KAMALA D. HARRIS
Attorney General

State of California
DEPARTMENT OF JUSTICE

600 WEST BROADWAY, SUITE 1800
SAN DIEGO, CA 92101
P.O. BOX 85266
SAN DIEGO, CA 92186-5266

Public: (619) 645-2001
Telephone: (619) 645-2274
Facsimile: (619) 645-2012
E-Mail: Tami.Hennick@doj.ca.gov

July 3, 2015

California Supreme Court
Frank A. McGuire
Court Administrator and Clerk
350 McAllister Street
San Francisco, CA 94102-7303

RE: *People v. Bailey Jackson*
Supreme Court California Case No. S139103
Riverside Superior Court, Case No. RIF97839

Dear Mr. McGuire:

INTRODUCTION

On May 20, 2015, this Court ordered the parties to file supplemental letter briefs addressing "the significance, if any, of Evidence Code section 1108 with respect to the cross-admissibility of evidence of the sexual assault on Myrna Mason." On June 19, 2015, both parties filed their supplemental letter briefs.

In its supplemental brief, Respondent demonstrated the applicability of Evidence Code section 1108 (hereafter "section 1108") to this case, explaining how cross-admissibility of the Mason evidence under that section provides an additional basis upon which to affirm the trial court's denial of Jackson's severance motion. Respondent herein files this supplemental reply brief addressing Jackson's response to the Court's question. As shown below, Jackson misconstrues this Court's decision in *People v. Story* (2009) 45 Cal.4th 1282 (*Story*), and he conflates the issues of admissibility and notice – both of which have been satisfied here. The denial of the severance motion should be affirmed.

ARGUMENT

I. CROSS-ADMISSIBILITY OF THE SEXUAL ASSAULT ON MASON UNDER SECTION 1108 PROVIDES AN ADDITIONAL BASIS UPON WHICH TO AFFIRM THE TRIAL COURT'S DENIAL OF JACKSON'S SEVERANCE MOTION

Jackson was charged with the murder of Geraldine Myers in violation of Penal Code section 187, subdivision (a), and it was alleged, in relevant part, that the murder was committed in the course of a burglary within the meaning of Penal Code section 190.2, subdivision (a)(17)(G). (3 CT 713-718.) As shown by the jury instructions, the murder was prosecuted under a theory of first degree felony murder as well as deliberate, premeditated murder. (15 CT 4124-4126.) The felony murder theory was based on the killing occurring during the commission or attempted commission of a burglary or robbery. (15 CT 4126 [CALJIC No. 8.21].) Specifically referencing the Myers burglary (as well as the Mason burglary) and the burglary special circumstance, the instructions defined burglary as an entry into a building with the intent to commit theft or "the specific intent to commit a felony, such as, Robbery, Rape, Sodomy, or Forcible Oral Copulation."[1] (15 CT 4138 [CALJIC No. 14.50].)

In *Story*, this Court held "section 1108 applies at least when the prosecution accuses the defendant of first degree felony murder with rape (or another crime specified in section 1108, subdivision (d)(1)), or burglary based on the intent to commit rape (or other sex crime), the underlying felony." (*Story, supra,* 45 Cal.4th at p. 1294.) Accordingly, the murder and both burglary charges as well as the special circumstance accused Jackson of a sexual offense within the meaning of section 1108.

Jackson seeks to avoid the holding in *Story* by arguing that, unlike his case, the charging document in *Story* specifically alleged murder in the course of a rape and burglary. (Supp. AOB at 2.) While the original indictment alleged that Story murdered the victim during the perpetration or attempted perpetration of a rape and burglary, the amended indictment "deleted any specific reference to rape and simply included an open charge of murder." (*Story, supra,* 45 Cal.4th at p. 1291.) Thus, contrary to Jackson's argument, the operative charging document in *Story* contained no specific reference to rape, and his attempt to distinguish the case on that basis fails.

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[1] Jackson is thus mistaken that the state did not assert any evidence of sex offenses against Myers until closing argument. (See Supp. AOB at 6.)

Like *Story*, the operative charging document in Jackson's case (the amended information) included "an open charge of murder" alleging a willful, unlawful killing with malice aforethought.[2] (3 CT 713.) "[A] pleading that contains an open charge of murder adequately notifies the defendant of the possibility of conviction of first degree murder on a felony-murder theory, including rape felony murder." (*Story, supra,* 45 Cal.4th at p. 1291; see also *People v. Abel* (2012) 53 Cal.4th 891, 937.)

The determinative factor for Evidence Code section 1108 is therefore the prosecution's theory or theories sought and obtained at trial. (*Story, supra,* 45 Cal.4th at p. 1291.) Where a defendant is prosecuted at trial under a theory of felony murder, burglary or a special circumstance based on a sexual offense enumerated under section 1108, he or she stands accused of a sexual offense within the meaning of that provision.

Jackson next argues there was "no actual evidence of a sexual crime" being committed on Myers in contrast to the evidence of a bloody tampon and semen in *Story*. (Supp. AOB 2-3.) Jackson ostensibly overlooks the strong *circumstantial evidence* of a sexual offense against Myers. Admissibility under section 1108 need not be premised on direct evidence. (See *People v. Coddington* (2000) 23 Cal.4th 529, 591, overruled on another point in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13 [preliminary fact for admission of evidence can be established through circumstantial evidence].)

As set forth in the Supplemental Respondent's Letter Brief, evidence of Myers's dress and pantyhose having been carelessly discarded on the floor of the guest bedroom in a manner inconsistent with her habit and custom of neatness as well as the fact that significant sums of money and valuables were left in the house provided sufficient circumstantial evidence of a sexual offense for purposes of section 1108. (8 RT 1984-1985, 2026, 2063; 9 RT 2064, 2066; Supp. RB at 2-3.) Accordingly, Jackson's argument that the references to sexual offenses within CALJIC No. 14.50 did not pertain to Myers due to a lack of evidence is unavailing.[3] (See Supp. AOB at 4.)

Jackson further argues that no body, semen, condom or pubic hair was found in Myers's home. (Supp. AOB at 6.) However, it is error to "focus[] on evidence that did not exist rather than on the evidence that did exist." (*People v. Story, supra,* 45 Cal.4th at

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[2] The amended information also alleged premeditation and deliberation. (3 CT 713.)

[3] Jackson also overlooks the fact that CALJIC No. 14.50, as given by the trial court, specifically referred to the Myers burglary (Count Two). (15 CT 4138.)

p. 1299.) Contrary to Jackson's argument, evidence of "unambiguously sexual injuries" is not required to prove a sexual offense.[4] (*Ibid.*)

Jackson complains of "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." (Supp. AOB at 5.) *Story* creates no such regime. *Story* instructs when a person is "accused of a sexual offense" within the meaning of section 1108, but this factor alone is not a "free-floating license" for admission of such evidence. A court must still engage in a careful weighing of its probative value against the risk of undue prejudice under Evidence Code section 352 (hereafter "section 352"), before admitting the evidence. (§ 1108, subd. (a).) As this Court explained in *Story*,

> The conclusion that section 1108 applies does not end the inquiry into whether the trial court correctly admitted the evidence. Section 1108 preserves the trial court's discretion to exclude evidence under section 352 if its prejudicial effect substantially outweighs its probative value.

(*People v. Story, supra,* 45 Cal.4th at pp. 1294-1295.)

Jackson concedes that "the evidence of the sexual charges against Mason might survive an Evidence Code section 352 challenge." (Supp. AOB at 8.) But the evidence does far more than present a possibility a court might not find it unduly prejudicial. As set forth in Respondent's Supplemental Letter Brief, a trial court would not be required to exclude the sexual offenses against Mason in a separate trial of the involving Myers offenses pursuant to section 352. (Supp. RB at 2-5.)

Nonetheless, Jackson argues the Mason offenses would not be cross-admissible in a separate trial on the Myers charges because he had not been convicted of and would be

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[4] Jackson notes that he "is at a loss to understand" how pages 920 and 923 of *People v. Falsetta* (1999) 21 Cal.4th 903, cited in this Court's order for supplemental briefing have "any application to this case." (Supp. AOB at 7.) The two cited pages stand for the propositions that "evidence of [defendant's] other sexual offenses is not sufficient by itself to prove his commission of the charged offense," and that the jury be "admonished not to convict defendant solely in reliance on the evidence that he committed prior sex offenses." (*Id.* at pp. 920, 923.) Thus, those pages clearly inform the Court's second subsidiary question which asked, "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?"

forced to defend against the Mason offenses unlike the prior convictions in *Falsetta.* (Supp. AOB at 8, citing *People v. Falsetta, supra,* 21 Cal.4th at p. 916.) Jackson fails to recognize that, whether the uncharged offenses resulted in convictions, is just one of many factors to be considered under section 352. (*Id.* at pp. 916-917.) Jackson also misconstrues section 352 as a consideration of whether the uncharged acts "qualify as more prejudicial than probative." (Supp. AOB at 9.) Rather, the test under section 352 is whether the "probative value is *substantially outweighed*" by a "*substantial danger* of *undue* prejudice, of confusing the issues, or of misleading the jury" or undue consumption of time. (§ 352 [emphasis added].)

Undue prejudice is that " ' "which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the issues." ' " (*People v. Alexander* (2010) 49 Cal.4th 846, 905, quoting *People v. Karis* (1988) 46 Cal.3d 612, 638.) Thus, " ' "[i]n applying section 352, 'prejudicial' is not synonymous with 'damaging.' " ' " (*Ibid.*)

> "'Prejudice' as contemplated by [Evidence Code] section 352 is not so sweeping as to include any evidence the opponent finds inconvenient. Evidence is not prejudicial, as that term is used in a section 352 context, merely because it undermines the opponent's position or shores up that of the proponent. The ability to do so is what makes evidence relevant. The code speaks in terms of *undue* prejudice."

(*People v. Doolin* (2009) 45 Cal.4th 390, 438-439, quoting *People v. Cudjo* (1993) 6 Cal.4th 585, 609 [emphasis in original]; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1168.)

Jackson next claims he has no idea what specific evidence and charges regarding Mason might constitute section 1108 evidence in a separate trial on the Myers offenses. (Supp. AOB 8-9.) This claim is unfounded. The amended information and evidence presented at his trial provides Jackson with the precise sexual offenses and evidence pertaining to Mason which would be presented in a separate trial.

Properly exercising its discretion under section 352, a trial court would not conclude the probative value of the sexual offenses committed against Mason was substantially outweighed by a substantial danger of undue prejudice in a separate trial on the Myers offenses. Indeed, section 1108 was enacted precisely for such circumstances as those presented here, because "[b]y their very nature, sex crimes are usually committed in seclusion without third party witnesses or substantial corroborating evidence. (*People v. Falsetta, supra,* 21 Cal.4th at p. 915.) "The need for such evidence

is especially compelling when the sexual assault victim was killed and cannot testify."[5] (*People v. Avila* (2014) 59 Cal.4th 496, 515, citing *Story, supra,* 45 Cal.4th at p. 1293.)

Accordingly, the evidence of the Myers and Mason offenses was cross-admissible under section 1108 as well as Evidence Code section 1101, subdivision (b), which provides an additional ground to affirm the trial court's denial of Jackson's severance motion.

II. JACKSON HAS RECEIVED ADEQUATE DUE PROCESS NOTICE AND STATUTORY DISCLOSURE TO CONSIDER THE APPLICABILITY OF SECTION 1108 FOR THE FIRST TIME ON APPEAL

Unable to escape the holding in *Story* that "an open charge of murder adequately notifies the defendant of the possibility of conviction of first degree murder on a felony-murder theory," Jackson attempts to recast the holding as a mere suggestion inconsistent with due process notice requirements. (Supp. AOB 3-4.) Such claims of inadequate notice have long been rejected by this Court.

As explained in *People v. Abel, supra,* 53 Cal.4th 891,

> An accusatory pleading charging murder need not specify the theory of murder upon which the prosecution intends to rely. [Citation.] We thus have consistently rejected the argument that defendant charged only with a violation of Penal Code section 187, subdivision (a) may not be convicted of first degree murder including first degree felony murder. [Citations.] [¶] A pleading referring only to Penal Code section 187, subdivision (a) provides adequate notice that the defendant might be convicted of first degree murder on a felony-murder theory. [Citation.]

(*Id.* at p. 937.) A special circumstance allegation can provide a defendant additional notice of a felony murder theory of first degree murder. (*Ibid.*) "In addition, ' "generally the accused will receive adequate notice of the prosecution's theory of the case from the testimony presented at the preliminary hearing." ' " (*Id.* at pp. 937-938, quoting *People*

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[5] Indeed, in arguing that there was "no actual evidence of a sexual crime" committed against Myers, Jackson points out that there was no semen, condom, or pubic hair recovered from Myers's home. (Supp. AOB at 6.) Yet, not one of these items was recovered from Mason's home either, despite the fact that she lived through the ordeal and underwent a physical examination following the brutal attack. Thus, the absence of this evidence does not support Jackson's argument, and underscores the purpose and value to admission of evidence pursuant to section 1108.

v. Hughes (2002) 27 Cal.4th 287, 369-370; see also *People v. Sattiewhite* (2014) 59 Cal.4th 446, 474.)

Jackson was afforded each of these forms of notice that the prosecutor would be proceeding on theories which included felony murder based on a burglary with intent to commit certain sexual offenses. Applying the rule in *Story* to Jackson's case comports with due process notice requirements.

Moreover, Jackson is wrong that he was deprived of disclosure of the proffered evidence as required under section 1108, subdivision (b).[6] (See Supp. AOB at 6.) Jackson received full disclosure of all of the evidence pertaining to the Myers and Mason offenses through pretrial discovery and the preliminary hearing.

Jackson was simply not provided notice in the trial court of the additional *theory* of cross-admissibility under section 1108. The lack of such notice does not deprive this Court of authority to affirm the trial court's denial of the severance motion on section 1108 grounds.

> " 'No rule of decision is better or more firmly established by authority, nor one resting upon a sounder basis of reason and propriety, than that a ruling or decision, itself correct in laws, will not be disturbed on appeal merely because given for the wrong reason. If right upon any theory of the law applicable to the case, it must be sustained regardless of the considerations which may have moved the trial court to its conclusion.' " [¶] That principle does not apply, however, when the "new theory was not supported by the record made at the first hearing and would have necessitated the taking of considerably more evidence, [or when] the defendant had no notice of the new theory and thus no opportunity to present evidence in opposition."

(*People v. Brown* (2004) 33 Cal.4th 892, 901, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 976, and *Green v. Superior Court* (1985) 40 Cal.3d 126, 137-138 (lead opn. of Kaus, J.); see also *Bailon v. Superior Court* (2002) 98 Cal.App.4th 1331, 1339 ["Generally, on

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[6] Section 1108, subdivision (b), provides that "[i]n an action in which evidence is to be offered under this section, the people shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered in compliance with the provisions of Section 1054.7 of the Penal Code."

appeal, a judgment or order will be affirmed if it is correct on any theory, regardless of the trial court's reasons; thus, a respondent may assert a new theory to establish that an order was correct on that theory '*unless* doing so would unfairly prejudice appellant by depriving him or her of the opportunity to litigate an issue of fact' "].)

As explained in Respondent's Supplemental Letter Brief, no further factual development is required in order to determine the cross-admissibility of the evidence of Jackson's sexual assault upon Mason under section 1108. All prosecution and defense evidence pertaining to the Myers and Mason offenses is currently in the record. Notably, Jackson does not request any further factual development on this issue. (See Supp. AOB at 1-10.) Thus, the exception to considering a new theory on appeal "does not apply here because the evidence as to admissibility was fully developed in the trial court." (*People v. Brown, supra,* 33 Cal.4th at p. 901.)

Jackson has a full opportunity to present all legal arguments and litigate the applicability of section 1108 in this supplemental briefing and at oral argument. Accordingly, Jackson is not prejudiced by consideration of this new theory of cross-admissibility on appeal, and this Court can fairly affirm the denial of the severance motion on section 1108 grounds.[7]

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[7] For the same reasons, Jackson's complaint about when the prosecutor first asserted evidence of the Myers sex offenses at trial is unavailing. (See Supp. AOB at 6-7.) Furthermore, Jackson is mistaken that there was no assertion of sexual offenses against Myers in the Respondent's Brief. (See Supp. AOB at 7.) On pages 89-90 of the Respondent's Brief, respondent made the following assertion:

> The prosecutor's primary argument was that the crimes had very distinct similarities for which direct evidence existed, and those similarities were circumstantial evidence that Jackson also sexually assaulted Ms. Myers. This was a reasonable inference drawn from the evidence.

(RB 89-90.)

CONCLUSION

For the reasons stated herein and in the Respondent's Brief and Respondent's Supplemental Letter Brief filed with this Court, respondent respectfully requests that the judgment be affirmed in its entirety.

Respectfully submitted,

TAMI FALKENSTEIN HENNICK
Deputy Attorney General
State Bar No. 222542

For KAMALA D. HARRIS
Attorney General

TFH:cjm

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DECLARATION OF SERVICE BY U.S. MAIL

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

No.: **S139103**

I declare:

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

On July 3, 2015, I served the attached **RESPONDENT'S SUPPLEMENTAL LETTER BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Diego, California, addressed as follows:

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

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

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

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

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on July 3, 2015, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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