cannot provide a basis to uphold the trial court's denial of defendant's motion to sever the Mason charges from the Myers charges.

CONCLUSION

There are no circumstances in this case under which there can be imagined to have been charges of sexual misconduct against Ms. Myers. To say that such charges would have to be made of whole cloth understates the matter. With neither evidence nor charges of sexual misconduct against Myers, no amount of legal magical-thinking can create what is not there. Accordingly, there are no valid grounds to uphold the trial court's denial of the motion to sever.

Respectfully submitted,

RICHARD I. TARGOW
Attorney at Law

Attorney for Appellant

DECLARATION OF SERVICE BY MAIL

Re: People v. Bailey Lamar Jackson No. S139103

I, RICHARD I. TARGOW, certify:

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

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

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

Valerie Hriciga, 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 Jackson, Appellant

Each said envelope was then, on June 18, 2015, sealed and deposited in the United States Mail at Sebastopol, California, with postage fully prepaid. I declare under penalty of perjury that the foregoing is true and correct. Executed this 18th day of June, 2015, at Sebastopol, California.

RICHARD I. TARGOW
Attorney at Law