

**SUPREME COURT COPY**

SUPREME COURT No. S137730

**DEATH PENALTY**

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

Plaintiff and Respondent, )

v. )

**TROY LINCOLN POWELL, )**

Defendant and Appellant. )

) Los Angeles County  
) Superior Court  
) No. BA240299-01  
)  
)  
)  
)  
)  
)

Automatic Appeal from the Judgment of the Superior Court  
of the State of California for the County of Los Angeles

HONORABLE WILLIAM POUNDERS, JUDGE

**SUPREME COURT  
FILED**

**REPLY BRIEF FOR APPELLANT  
TROY LINCOLN POWELL**

NOV 27 2013

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**DEATH PENALTY**

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HONORABLE WILLIAM POUNDERS , JUDGE

**REPLY BRIEF FOR APPELLANT  
TROY LINCOLN POWELL**

**I.**

**SINCE THE MAYHEM AND TORTURE ALLEGATIONS WERE INTEGRAL TO THE HOMICIDE, A CONVICTION FOR FIRST DEGREE FELONY-MURDER BASED ON THOSE FELONIES VIOLATED THE MERGER PRINCIPLE OF *PEOPLE V. IRELAND* (1969) 70 CAL.2d 522.**

*Summary of Appellant’s Argument*

In his opening brief, appellant argued that the *Ireland* merger doctrine

prohibits a felony that is integral to the homicide from being used as the predicate felony for a felony murder conviction. In this case, the evidence showed that appellant suffered from a lifetime of severe mental illness. While off his medication, appellant was visiting his girlfriend, Ms. Epperson in her apartment. During his visit, Ms. Epperson received a phone call from an unknown person. Apparently, the gist of the conversation was that she anticipated dating someone else. When appellant confronted Ms. Epperson about the call, there was a quarrel. Ms. Epperson informed appellant that their relationship was terminated.

Appellant exploded in a jealous rage and eventually beat Ms. Epperson to death. Although the jury believed he intended to kill her, the evidence shows that such an intent arose during their quarrel when his reason was impaired by the heat of passion.

In any event, during the course of the assault, he seized whatever instrumentalities were close by and available to him in the apartment. These included a flower pot, a wooden stool, a glass candlestick holder and a ceramic statue or pillar. He also finally located a screwdriver and used that as well. Significantly, however, all of these instruments broke during the assault except the screwdriver. It should be noted as well that Ms. Epperson's injuries were clustered primarily on the head, neck and face.

There is no dispute that the assault occurred over a period of time; that appellant sometimes used the pieces of the smashed instruments to keep on hitting Ms. Epperson or that as a result of the beating Ms. Epperson was badly disfigured. What is in dispute is whether appellant harbored any independent or concurrent intent to maim or torture Ms. Epperson.

Although the beating took some period of time to accomplish, the evidence

shows that appellant simply chose whatever instrumentalities were handy and the length of time was largely the result of the breakage of the instrumentalities used to kill her. That is, after a few blows the instruments would break and appellant would either continue striking Ms. Epperson with the pieces or locate another instrument. Since none of these instruments was intended to be used as a weapon, they were very inefficient for striking the fatal blow.

Therefore, because the instrumentalities used to effect the battery continually broke before Ms. Epperson finally succumbed, the fact that the assault took place over time and necessarily caused prolonged pain as well as disfigurement, these results were integral to the manner by which the homicide was accomplished. They were not the result of any separate or concurrent intents to maim or torture.

#### ***Summary of Respondent's Argument***

Citing *People v. Gonzales* (2011) 51 Cal.4th 894, respondent argues that the *Ireland* doctrine applies only to burglary felony murder "where the defendant's only felonious purpose was to assault or kill the victim." (*Id.*, at p. 942.) Further, in this case, the crimes of mayhem and torture had independent felony purposes and the jury so found. According to respondent, the evidence shows that appellant had an independent felonious purpose to commit mayhem and torture. The type of wounds inflicted and the time it took to inflict those wounds while she was alive demonstrated those independent purposes.

Respondent cites appellant's own statements to show an independent felonious purpose because he acted out of jealousy and rage. Respondent notes that appellant purportedly told Todd that if he could not have Ms. Epperson, then no one would. He purportedly also told Vannoy that he beat Ms. Epperson out of



jealousy and revenge because she was going out with someone else.

Respondent also claims that holding appellant to account for these independent felonies supports the very purpose for which the felony murder doctrine was created. That is, the purpose of the felony murder rule is to deter felons from killing accidentally or negligently killing during the course of felonious conduct. Thus, under the felony murder rule, they are held strictly liable for any death that occurs as a result of the felonious conduct.

Finally, even if the *Ireland* merger rule applied here, the *Green*<sup>1</sup> rule requiring dismissal does not. The conviction could be upheld independently on a felony murder theory of rape/ murder. Thus, any *Ireland* merger error regarding mayhem and torture would be harmless beyond a reasonable doubt. (Respondent's briefing at pp. 193-203.)

#### ***Summary of Errors in Respondent's Arguments***

The primary error in respondent's argument is the reliance on the number and placement of the wounds inflicted on the body as the basis for a finding of independent felonious intent to maim and torture. Nothing in respondent's recitation of the type and placement of these wounds, however, shows a specific intent to maim or torture. The number and placement of these wounds show an ineffective attempt to kill using inefficient instrumentalities. They are truly the classic hallmarks of a sudden explosion of violence fueled by the heat of passion.

Nevertheless, in order to rely on the condition of the body as a method of proof beyond a reasonable doubt that appellant entertained a separate intent to maim or torture, the condition of the body must show something unique to those

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<sup>1</sup> *People v. Green* (1980) 27 Cal.3d 1.

felonies. Certainly the number and placement of the wounds must show something more unique than a sudden explosion of violence.

On the issue of appellant's statements as indicators of intent to maim and torture respondent argues that they show jealousy and rage. There is no question that appellant acted out of heat of passion. Indeed, that was the whole point of appellant's defense. It was his jealousy and his rage at suddenly being jilted that caused this explosion of violence. It was this explosion of violence after a sudden quarrel that reduces murder to manslaughter. The admission of jealousy and rage has nothing to do with maiming and torture.

On the issue of the purpose and intent of the felony murder rule; if the purpose of the rule is to deter negligent homicides, the *Ireland* merger doctrine is not in conflict with the rule. Where an assault is simply an integral part of the homicide, there is no negligence involved. Thus the assailant would not be deterred by the felony-murder rule.

Finally, on the matter of prejudice, if the *Ireland* merger doctrine is applicable, the *Green* rule requires dismissal of the homicide count. Respondent attempts to sidestep that problem urging that the purported rape was the substantive felony supporting the felony murder conviction. As explained in issue III, however, an injury that is as consistent with consensual sexual activity as unlawful sexual activity is hardly proof of rape beyond a reasonable doubt. In toto, the evidence that the prosecution relied upon to corroborate a rape conviction is either equivocal or completely inconsistent with rape.

#### ***Number and placement of wounds***

At the outset, it is important to note that this Court has declared that as a matter of law, a special circumstance of maiming cannot stand if the disfigurement

is simply a by-product of an indiscriminate attack. (*People v. Sears* (1970) 2 Cal.3d 180, 186-188.)

Respondent does not and cannot point to anything in the number and placement of the wounds demonstrating an independent intent to maim and torture instead of an indiscriminate attack arising from jealousy and rage. There is no question that Ms. Epperson suffered many blows and that the assault took place over time because the blows were ineffective in achieving her death. That said, the number and placement of the wounds are not so unique as to support a finding of an independent purpose to maim and torture.

As appellant explained in his opening brief, the criminalist categorized the injuries as follows: the beating probably began with fists. Ms. Epperson was hit at least six times. (See, e.g., 10 RT 1318.) She was also hit multiple times with a heavy ceramic flower pot or vase which broke (10 RT 1325-1326, 1352, 1354, 1396), a heavy lamp base or statue which also broke (10 RT 1349-1350, 1354, 1395) as well as a glass candle holder that broke. (9 RT 1230-1231, 1247.) Apparently a wooden foot stool was also used in the beating and that broke as well. (10 RT 1296-1297, 1375-1376.) The only thing that apparently did not break was the screwdriver found under Ms. Epperson's hand. (10 RT 1297.)

Ms. Epperson sustained multiple bruises and abrasions on the back of both arms and hands and bruising and abrasions on her right leg. (9 RT 1225.) The wounds on her hands were probably defensive wounds. (9 RT 1225.) She had multiple blunt force injuries on her head and face as well as multiple lacerations on her forehead and face, including both eyes, her nose, cheeks and upper and lower lips. (9 RT 1228-1229.) A large laceration on her forehead had an underlying open skull fracture; a laceration on her lower lip went all the way

through; and abrasions on the back of her neck indicated blunt force injury. (9 RT 1229-1230.) Ms. Epperson's injuries were not consistent with knife wounds but were more likely caused by a kind of glass or other object. (9 RT 1230-1231.)

No major arteries or veins were cut, but Ms. Epperson's facial bones were fractured and there were jagged cuts on both sides of her throat. (9 RT 1233.) She had extensive fractures at the front base of her skull, caused by blunt force trauma. (9 RT 1242-1243.) She was also stabbed in the face[ probably by the screwdriver found near her body]. (9 RT 1229-1230.) The coroner could not say which of at least ten severe blows to her head killed Ms. Epperson. Any one of them could have caused lack of consciousness; she could have died very quickly or over a period of time. (9 RT 1250-1252.)

This was unquestionably a severe beating, but nothing in this evidence proves maiming or torture beyond a reasonable doubt. Because of the nature of the assault itself, disfigurement and pain were virtually inevitable. Nevertheless, they were integral to the homicide, not the result of an independent or concurrent intent to maim or torture.

A short analogy might make the point more clearly. Lover infidelity is the classic heat of passion situation. (*People v. Berry* (1976) 18 Cal.3d 509, 513-516; see also *People v. Borchers* (1958) 50 Cal.2d 321, 329 ) Suppose a husband comes home to find his wife in bed with another man. Husband goes to his dresser and pulls out a revolver. A struggle ensues between lover and husband as evidenced by defensive wounds. During the struggle, husband shoots lover several times. However, there is no single, clear shot that is the cause of death. The coroner testifies that lover's ear and eye are either missing or badly damaged during the struggle and the shooting. Moreover, several shots could have been

ultimately fatal, but none were immediately fatal. Finally, the coroner cannot say if lover was conscious or unconscious during the entire struggle and because it is unknown which wound was ultimately fatal, the coroner cannot say how long it took for lover to finally succumb. There were no additional wounds once the revolver ammunition was completely expended..

On those facts, are the independent intents to commit mayhem and torture proven beyond a reasonable doubt? The answer is obvious from the question. Nevertheless, the facts from the hypothetical are essentially the same as those presented in this case. Like the facts of this case, the number and placement of the wounds in the hypothetical show a struggle with resulting injuries. They do not, however, show beyond a reasonable doubt that appellant had an independent intent to maim and torture.

#### ***Appellant's statements***

Respondent's assertion that appellant's statements show an independent intent to maim and torture is similarly flawed. As appellant explained above, appellant's statements show heat of passion. Nothing in his purported statements that if he could not have Ms. Epperson, then no one would or that he beat Ms. Epperson because she was going out with someone else show a separate intent to maim or torture. Those statements purportedly explain why he assaulted Ms. Epperson with the intent to kill her. Nevertheless, they do not assert- either explicitly or implicitly - that he intended to maim or torture Ms. Epperson.

#### ***Purpose of the Felony Murder Rule***

On the issue of the purpose and intent of the felony murder rule: respondent correctly notes that the purpose of the rule is to deter felons from killing accidentally or negligently by holding them strictly liable for the consequences of

an independent felony. Nevertheless, the *Ireland* merger doctrine fits perfectly with the felony murder rule. When the perpetrator entertained solely an intent to kill, the merger doctrine in *Ireland* was intended to eliminate a multiplicity of convictions for offenses that were, in fact, integral to the homicide. (*People v. Burton* (1971) 6 Cal.3d 375, 386–388. ) This Court wrestled with the same problem in the assault context. It concluded that in circumstances where an assault is an integral part of the homicide, one man assaulting another with a deadly weapon would **NOT** be deterred by the felony-murder rule . (See *People v. Sears, supra*, 2 Cal.3d at pp.186-188.) Stated differently: If there was an intent to kill, the felony murder rule would not be a deterrent.

The same is true here. Ms. Epperson’s death was not the negligent result of any separate intent to maim or torture. Instead the reverse is true. Any prolonged pain or disfigurement were simply incidental to the homicide and resulted from an inefficient method of killing. Certainly nothing in the evidence would prove beyond a reasonable doubt that appellant harbored a separate intent to main or torture.

### ***Prejudice***

As appellant explained in his opening brief, the jurors were instructed on two alternate theories, first degree murder and felony murder. Since the felony murder was based on an invalid culpability theory because of the *Ireland* merger doctrine, the homicide charge must be dismissed pursuant to *People v. Green, supra*, 27 Cal.3d 1, 69.<sup>2</sup> (See, e.g., *People v. Wilson* (1970) 1 Cal.3d 431, at pp.

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<sup>2</sup> *Green* was overruled on other grounds in *People v. Hall* (1986) 41 Cal.3d 826, 834 & n.3, and abrogated on other grounds in *People v. Martinez* (1999) 20 Cal.4th 225, 239, 241.]

438-440 [where jurors were instructed on legally correct theories of first degree premeditated murder and felony-murder predicated on a burglary with intent to steal, it was error to also instruct jurors on alternative, legally incorrect theory of felony-murder predicated on a burglary with intent to commit assault with a deadly weapon in violation of *Ireland*-merger doctrine]; *People v. Smith* (1984) 35 Cal.3d 798 at pp. 802-808 [court erred in providing instructions on legally correct theory of second-degree murder with malice and legally incorrect theory of second-degree felony-murder in violation of *Ireland*-merger doctrine]; *Suniga v. Bunnell* (9<sup>th</sup> Cir. 1993) 998 F.2d 664 at pp. 667- 670 [permitting jurors to convict of felony-murder under alternative felony-murder theory that was barred by *Ireland*-merger doctrine violated defendant's federal constitutional right to due process]; see also *People v. Morales* (2001) 25 Cal.4th 34, 43 [""Trial courts have the duty to screen out invalid theories of conviction, either by appropriate instruction or by not presenting them to the jury in the first place""]; *People v. Pulido* (1997) 15 Cal.4th 713, 728-729 [same.]

Respondent urges that even if the mayhem and torture allegations are not sufficient to support a felony murder conviction, the rape allegation is sufficient. It is not.

As appellant explains in issue III, the medical examiner conceded that the trauma he saw in Ms. Epperson's vaginal area was consistent with consensual sexual intercourse between a person of appellant's size and a person of Ms. Epperson's size. An injury that is as consistent with consensual sexual activity as unlawful sexual activity is hardly proof of rape beyond a reasonable doubt. (See

e.g., *Cuppett v. Duckworth* (7th Cir. 1993) 8 F.3d 1132, 1137.) In *Cuppett*, the court held, "When evidence supports two inconsistent inferences, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences."

For the additional reasons set forth below in issue III and in appellant's opening brief, the evidence that the prosecution relied upon to corroborate a rape conviction accomplished no such thing. In fact, those evidentiary matters that are not simply equivocal are completely inconsistent with rape.

For these reasons, and those set forth in appellant's opening brief, the conviction on Count I must be reversed and the death penalty set aside.



## II.

**ALTERNATIVELY, EVEN IF ALL THE CHARGED FELONIES ARE NOT INTEGRAL TO THE HOMICIDE, THERE IS INSUFFICIENT EVIDENCE TO SUPPORT EITHER THE TORTURE MURDER THEORY OF FIRST DEGREE MURDER, THE CONVICTION FOR TORTURE, OR THE TORTURE MURDER SPECIAL CIRCUMSTANCE.**

### *Summary of Appellant's Argument*

Appellant was convicted of Count I alleging first degree murder/felony murder on the basis of several felonies including torture. The jury also found the torture murder special circumstance to be true.

The law is clear that the condition of the body is insufficient to prove beyond a reasonable doubt that an assailant necessarily intended to inflict extreme and prolonged pain. A badly abused corpse may reflect many things besides torture, including a frenzied killing. To prove a specific intent to inflict pain for personal gain, there must be some additional evidence.

In this case, the only evidence of any specific intent to inflict pain was the condition of the body. If this factor was removed from the jury's consideration, there is simply no other evidence which would support a conviction for torture murder as a theory of first degree murder or a true finding on the torture murder special circumstance.

### *Summary of Respondent's Argument*

Respondent claims that there was sufficient evidence of intent to inflict prolonged pain. The essence of respondent's argument is that if appellant's intent was simply to kill Ms. Epperson, he could have done so quickly. Because the killing took some period of time to accomplish shows that appellant intended to

inflict considerable pain before Ms. Epperson expired. Respondent argues that appellant carefully cut the sides of Ms. Epperson's neck, yet did not sever her carotid arteries or jugular vein. Further, abrasions on her neck show that he effected some sort of strangulation but did not kill her. Finally, according to respondent, appellant's statements and the blood spatter evidence also show an intent to inflict prolonged pain. (Respondent's brief at pp. 203-212.)

### ***Errors in Respondent's Arguments***

Because there is no direct evidence of appellant's intent, the trier of fact must have relied on inferences deduced from the facts. While it is certainly true that the standard of review for sufficiency of the evidence "is whether after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 318-319). Nevertheless, because the torture conviction (as well as the maiming and rape convictions) must rely on inference, the specific evidence upon which the jury relied must have been "substantial."

The primary error in respondent's argument is that it substitutes an "any evidence" standard for a "substantial evidence" standard. None of the evidentiary matters enumerated by respondent, either alone or in conjunction with others, establish torture. At most, they allowed the jury to speculate that Ms. Epperson might have been tortured because she suffered many horrible wounds. That type of speculation is an unsound basis for conviction.

As respondent concedes, this Court has 'cautioned against giving undue weight to the severity of the victim's wounds, as horrible wounds may be as consistent with a killing in the heat of passion, in an "explosion of violence," as

with the intent to inflict cruel suffering.’ [Citation.]” (*People v. Elliot* (2005) 37 Cal.4th 453, 467 quoting *People v. Cole* (2004) 33 Cal.4th 1158, 1213-1214, see also *People v. Haskett* (1990) 52 Cal.3d 210, 229-230, fn. 9, “[U]se of wounds or manner of killing has limited value in supplying evidence or inferences of a requisite state of mind. . . .”]

Additionally, in *People v. Leach* (1985) 41 Cal.3d 92, 110, this court found that the "record does not establish intent to inflict pain as a matter of law." In words that apply to the facts in this case, the court concluded that “[i]ndeed, the strong evidence of intent to kill militates to some extent against a finding of intent to inflict pain. Under one view of the evidence, the numerous wounds indicate not so much a wish to inflict pain, as great difficulty in killing Messer.” (*Id.* at 110.)

More to the point, as appellant pointed out in his opening brief, to satisfy the due process standard for conviction beyond a reasonable doubt and to avoid an affirmance based primarily on speculation, conjecture, guesswork, or supposition (*People v. Morris* (1988) 46 Cal.3d 1, 21),<sup>3</sup> the record must contain **substantial** evidence of each of the essential elements. In order for the evidence to be "substantial," it must be "of ponderable legal significance . . . reasonable in nature, credible, and of solid value." (*People v. Johnson* (1980) 26 Cal.3d 557, 576-577, 578.) "Evidence which merely raises a strong suspicion of the defendant's guilt is not sufficient to support a conviction. Suspicion is not evidence; it merely raises a possibility, and this is not a sufficient basis for an inference of fact." (*People v. Kunkin* (1973) 9 Cal.3d 245, 250, interior quotation marks deleted.) In *People v. Morris, supra*, this court stated:

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<sup>3</sup> Overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543.