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.	Los Angeles County Superior Court No. BA240299-01
TROY LINCOLN POWELL,	
Defendant and Appellant.	

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

HONORABLE WILLIAM POUNDERS, JUDGE

REPLY BRIEF FOR APPELLANT TROY LINCOLN POWELL

R. Clayton Seaman, Jr.
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
(928) 776-9168
Bar No. 126315

Counsel for Appellant
Troy Lincoln Powell

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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*[1] 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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[1] *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 jealously 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.[2] (See, e.g., *People v. Wilson* (1970) 1 CaI.3d 431, at pp.

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[2] *Green* was overruled on other grounds in *People v. Hall* (1986) 41 Ca1.3d 826, 834 & n.3, and abrogated on other grounds in *People v. Martinez* (1999) 20 Ca1.4th 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* (9th 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),[3] 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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[3] Overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543.

> "We may *speculate* about any number of scenarios that may have occurred on the morning in question [when the victim was murdered with no eyewitnesses present]. A reasonable inference, however, 'may not be based on suspicion alone, or on imagination, speculation, supposition, surmise, conjecture, or guess work. [Para.] . . . A finding of fact must be an inference drawn from evidence rather than . . . a mere speculation as to probabilities without evidence.'"

[Citations.] (*Id.* at p. 21.)

Because this is a capital case additional considerations come into play. Even if the evidence were sufficient, in a noncapital context, to support a torture conviction or a torture/ murder conviction (which it is not), the evidence of the intentional infliction of prolonged pain "for the purpose of revenge... other sadistic purpose" is too weak and uncertain to serve as a constitutionally valid basis for establishing death-eligibility and turning a noncapital homicide into capital murder. The evidence cannot satisfy the heightened-reliability requirement mandated in capital cases by the Eighth and Fourteenth Amendments and California state constitutional analogues. Thus, permitting appellant's torture conviction, torture/murder conviction and the torture special circumstance finding to stand would violate not only the due process standard for criminal convictions, but would also violate the special reliability standards mandated in capital cases by due process and the Eighth Amendment, and California state constitutional analogues. (U.S. Const., 8th and 14th Amendments; Cal. Const., art. 1, sections 1, 7, 15, 17; *Beck v. Alabama* (1980) 447 U.S. 625 at 637-638; *People v. Marshall* (1997) 15 Cal.4th 1, 34-35.)

The inferences that respondent urges from the facts here do not constitute "substantial" evidence supporting the conviction.

Wounds to the Neck

Respondent first urges that the wounds to Ms. Epperson's neck show an intent to inflict prolonged pain because the cutting instrument was used with some precision and "carefully" missed the carotid arteries and jugular vein. Had the perpetrator cut these vessels, Ms. Epperson would have bled to death quickly. (Respondent's brief at p. 207.)

Omitted from respondent's argument is any acknowledgment that the medical examiner never said that the cuts were precise or that the perpetrator "carefully" missed these blood vessels. In fact, in response to a series of questions from the prosecutor, Dr. Wang said something quite different. He said that there were **jagged** cuts on both sides of Ms. Epperson's throat and that neither the carotid arteries or the major jugular vein was severed. (9 RT 1233-1234.) Dr. Wang never offered an opinion concerning the precision of these cuts.

Nothing in the medical examiner's testimony showed that the cuts were made with the surgical precision of a knife or scalpel. The wounds on Ms. Epperson's neck were jagged cuts made by a broken piece of glass or ceramic and no one contends otherwise. If these cuts were "carefully" made to inflict severe pain but avoid severing a critical blood vessel, one would expect to see much more precision and controlled force. For example, one might expect to see deeper and straighter cuts made above and below the critical vessels. (*See, e.g., People v. Elliot, supra*, 37 Cal.4th at p. 467 [torture demonstrated where eyelids were completely severed in a precise straight line by a knife but the eyeballs below were untouched]; *See also*, *People v. Pensinger* (1991) 52 Cal.3d 1210, 1240 [incision wounds exhibit a "nearly scientific air" provide "strong evidence" of an independent intent to inflict pain].)

The evidence established all of these injuries resulted from the struggle between appellant and Ms. Epperson . Indeed, the defensive wounds on Ms. Epperson's hands and arms attest to that struggle. (See, e.g., 9 RT 1225.) The neck wounds in particular are not consistent with a precise and calculated attempt to inflict pain but avoid death. Nothing like the precision cuts seen in *Elliot* and *Pensinger* exist here.

Strangulation

The evidence supporting the purported strangulation bruises is at best marginal. There was no fracture of either the hyoid bone or the larynx, something commonly observed in strangulation cases. (9 RT 1234-1235.) Dr. Wang testified that there were no fingermarks on Ms. Epperson's neck and no significant bruising, again something commonly observed in a strangulation attempt. (9 RT 1261.) Dr. Wang also stated that the only evidence of any attempt at strangulation was some hemorrhaging in Ms. Epperson's eyes and slight neck subsurface bruising. Dr. Wang agreed, however, that these hemorrhages might have been caused by the blows to her head. (9 RT 1262.) In any event, nothing in the slight evidence of strangulation shows an intent to inflict severe pain separate and distinct from a sudden explosion of violence. (*See People v. Arcega* (1982) 32 Ca1.3d 504, 524-525 [evidence victim beaten, strangled, and stabbed "certainly open to the interpretation that the killings were committed in a sudden rage"].)

Appellant's statements and the blood spatter evidence

As appellant explained in the prior issue, his statements of rage and jealousy explain why he committed an assault. For example, Vannoy claimed that appellant mentioned that during the heat of the assault, Ms. Epperson asked appellant if he

was going to kill her. Purportedly, he replied that he was. (Exh. 88B 39, 85.)[4] Appellant also purportedly told Todd that if he could not have Ms. Epperson, no one would. (9 R.T. 1155-1156, 1185, 1214.) Absolutely nothing in those statements, however, makes any reference to an independent intent to maim, torture, or even cause Ms. Epperson to suffer pain. Those statements evidence an intent to kill and nothing more.

As for the blood spatter evidence, the only thing such evidence shows is that the beating was severe. There is no question that there was significant blood spatter that took place over the course of the assault and the movement of Ms. Epperson from the bathroom to the living area. Nevertheless, the amount of blood spatter does not show an intent to inflict severe pain that is separate and distinct from the pain resulting from the explosion of violence. As appellant has repeatedly explained, the otherwise non lethal instruments used and the inefficient way they were used resulted in an assault that was more protracted than most. Nevertheless, a largely ineffective attempt to kill does not equate to an independent intent to inflict significant pain.

For these reasons, and the reasons set fort in appellant's opening brief, the evidence presented in this case will not support either the torture murder theory of first degree murder, the conviction for torture, or the torture murder special circumstance.

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[4] In his opening brief, appellant properly identified Exhibit 88A as the videotape of Vannoy's statement to the police. However, Exhibit 88B is the transcript of that videotape. In the opening brief, appellant misidentified transcript pages as being part of Exhibit 88A instead of 88B. Appellant regrets any confusion this error may have caused.

III.

THE EVIDENCE WAS INSUFFICIENT TO CONVICT APPELLANT OF RAPE, OR TO SUPPORT THE RAPE MURDER THEORY OF FELONY MURDER OR TO SUPPORT THE TRUE FINDING ON THE RAPE SPECIAL CIRCUMSTANCE.

Summary of Appellant's Argument

In his opening brief, appellant argued that while there is evidence of sexual intercourse between appellant and Ms. Epperson, there is no direct evidence of any rape. Thus, a conviction for this offense necessarily rests solely on inferences. Because this is a capital case with its heightened concern for reliability in both the guilt and penalty phases, those inferences must be scrutinized with special care. The evidence here shows only consensual sexual contact followed by an act of animal fury and an indiscriminate beating, not a rape.

Summary of Respondent's Argument

Respondent urges that the following factors constituted proof of rape (plus the rape/murder and the rape special circumstance) beyond a reasonable doubt: there was significant bruising and abrasion near the vagina; a mixture of appellant's blood and Ms. Epperson's blood was found on Ms. Epperson's thighs and appellant's blood was found on the inner pockets of Ms. Epperson's jeans as well as her bra and panties. Finally, appellant's statements to others and his beating of other women prove rape. (Respondent's brief at pp. 212-216.)

Errors in Respondent's Arguments

The primary evidence that respondent relies upon is the genital trauma

suffered by Ms. Epperson. Indeed, Dr. Wang testified on direct examination that he had seldom seen that much genital trauma. (9 RT 1248.)

Nonetheless, Dr. Wang noted that the abrasion near her vaginal area was only 3/16 of an inch. (9 RT 1256.) He agreed that the abrasion and bruising trauma could have been caused by a 280 pound man (appellant's size) having prolonged consensual sex with a 118 pound woman (Ms. Epperson's size). (9 RT 1256-1257.) Dr. Wang was unaware of any studies concerning how many pounds of force are involved with sexual intercourse. (9 RT 1257.)

Appellant told Vannoy he had consensual sex with Ms. Epperson for about 20 minutes prior to the phone call that ultimately led to the assault (Exh. 88B, 40 64). Consequently, it is not surprising that appellant's sperm and DNA were found in the vaginal cavity and that she may have had a small laceration near her vaginal area.

Although not addressed in respondent's brief, the interesting fact concerns what was NOT found on Ms. Epperson's panties. What was NOT found were epithelial cells. As appellant explained in his opening brief, criminalist Taylor testified that he examined Ms. Epperson's panty liner for bodily fluids, particularly epithelial cells. If those cells are found on an object, it is indicative of body fluids having been deposited on the object. (11 RT 1577.)

Mr. Taylor identified photos of Ms. Epperson's panties and the attached panty liner. (11 RT 1578 -1579.) He found a small amount of blood on the front of the panties. (11 RT 1580.) In sexual assault cases those items are examined to determine whether the garment was worn subsequent to sexual intercourse. (11 RT 1580.) If so, one would expect to find semen or other bodily fluids that were secreted from the body into the garment. (11 RT 1580.) If only epithelial cells

were found, it would indicate that the garment was worn prior to intercourse but not afterwards. If semen was found, it would likely indicate that the garment was worn after intercourse. (11 RT 1580.)

In this case, neither epithelial cells nor semen was found. Thus it was unlikely this garment was worn **at all** by the decedent. (11 RT 1580-1581.) Additionally, there were no indications of blood in the panty liner. The only blood observed was a small amount found on the front of the panties. (11 RT 1583-1584.) If a woman was fighting to ward off a rapist while wearing these panties (as respondent argues), Mr. Taylor would expect to see a great deal of secretion of bodily fluids into the panty liner. (11 RT 1584 -1585.)

Since no epithelial cells were found, it is more likely that Ms. Epperson removed her panties **prior** to the assault. That circumstance would be entirely consistent with appellant's purported statement to prosecution witness Vannoy that he [appellant] and Ms. Epperson had consensual sexual relations prior to the triggering phone call. This inference combined with the evidence set forth below, is entirely inconsistent with respondent's argument that appellant forcibly removed her jeans and panties in order to rape her.

Respondent's reliance on the arrangement of Ms. Epperson's clothing and the blood on thighs and lower body as evidence of rape is similarly misplaced. The essence of respondent's argument on the point is that from the placement of bloodstains on Ms. Epperson's jeans, a jury could infer that someone with a bloody hand forcibly removed her jeans. Because there was blood on her upper thighs, a jury could infer that the bloody assailant then spread her legs apart prior to a rape. There was a rip in the panties as well as blood on the panties. Finally, Ms. Epperson's brassier was pulled up above a nipple. According to respondent

these circumstances all show evidence of rape. (Respondent's brief at pp. 214-215.)

However, a significant fact unaddressed by respondent is that Ms. Epperson's panties were found in a pile **underneath** her jeans. (10 RT 1394.) As defense counsel argued, and prosecution criminalist Raquel conceded, if appellant forcibly pulled off Ms. Epperson's jeans and her panties in order to rape her as argued by Respondent, **the panties would be on top of her jeans.** (13 RT 1904-1905.) If respondent was correcrt, the jeans would be pulled off first and flung on the floor. The panties would be pulled off second and would have landed near or on top of the jeans. (13 RT 1904-1905.) It is also significant that criminalist Raquel agreed that even the small rip in the panties could have been caused by normal wear and tear as opposed to being ripped during a forceful rape. (10 RT 1405.) Raquel also noted that the blood drop observed on the panties was consistent with a bloody object dripping blood from directly above the panties. (10 RT 1381)

It must be emphasized, as appellant noted previously, there was no evidence of epithelial cells or sperm cells on the panty liner. (11 RT 1580-1581.) The lack of bodily fluids on the panty liner is not consistent with a woman attempting to fend off an assault, a forcible rape or having her panties and jeans ripped from her body.

Bolstering appellant's argument, prosecution criminalist Raquel opined that the assault actually began in the bathroom and thereafter Ms. Epperson was carried to the living area where the assault finally resulted in her death. (10 RT 1407.) Any transfer of appellant's blood to the jeans, panties or bra likely occurred during the struggle or after Ms. Epperson's death when the apartment

was ransacked. (See, e.g., 10 RT 1380.)

As appellant explained in his opening brief with respect to the blood stains found on Ms. Epperson's bra, and the placement of the bra above one nipple after the assault, the prosecution argued that appellant picked up Ms. Epperson in the bathroom and placed her against the wall before he started hitting her. After he started hitting her, she sank lower and lower against the wall as her knees buckled. (See, e.g., 13 RT 1858.) Thus, if appellant had a hand on her torso as she started to sink while he attempted to hold her against the wall as he hit her, his bloody hand would not only touch her bra, but would pull the bra upwards over her nipple as she sank towards the floor.

With regard to the bloodstains on Ms. Epperson's thighs, the investigation showed that Ms. Epperson bled profusely during the assault and there was blood all over her. (10 RT 1397.) The blood on her thighs showed a mixture of her DNA and appellant's DNA. (10 RT 1450-1451.) The coroner also identified a wound on Ms. Epperson's leg and bruises in the knee area. (People's exhibit 10, 12; 9 RT 1226-1227.) Thus, the mixture of appellant's blood and Ms. Epperson's blood on her thighs were likely smears that occurred during the struggle between the two or when appellant purportedly carried Ms. Epperson from the bathroom to the living area.

Evidence of the assaults on Ms. McDermott and Ms. Colletta, do not establish either an intent to rape or any actions in preparation for rape. To the contrary, they show exactly the same type of animal fury and indiscriminate beating that occurred in the assault on Ms. Epperson. These prior incidents established that when these women rejected further intimacy (not just sexual intimacy) with appellant, he erupted in violence. It also noteworthy that in neither

case did appellant take advantage of the situation to attempt rape or any other sexual activity.

Finally, nothing in appellant's statements to others shows an intent to rape. Respondent confuses appellant's highly emotional response to a rejection of intimacy by his female partner with intent to commit rape. Assertions by appellant that if he could not have Ms. Epperson then no one could, are expressions of passion. While such statements could be construed as threats to kill, they are not expressions of intent to commit rape.

In short, the evidence is consistent with appellant's claim of consensual intercourse followed by an assault based on heat of passion and inconsistent with the prosecution's claim of forcible rape.

As appellant also pointed out in his opening brief, in cases far more compelling than this one, this court has not hesitated to reverse convictions for underlying sex felonies and special circumstances based on sex felonies because the evidence was simply insufficient to prove the charged offenses. (*See e.g.,* *People* v. *Craig* (1957) 49 Cal.2d 313 ("*Craig I*"); *People* v. *Anderson* (1968) 70 Cal.2d 15; *People* v. *Granados* (1957) 49 Cal.2d 490; *People* v. *Raley* (1992) 2 Cal.4th 870; and *People* v. *Johnson* (1994) 6 Cal.4th 1.)

For the reasons set forth above and in appellant's opening brief, the rape conviction, the rape felony murder theory and the rape special circumstance must all be set aside.

IV.

APPELLANT'S CONVICTION FOR FIRST DEGREE MURDER MUST BE REVERSED BECAUSE THE EVIDENCE WAS INSUFFICIENT TO PROVE PREMEDITATION AND DELIBERATION

Summary of Appellant's Argument

In the opening brief, appellant argued that since there was no evidence of planning, no viable evidence of motive and the manner in which Ms. Epperson was killed did not support a finding of premeditation and deliberation, the first degree murder conviction must be reversed. Further, although there was evidence of an intent to kill based on a sudden quarrel and heat of passion, the heat of passion negates the intent to kill and will not support a first degree murder conviction.

Summary of Respondent's Argument

Respondent urges that there was proof of premeditation and deliberation because there was evidence of planning, motive and manner of killing. Regarding planning, before the assault, appellant was able to isolate Ms. Epperson in her apartment. Before going into the apartment, appellant parked his truck in a different parking space than he might have otherwise so he would not be seen leaving the area. The use of many tools to kill Ms. Epperson took time and may have shown that appellant planned to be in a rage.

Respondent cites as motive evidence of the fact appellant was jealous of Ms. Epperson and told Todd that he would kill her if she dated other men. Further, the jury could have believed that appellant killed Ms. Epperson to " 'avoid detection for the sexual and other physical abuses he committed against her [Citation]'"

(Respondent's brief at p. 220.)

Respondent argues the manner of killing showed premeditation and deliberation. The numerous injuries and their placement took time to inflict and therefore demonstrated premeditation. Further, subsequent to Ms. Epperson's demise, facts showing that appellant ransacked the apartment, washed his hands, locked the apartment door and lied to the security guards concerning Ms. Epperson's condition also demonstrated planning, motive and manner of killing.

Finally, any provocation was insufficient to reduce first degree murder to second. According to respondent Ms. Epperson's statements to appellant would not have been enough under any objective standard to reduce murder to manslaughter. Finally, since the jury found appellant guilty of felony murder, there is no basis upon which to reduce the conviction to second degree. (Respondent's brief at pp. 217-225.)

Errors in Respondent's Arguments

As with many of the prior arguments, respondent substitutes a "some evidence" standard for a "substantial evidence" standard. In some instances, respondent bolsters its claims by relying on nothing more than sheer speculation.

No Evidence of Prior Planning

Turning first to the evidence of planning, respondent urges that appellant isolated Ms. Epperson in the apartment. According to respondent this isolation is evidence of a planning with respect to his intent to kill. (Respondent brief at p. 218.)

Omitted from respondent's argument is a full recitation of what happened on that day. After Ms. Epperson concluded her conversation with Sims she crossed the street and asked appellant to walk her home, which he did. The fact appellant was

not concealing his presence contradicts respondent's supposition that he was "'surveying the [place] for a later attack.'" (Respondent's Brief, p. 218.) When they arrived at the Ballington Plaza, she asked appellant to come in. (11 RT 1524.) According to the sign-in sheet, it was about 10:45 a.m. when appellant signed in. (11 RT 1524-1525.) Undoubtedly, Ms. Epperson invited appellant into her apartment because he had to sign the entry log that day with her present and provide his driver's license number. (8 RT 1009-1014.) Indeed, Security guard Clevers Ray testified that if Ms. Epperson had not wanted appellant to come in she would have come to the front office and let them know. (9 RT 1134-1135.)

At some point subsequently, appellant and Ms. Epperson left the apartment to go to a Christian book store. Appellant drove her there and she bought a bible. (11 RT 1525-1526.) The receipt is dated 12:09 p.m. on 11/12/00. After leaving the bookstore, they returned to Ms. Epperson's apartment arriving no later than 12:30 p.m . (11 RT 1526.) Appellant did not have to sign in again because the security guards recognized him and they were not that strict about the sign-in procedure. (11 RT 1521-1522; see also 9 RT 1140-1141.) Security guard Ray admitted that she did not demand that appellant make another entry in the sign-in log when she saw him leaving that day. (9 RT 1135-1136.)

These circumstances are not consistent with a preplanned effort to isolate Ms. Epperson in her apartment in order to kill her. They reveal simply the normal comings and goings present in everyday life. Speculation of homicidal preplanning based on these ordinary circumstances is inconsistent with proof beyond a reasonable doubt. Furthermore, if the whole purpose of going to Ms. Epperson's apartment was to isolate and kill Ms. Epperson, it begs the question of why appellant would not do so during the first visit to the apartment after seeing her

talking with Mr. Sims? If appellant truly harbored intent to kill after seeing Epperson with Sims, as respondent claims, why would he wait to do so until after the second trip out to the bookstore to purchase a bible?

Rampant speculation also colors respondent's claim concerning appellant's parking place for his truck. Security guard Clevers Ray testified that when appellant left the apartment, he did not walk across the street to the building parking lot. Instead, he turned right after leaving the building and walked up a nearby street. She did not see him cross the street into the parking lot. (9 RT 1140, 1142.)

Based on this evidence, respondent urges that appellant did not park in the parking lot he normally used across the street from Ms. Epperson's apartment building because he did not want someone to see him after he left the apartment. Using a new parking space would supposedly allow him to avoid detection. Thus, according to respondent, the change in parking space constitutes evidence of preplanning. (Respondent's brief at p. 219.)

The problem with respondent's argument is that it piles speculation on top of speculation. Appellant testified that initially he parked in the parking lot of the Weingart building where he lived. (11 RT 1123.) As he entered the building, he saw Sims in the lobby. (11 RT 1123.) Sims then ran across the street from the Weingart building to intercept Ms. Epperson as she was coming out of church. Appellant remained where he was. After Sims and Ms. Epperson finished talking, Ms. Epperson crossed the street to where appellant was standing and asked him to walk her home to her apartment, which he did. (11 RT 1123-1124.) Again, these facts are completely inconsistent respondent's speculation that appellant was "'surveying the [place] for a later attack.'"

There is no evidence whatsoever that after leaving Ms. Epperson's apartment

and visiting the bookstore, appellant used a different parking spot. Although appellant could have walked directly across the street from Ms. Epperson's apartment building into that building's parking lot, Ms. Ray testified that she simply did not see him cross the street. No other witness testified that appellant parked in a place other than the usual parking lot. In fact, the only parking spot that was mentioned at all was the parking spot that appellant used at the Weingart building where he lived and where he had parked that day.

Even if by some chance appellant used a parking spot different than the lot across from Ms. Epperson's apartment building or different than the Weingart parking lot, there is no evidence that this purported parking space was more secluded than appellant's usual parking lot and was thus a method for avoiding detection. Indeed, if speculation is called for, any purportedly different parking spot could have been on a busy thoroughfare where detection was MORE likely.

The fact is that there isn't a shred of evidence to support either assertion. These assertions are simply rampant speculation with no basis in fact and should be recognized as such. Even if true, appellant's purported choice of a different parking space is not substantial evidence supporting proof beyond a reasonable doubt of planning for homicide. As appellant has noted repeatedly, "speculation is not evidence, less still substantial evidence." (*People v. Waidla* (2000) 22 Cal.4th 690, 735, quotation marks omitted.)

Respondent next asserts that the manner of killing shows planning and premeditation because the cuts on Ms. Epperson were inflicted in a precise manner, and because the assault lasted a long time while appellant used several instruments to accomplish the killing. (Respondent's brief at p. 219, 220-222.) .)

Again, respondent piles speculation upon speculation. As appellant explained

previously, no expert testified that the cuts on Ms. Epperson were placed there with surgical precision or anything close to it. Dr. Wang testified that there were **jagged** cuts on both sides of Ms. Epperson's throat and that neither the carotid arteries or the major jugular vein was severed. (9 RT 1233-1234.) Nothing was said about the manner in which these cuts were inflicted. Further, the instruments that appellant used were not the sort of weapons that one would normally associate with a preplanned intent to kill. Instead of a gun or knife, appellant assaulted Ms. Epperson with ordinary household items such as a footstool and a flower vase - at least until they broke. These are not sinister weapons that would prove premeditation and deliberation beyond a reasonable doubt. Use of these objects are not substantial evidence of planning and premeditation. The objects used to accomplish the killing were the sort of close-at-hand items that a person would seize while acting irrationally in the heat if passion.

While it is certainly true in the abstract that a jury could find premeditation and deliberation even if the evidence could also be reconciled with a finding of heat of passion, nevertheless, the fact that evidence could support contrary findings is not the issue here. The issue here is whether there is substantial evidence to support a finding of premeditation and deliberation beyond a reasonable doubt. The evidence cited by respondent does not meet that standard. Respondent's argument is based largely on speculation with no solid anchor in the facts of this case. The facts of this case show a mentally disturbed man who reacted violently to a sudden quarrel in an emotionally charged sexual situation. It is the classic heat of passion scenario and the evidence does not support any other theory of guilt.

V-A.

THE TRIAL COURT ERRED BY REFUSING TO EXCLUDE IRRELEVANT EVIDENCE OF APPELLANT'S PURPORTED GANG AFFILIATION AND GANG TATTOOS.

Summary of Appellant's Argument

Contrary to the prosecution's theory of the case, this was not a race based assault and emphatically was not a gang case. As explained in Issues I, II, III and IV, this case was about appellant's state of mind when he assaulted Ms. Epperson. As explained in those issues, this was a classic case of seething jealously that monumentally erupted when the object of appellant's affection callously terminated their relationship presumably in favor of another.

More to the point, although coincidentally Sims was black and appellant was white, the evidence is unequivocal that Sims was not the reason for the assault. He could **NOT** have made the phone call that ultimately triggered the assault. He did not have Ms. Epperson's phone number (only her pager) and Sims specifically admitted that he did not talk to her and that she never answered his page. Moreover, there is no evidence that appellant thought Sims made the phone call or that he thought Sims and Ms. Epperson were getting back together. Thus, even if there was some racial animus between appellant and Sims (which there was not) absent some nexus between the racism and the assault, the white supremacist gang evidence amplified by the tattoo evidence was simply irrelevant.

In that regard, the initial mention of white supremacist gang affiliation was elicited as a result of prosecutorial misconduct. Because the prosecutor's series of questions leading up to Sims' assertion that appellant was a white supremacist was a

blatant invitation to "volunteer" the inadmissible opinion, the prosecution either deliberately elicited this evidence or failed to admonish Sims not to reveal it. Either circumstance constitutes misconduct.

The trial court subsequently compounded the initial misconduct by mistakenly asserting that appellant invited the gang evidence. The transcript will not support the trial court's determination. Even assuming arguendo that there was some sort of racial animus between appellant and Sims, there is no evidence linking it to the assault on Ms. Epperson. Because Sims did not make the triggering phone call to Ms. Epperson and there is no evidence that appellant thought he had, there is no fair inference that racial animosity towards Sims led to the assault. Aside from pure unadulterated speculation by the trial court, there is no evidence - or even an inference - that racial animus made the assault more severe than would be apparent from simple jealousy alone.

Finally, appellant was severely prejudiced by the gang evidence. The improper gang evidence was intended to persuade the jury that appellant had a predisposition to commit criminal acts. Introducing such improper evidence lowered the prosecution's burden of proof and made it easier to persuade the jury to convict of first degree murder and render a true finding on the torture allegations.

Death was not a foregone conclusion in the penalty phase. The first penalty phase jury hung. In the second penalty phase trial, the jury was apparently hung 10-2 for awhile before finally voting to impose the death penalty. By unfairly portraying appellant as a person of bad moral character, the improper gang evidence tipped the balance for the prosecution in persuading the jury to impose death.

Summary of Respondent's Argument

Respondent first urges that the federal constitutional component of the issue

is waived because most objections made during trial were on state law grounds. Respondent concedes that there was a federal due process and Eighth Amendment objection in appellant's motion for a new trial but insists that the constitutional issues are waived because they were not timely made during trial. (Respondent's brief at pp. 238-239.)

Respondent also urges that the tattoo and gang evidence was both relevant and properly admitted because the evidence established motive and intent for the assault on Ms. Epperson, particularly the requisite intent necessary to support the mayhem, torture, rape and murder findings. Additionally, even though there was less such evidence admitted at the second penalty phase trial, racial animus was admissible to explain the explosive nature of the violence against Ms. Epperson. (Respondent's brief at pp. 240-242.)

In any event, respondent asserts that any error in admitting the evidence was harmless. According to respondent, even if the tattoo and gang evidence had been excluded, the result would have been the same. Racial animus could have been shown by other means and the other evidence in the case would have compelled the same result. (Respondent's brief at pp. 242-243.)

Finally, respondent asserts that any appellate claim of prosecutorial misconduct is waived because no such objection was made at trial and even if not waived, there was no misconduct. The prosecutor properly elicited the tattoo and gang evidence. Moreover, even if error, the result would have been the same so any error was harmless. (Respondent's brief at pp. 243-247.)

Errors in Respondent's Arguments

The primary flaw in respondent's argument is the failure to come to grips with the nature of the offenses. The assault on Ms. Epperson had nothing to do with

racial animus, let alone white supremacist gang affiliation. It had everything to do with a mentally disturbed young man who was off his medications and who violently exploded in a jealous rage when his lover told him in a callous way that their relationship was over. Racial animus was nothing more than a speculative assertion that bolstered an evidentiary weak theory of first degree murder.

Federal Constitutional Issues

Respondent first asserts that appellant's claim of Constitutional violations was untimely. Respondent acknowledges that appellant raised federal due process and Eighth Amendment reliability claims in his motion for a new trial. Respondent also concedes that among appellant's claims of Constitutional violation were that the trial court erred in admitting evidence of his tattoos, his purported gang affiliation and the use of racial epithets. Nevertheless, respondent urges that at trial appellant's objections were largely on state law grounds. According to respondent waiting until the motion for a new trial to raise federal constitutional allegations make such claims untimely. (Respondent's brief at pp. 238-239.)

Respondent errs. The purpose of an objection is to allow the trial court to correct error. Respondent does not claim that appellant failed to object at trial or objected on the wrong grounds. Respondent simply argues that waiting until the motion for a new trial to assert the federal constitutional "gloss" make the claims untimely. It does not. The arguments do not invoke facts or legal standards different from those the defense asked the trial court to apply. The motion for a new trial and the claims on appeal assert that the trial court's errors were wrong for the reasons presented to the trial court and had the additional legal consequence of violating the Constitution. Given those circumstances, this court has repeatedly held that the constitutional arguments are not forfeited on appeal. (See *People v. Partida* (2005)

37 Cal.4th 428, 433-439; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1195, fn. 6; *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Tattoo and Gang Evidence Improperly Admitted

Racial animus was inadmissible to show either the motivation for, or the violent nature of, the assault on Ms. Epperson. The trial court's inference of intent based on racial animus was based on four unrelated facts (1) appellant had "White Power" and "White Anger" tattooed on his arms and legs; (2) because he had these tattoos, he might have belonged to a white supremacist gang at some point in his life; (3) appellant called Sims a "punk m.f" approximately two years before the assault and (4) because appellant saw Sims talking to Ms. Epperson for a few minutes after church on the date of the assault, appellant must have thought the phone call meant that Epperson and Sims were getting back together.

According to respondent, because appellant was likely a racist and Sims was black, racial animus explains why the assault was so violent. In other words, appellant acted with violence beyond any mere jealousy of Sims when he killed Epperson. As the judge phrased it: "I think the white power designation, when somebody allows themself to be tattooed with the words in block print, as I recall, on each leg White Power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African-American and not white, that I think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

Respondent concedes that by the trial court's own admission these inferences were based on speculation and not on evidence presented during the trial. (28 RT 4149-4160; Respondent's brief at p. 234.) The evidence shows that the assault on Ms. Epperson was an explosive reaction to Ms. Epperson's decision to terminate

her relationship with appellant after a phone call she received from an unknown caller. Sims did not make the call that sparked the assault (8 RT 1051) and there is no evidence that appellant thought he did. Appellant testified that he was not aware that Sims was in a continuing relationship with Epperson (11 RT 1622) and no witness testified that he was so aware. Even Sims admitted that he knew Ms. Epperson was upset with him for coming around. (32 RT 4742-4743.)

Further, the evidence is undisputed that appellant changed the locks on Ms. Epperson's apartment shortly before the assault. (8 RT 1024; 9 RT1180; 11 RT 1503.) Appellant testified that he changed the locks because Ms. Epperson told him that she was afraid of Sims. (11 RT 1503.) In a similar vein, the apartment manager, the one witness who did not have a motive to shade the truth, testified that he approved the lock change because Epperson told him that Sims was stalking her. (8 RT 1023, 1027; 28 RT 4244.) The change took place while Sims was still living in the apartment complex shortly before he was evicted for drug use. (8 RT 1024.)

No witness contradicted appellant's claim that his problem with Sims arose from Sims' attempts to see Ms. Epperson, not because Sims was African American. (11 RT 1622.) Indeed, even Todd testified that appellant said "he would kill that nigger if he kept trying to see Tammy."(8 RT 1161.) It wasn't until the second penalty phase trial that Todd changed his story to aver that appellant said he would kill both Sims and Epperson if Sims kept trying to see Ms. Epperson. (31 RT 4622.) Even assuming that Todd's sudden, late revelation is an accurate reflection of what appellant actually said, in context, his testimony shows that appellant threatened to harm both Sims and Ms. Epperson if they got back together again. Indeed, it would be nonsensical to suppose that appellant would change the door locks on Ms.

Epperson's apartment to keep Sims from annoying her, but he would nevertheless kill Ms. Epperson simply because Sims persisted in trying to see her.

If appellant actually said he would kill both, it is highly unusual that there is nothing in the testimony of either Vannoy or Todd that suggests that appellant expressed any ill will towards Sims at any point after Ms. Epperson's death. Thus, any claim that Todd's testimony supported racial animus as the basis for the assault is simply nonsensical.

There is simply nothing in the evidence supporting an inference that Sims and Ms. Epperson were getting back together or that appellant thought they were getting back together. As noted in appellant's opening brief, Todd testified that it was his understanding that once Sims got off drugs, Sims and Epperson were going to get married. (9 RT 1181.) That would have been a surprise to Sims since he testified that although they were still friends, there was no longer any boyfriend/girlfriend relationship. (8 RT 1045.) Further, Sims did not even have Ms. Epperson's telephone number. All he had was her pager number. (32 RT 4747.) If, as Todd suggested, Sims and Ms. Epperson were so close to being married, it is certainly odd that she changed her telephone number, refused to give it to him, and also had her locks changed. As noted above, nothing in Todd's testimony suggests that appellant was under the impression that Sims and Ms. Epperson were getting back together.

Thus, there is nothing in the facts that would support a valid inference that racial animus had anything to do with the assault on Ms. Epperson. The trial court's series of tenuous inferences is contrary to the weight of the evidence and does not add up to a valid inference of racial animus, let alone sufficient justification to allow the white supremacist gang evidence admitted here.

As this Court pointed out in *People v. Morris, supra,* 46 Cal.3d 1, 21, (overruled on another point in *In re Sassounian* (1995) 9 Cal.4th 535, 543), the record must contain **substantial** evidence. 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, supra,* 26 Cal.3d 557, 576-577, 578. Even if the tattoos and gang membership evidence were admissible, that evidence rises merely to the level of suspicion that they played a role in Epperson's death. It is well accepted that suspicion, even strong suspicion, will not support an inference of fact. (*People v. Martin* (1973) 9 Cal.3d 687, 695; see also *People v. Blakeslee* (1969) 2 Cal.App.3d 831, 837.) Aside from mere speculation there is no evidence - or even a fair inference - that racial animus made the beating more severe than would be apparent from simple jealousy. Certainly there was no expert testimony that racial animus made the assault in any way different from an assault arising from a jealous rage.[5]

Even if there was some factual support for the inferences the court permitted the jury to draw (which there is not), there is yet another reason why the trial court's purported inference is not legally valid. Where the uncontradicted evidence gives rise to two equally likely reasonable inferences of a defendant's intent, the prosecution must prove beyond a reasonable doubt that the **probability** of one inference of intent overcomes the probability of the other. If the probabilities are equal, or the prosecution's inference of intent is less likely, there is a failure of proof. (Cf. *In re Winship* (1970) 397 U.S. 358, 90 S.Ct. 1068.) Thus, regardless of

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[5] Indeed, the prosecution even suggested that the jury could have found that sexual sadism might have provided an extra level of brutality rather than racial animus. (38 RT 5936-5937.)

the nature of the underlying facts, and regardless of the state's supposition that the defendant probably had some racial animosity towards Sims and probably some intent to kill or torture Ms. Epperson, a judgment in such a case must be reversed.

Even if it could be persuasively argued here that there was some evidence of racial animus against Sims that played a part in the assault and torture of Ms. Epperson, the evidence shows that it is at least equally likely (or probably more likely) that racial bias played NO part in that assault. Therefore, because these two contradictory inferences are (at best) equally likely, the prosecution inference of appellant's intent must fail. Absent stronger proof that racial animus against Sims motivated or aggravated the assault on Ms. Epperson, the prosecution has failed to carry its burden of proof. (*Pennsylvania Railroad Co. v. Chamberlain* (1933) 288 U.S. 333, 339-340.)

In accord is *Cuppett v. Duckworth, supra,* 8 F.3d 1132, 1137. There 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.'" *Stirk v. Mutual Life Ins. Co. of N. Y.* (10th Cir. 1952) 199 F.2d 874, 877, holds similarly: " ...where proven facts give equal support to each of two inconsistent inferences neither of which is established, it is the duty of the court to render judgment against him upon whom rests the burden of proving his case." (see also *People v. Allen* (1985) 165 Cal.App.3d 616, Citing *Pennsylvania Railroad v. Chamberlain*, court reversed personal use of a weapon conviction where one of two assailants shot victim, but no conclusive evidence that appellant was the actual shooter; *Accord, People v. Blakeslee, supra,* 2 Cal.App.3d at p. 840; *People v. Snow* (2003) 30 Ca1.4th 43, 68.)

Even if intent to kill and torture were possible inferences that could have

been drawn from the racial animus evidence in the instant case, they are not established as the probable primary intent. The inference of these factors as the primary intent is at best equally consistent with the inference that neither was the primary intent (or comprised any intent at all). Simply because a possible inference may be drawn does not mean that such an inference is more probable than any other, or that it constitutes substantial evidence of the thing inferred. In such a case, the prosecutor has not maintained the proposition upon which alone he would be entitled to a guilty verdict, i.e., proof by substantial evidence, beyond a reasonable doubt, of a primary intent to kill (aside from heat of passion) or torture. (*In re Winship, supra*, 397 U.S. 358, 90 S.Ct. 1068.)

Prosecutorial Misconduct

Respondent urges that any claims of prosecutorial misconduct were waived because they were not asserted during the trial. Moreover, there was no misconduct in eliciting the gang/tattoo/racial animus evidence in any event because the evidence was highly relevant. (Respondent's brief at pp. 243-247.)

As explained above and in appellant's opening brief, bringing gang evidence in a non-gang case is a practice fraught with peril. It has long been the law that gang evidence is highly prejudicial and its admission must be scrutinized with great care. Even the trial judge recognized that, under the circumstances of this case, the evidence was improper. Indeed, when the prosecution first tried to bring in evidence that Sims thought appellant was a white supremacist and the defense objected, the trial court sustained the objection and told the jury to disregard Sims' remark. (8 RT 1050.)

It is certainly true that Sims' original statement that appellant was a white supremacist was volunteered. The prosecutor never specifically asked Sims if he

thought appellant was a white supremacist. Nevertheless, as appellant explained at length in his opening brief, the prosecutor repeatedly asked Sims if he was intimidated by appellant. The next step in the logical chain would be to ask Sims why he felt intimidated by appellant. Here, Sims simply volunteered the answer to that next question instead of waiting for the prosecutor to ask it. By setting up that logical chain, however, the prosecutor engaged in misconduct.

As appellant also observed in his opening brief, a prosecutor engages in misconduct by intentionally eliciting inadmissible testimony. (*People v. Silva* (2001) 25 Cal.4th 345, 373; *People v. Smithey* (1999) 20 Cal.4th 936, 960; *People v. Bonin* (1988) 46 Cal.3d 659, 689.) "The mere offer of known inadmissible evidence or asking a known improper question may be sufficient to communicate to the trier of fact the very material the rules of evidence are designed to keep from the fact finder." (ABA Standards for Criminal Justice, Prosecution Function and Defense Function (3d ed. 1993) § 3-5.6, p. 102.)

Crucially important to the issue here, it has also long been the law that a prosecutor has a duty to guard against prosecution witness' answers containing excluded or inadmissible matters. (*People v. Cabrellis* (1967) 251 Cal.App.2d 681, 688.) As the court in *Cabrellis* pointed out "A prosecutor is under a duty to guard against inadmissible statements from his witnesses and guilty of misconduct when he violates that duty. [Citations omitted.]" (*Ibid.*; *see also, People v. Baker* (1956) 147 Cal.App.2d 319, 324-325, "The prosecutor has the duty to see that the witness volunteers no statement that would be inadmissible and especially careful to guard against statements that would also be prejudicial.'") Once such misconduct has occurred, it is nearly always prejudicial. It is well understood that such a bell cannot be "unrung" once heavily prejudicial information has been smuggled into the

trial. "You can't unring a bell." (*People v. Hill* (1998) 17 Cal.4th 800, 845, citing *People v. Wein* (1958) 5 Cal.2d 382, 423.)

Because Sims' "volunteered" statement was both a logical and foreseeable response to the prosecutor's line of questioning, the fact that it was "volunteered" is of no consequence. The prosecutor had an affirmative duty to warn Sims not to make such a statement.

As appellant also pointed out in his opening brief, there are additional indicia of misconduct here. There is NO evidence that the prosecutor gave Sims any warning to avoid the gang evidence. To the contrary, the line of questioning **and the prosecution's later assertion that racial animus was a significant theme of its case** (28 RT 4162) suggests that the white supremacy evidence was elicited deliberately. Whether deliberately or inadvertently elicited, however, the evidence resulted from prosecutorial misconduct.

Regarding respondent's specific claim of waiver, since the defense originally won the motion to exclude the white supremacist evidence, initially, there was no need to specifically assign prosecutorial misconduct as an issue. The problem arose after the trial court wrongly determined that the defense brought the white supremacist and racial animus evidence into the trial. A review of the transcript as set forth in detail in appellant's opening brief demonstrates that it was the prosecution NOT the defense that raised the issue of why Sims would avoid appellant. The defense vehemently objected to such evidence and those objections were repeatedly overruled. Thus, it would have been futile to argue prosecutorial misconduct after the trial court repeatedly ruled the evidence admissible. Under these circumstances, "'The law neither does nor requires idle acts.'"(*People v. Kitchens* (1956) 46 Cal.2d 260, 263; see also *Douglas v. Alabama* (1965) 380

U.S. 415, 422 [13 L.Ed.2d 934, 85 S.Ct. 1074]; *People v. Anderson* (2001) 25 Cal.4th 543, 587.) Although the defense explored the racial animus issue on cross examination of Sims after its objections on direct examination were overruled, there can be no waiver or invited error where the defense tried to limit the damage from a bad situation that it did not create. (See, e.g., *People v. Calio* (1986) 42 Cal.3d 639, 643.)

Thus, for the reasons set forth above and in the opening brief, there was no waiver of the prosecutorial misconduct issue.

Prejudice

The essence of respondent's argument on prejudice is that since the gang/tattoo evidence showing racial animosity was properly admitted, there could be no prejudice. Further even if the gang/tattoo evidence was not admissible, appellant was not prejudiced because racial animosity could be shown by other means. Specifically, respondent points to Todd's testimony that appellant used a racial epithet to describe Sims; Sims' testimony that appellant attempted to intimidate him by calling him a "punk m.f." and that appellant monitored Sims' conversation with Ms. Epperson from across the street on the day of the incident. (Respondent's brief at pp. 242-243.)

To assert that such evidence constitutes strong evidence of racial animosity in the context of this case is a stretch even under the most favorable standard of review. As explained above, appellant's problem with Sims arose from Sims' attempts to stalk Ms. Epperson and get into her apartment, not because Sims was African American. (11 RT 1622.)

Even if evidence of racial animosity was admissible [which it was not] the foregoing evidence is at best equivocal. Equivocal circumstantial evidence falls far

short of proof beyond a reasonable doubt. (See, e.g., *O'Laughlin v. O'Brien* (1st Cir. 2009) 568 F.3d 287, 303-304 [circumstantial evidence susceptible to conflicting inferences was insufficient to support the judgment]; *Evans-Smith v. Taylor* (4th Cir 1994) 19 F.3d 899, 900-910. [same]. Thus, such evidence would not be sufficient to show racial animus as a motive for the assault on its own merit.

The real problem is that the prosecution was not content with the foregoing equivocal evidence of racial animus. Instead it presented substantial evidence of appellant's purported membership in white supremacist organizations and purported gang related tattoos. Obviously, the introduction of gang evidence into a non-gang case is highly prejudicial. As noted above, even the trial judge recognized that this area was very complex (24 RT 3365) and a dangerous subject matter to explore. (28 RT 4161-4162.)

Sims' testimony and that of Todd and Vannoy to the effect that appellant's tattoos were indicative of gang membership ensured that the jury would be visibly reminded of the assertion that appellant was a gang member every time the jurors looked at appellant during the trial. Thus,"the jurors would have read it in defendant's features as he sat before them as clearly as if it had been written there." (*People v. Ozuna* (1963) 213 Cal.App.2d 338 at p. 342.)

The prosecution's case against appellant with respect to the first degree murder and the torture allegations was far from overwhelming. As explained in Issues I-IV, *supra*, while the evidence of a homicide was clear, the horrific nature of the killing itself undermines the prosecution's theory of a deliberate, premeditated homicide. The extreme beating and multiple blunt force trauma is entirely consistent with an "explosion of violence," "a killing in the heat of passion," or an "act of animal fury." (*People v. Mincey* (1992) 2 Cal.4th 408 at p. 433; *People v.*

Davenport (1985) 41 Cal.3d 247 at p. 268; *People v. Wiley* (1976) 18 Cal.3d 162 at p. 168; *People v. Steger* (1976) 16 Cal.3d 539 at p. 546.) Thus the nature of the injuries leaves no doubt of its sudden explosive violence.

Nevertheless, to persuade the jury that this was not just a heat of passion case, the prosecution bolstered its presentation through innuendo and character assassination by eliciting extremely inflammatory evidence that portrayed appellant as a gang member and a person of bad character who would likely commit a heinous crime. This Court has repeatedly recognized the inherently prejudicial impact of gang membership evidence because it "creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged. [Citation.]" (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Cardenas* (1982) 31 Cal.3d 897, 904-905see also *People v. Hernandez* (2004) 33 Cal.4th 1040, 1049; *People v. Gurule* (2002) 28 Cal.4th 557, 653) This Court has also observed that ". . . evidence of common gang membership . . . is arguably of limited probative value while creating a significant danger of unnecessary prejudice" *(Williams v. Superior Court* (1984) 36 Cal.3d 441, 450 [Petition to sever two murder counts, linked only by evidence of common gang membership, granted]). Evidence that a defendant is a member of a street gang or a crime is gang related may have a "highly inflammatory impact" on a jury. (*People v. Champion* (1995) 9 Cal.4th 879, 922.) Because of the widespread publicity concerning street gangs and their illegal and violent activities, the introduction of gang evidence creates the risk the jury will infer the defendant's guilt and criminal disposition merely from gang membership. (*Ibid.*)

"When offered by the prosecution, [courts] have condemned the introduction of evidence of gang membership if only tangentially relevant, given its highly

inflammatory impact." (*People v. Cox* (1991) 53 Cal.3d 618, 660; see also *People v. Anderson* (1978) 20 Cal.3d 647, 650-651; see *In re Wing Y.* (1977) 67 Cal.App.3d 69 [Court trial reversed where gang membership evidence admitted to only show bias].)

Even in cases where gang evidence is relevant, this Court has cautioned that "trial courts should carefully scrutinize such evidence before admitting it." *(People v. Champion, supra, 9* Cal.4th at p. 922.) In cases where the evidence is "only tangentially relevant," this Court has "condemned the introduction of evidence of gang membership [. . .] given its highly inflammatory impact." *(People v. Cox, supra,* 53 Cal.3d 618, 660.)

Because of the inflammatory nature of gang evidence and its tendency to imply criminal disposition, erroneous admission of gang-related evidence has frequently been found to be reversible error. (*People v. Bojorquez* (2002) 104 Cal.App.4th 335, 345; *People v. Maestas* (1993) 20 Cal.App.4th 1482 at pp. 1498-1501); *People v. Perez* (1981) 114 Cal.App.3d 470, 479; *In re Wing Y* (1977) 67 Cal.App.3d 69, 79.) Apropos of this case, in *Dawson v. Delaware* (1992) 503 U.S. 159, 163, the United States Supreme Court held that admission of evidence in the penalty phase of a capital trial that a defendant was a member of a white racist organization constituted federal constitutional error when such evidence was not relevant as proper rebuttal to any specific mitigating evidence.

Along the same line, evidence of gang membership is among the most prejudicial types of evidence which can be presented. It frightens jurors and suggests bad character. (See *People v. Roldan* (2005) 35 Cal.4th 646 at p. 705; *People v. Hernandez, supra*, 33 Cal.4th at p. 1049; *People v. Cardenas, supra,* 31 Cal.3d 897 at pp. 904-905; *People v. Albarran* (2007) 149 Cal.App.4th 214,

223-224; Mitchell L. Eisen, *Examining the Prejudicial Effects of Gang Evidence on Jurors*, Journal of Forensic Psychology Practice, 13:1-13 (2013) [just mentioning a defendant's gang affiliation increased guilty verdicts in mock trials from 43.8% to 59.2% while mentioning a defendant's gang membership increased guilty verdicts to 62.5%].)

None of this gang evidence had any relevance to the death of Ms. Epperson. It was instead the kind of highly prejudicial criminal propensity evidence calculated to cause a jury to improperly resolve its reasonable doubts about whether this was a legitimate heat of passion case or a first degree murder.

As appellant also pointed out in his opening brief, the proof of prejudice is in the pudding. If even so sophisticated an observer as the trial judge concluded that this "white supremacist" gang evidence supported an inference that appellant assaulted and tortured Ms. Epperson because of racial animus against Sims (despite his acknowledgment there was no specific evidence of this), it is hard to fathom why jurors would not do likewise.

Given the weakness in the prosecution's guilt phase case for conviction of any homicide beyond that generated by heat of passion, eliciting this inflammatory evidence cannot be deemed harmless beyond a reasonable doubt. Reversal is therefore required. (*Chapman v. California* (1967) 386 U.S. 18 at p. 24.)

With respect to penalty alone, trial defense counsel argued that appellant was prejudiced because during deliberation the vote was apparently ten to two at one point. The two holdouts for life were jurors 6 and 12. Both those two jurors were black; all the others were non black - that is, white or Asian. Thus, "Racial animus might have been the thing that put them over the top or created an atmosphere where they would be more willing to give the death penalty than had that evidence

been excluded." (38 RT 5935-5936.)

The trial court observed that the killing here showed a viciousness beyond mere jealousy. According to the court, the racial animus evidence explained that extra level of viciousness. (38 RT 5936.) In denying appellant's motion for a new trial, the trial court ruled:

> "I think the white power designation, when somebody allows themself to be tattooed with the words in block print, as I recall, on each leg White Power, nobody is going to convince me that that doesn't show racial bias on his part, and since the victim's boyfriend was African-American and not white, that I think went directly to the motivation for the viciousness of the attack, not just the attack but the viciousness of it..." (38 RT 5942.)

Again, if the trial judge was persuaded by the improper evidence at penalty phase, it is hard to imagine that no juror would be. Therefore, the improper admission of the gang/tattoo evidence and its likely effect on the jury sufficiently undermined the reliability of the penalty phase determination and thus appellant's death sentence must be reversed. (*Hendricks v. Calderon* (9th Cir.1995) 70 F.3d 1032, 1044-1045.)

V-B.

THE VERDICT FINDING APPELLANT TO BE SANE MUST BE REVERSED BECAUSE THE EVIDENCE OF INSANITY WAS OF SUCH WEIGHT AND QUALITY THAT A JURY COULD NOT REASONABLY REJECT IT

Summary of Appellant's Argument

The defense must prove a claim of insanity by a preponderance of the evidence. Here the defense presented a medical history showing a lifetime of brain damage or dysfunction as well as multiple diagnoses of major mental illness. In support of that history, the defense offered evidence of abnormal EEGs, abnormal brain function test results and psychiatric medications of such high dosage that no normal person could remain conscious, let alone functional at the dosage levels of medication given to appellant. Even if appellant suffered from an anti social personalty disorder as a secondary or Axis II diagnosis, because of his organic brain dysfunction, severe mental illness and the events that triggered it, appellant was insane at the time of the homicide.

The prosecution did not fully dispute the abnormal EEGs, the brain function test results or the large doses of the medication given to appellant. It merely urged that these factors were not illustrative of either brain dysfunction or mental illness. While also conceding that the appellant might have suffered from a major mental illness, the primary prosecution expert could not determine what it might be because appellant exaggerated his symptoms on prosecution administered tests. Instead, the prosecution argued that because appellant tried to fake his results on the prosecution administered tests, he suffered from nothing more than an anti social personality

disorder. Thus by definition, appellant must have understood the difference between right and wrong.

Nevertheless, even assuming that appellant suffered from an anti social personality disorder in addition to his mental illness, the defense evidence was of such weight and character that no rational trier of fact could have concluded that appellant failed to prove insanity by a preponderance of the evidence.

Summary of Respondent's Argument

The essence of respondent's argument is that even if expert opinions vary, the jury is entitled to give more credence to one set of opinions than the other. (Respondent's brief at p. 265.) Respondent notes that only two of the four defense experts offered an opinion on sanity and those two differed in their diagnoses. (Respondent's brief at pp. 265-269.) By contrast, prosecution expert Dr. Mohandie opined that appellant was sane and simply a malingerer. (Respondent's brief at pp. 269-271.) Given the inconsistencies in the defense presentation and the consistent presentation by the prosecution experts, the jury properly found that the defense failed to carry its burden of proof. (Respondent's brief at pp. 271-272.)

Errors in Respondent's Argument

As appellant pointed out in his opening brief and as respondent correctly concedes, on appeal, the test is **NOT** the substantiality of the evidence favoring the jury's verdict. Instead, it is "whether the evidence contrary to [the jury's] finding is of such weight and character that the jury could not reasonably reject it." *(People v. Drew* (1978) 22 Cal.3d 333, 351; see also, *People v. Duckett* (1984) 162 Cal.App.3d 1115, 1119, both superseded by statute on another ground.), While a reviewing court must view the record in the light most favorable to the verdict, the jury's discretion is not absolute. "The verdict must be supported by substantial

evidence-that is, evidence reasonable in nature, credible and of solid value; it must actually be substantial proof of the essentials of which the law requires in a particular case." (*People v. Samuel* (1981) 29 Cal.3d 489, 505; interior quotation marks and citations omitted.) In that regard, "[I]n passing on its substantiality, we must look to the record as a whole. Although an item of evidence considered without regard to the rest of the record may appear probative, its value may be undercut by undisputed facts compelling a contrary conclusion." (*Id.,* at p. 504; citations omitted.)

The primary error in respondent's argument is the failure to deal with the problems inherent in Dr. Mohandie's expert opinion that appellant suffered from a mere personality disorder. Of the three doctors who testified about sanity, Dr. Mohandie was the only expert who testified that appellant was sane at the time of the assault. (18 RT 2614.) Although he conceded that appellant might have a major mental illness, he could not detect it because appellant exaggerated his symptoms on Dr. Mohandie's tests. (18 RT 2602, 2622, 2628.) Further, Dr. Mohandie's tests indicated that appellant was a malingerer. Malingering is indicative of an antisocial personality disorder, a disorder that would not prevent him from knowing right from wrong. (18 RT 2601-2602, 2608, 2651.) Thus, because appellant had an antisocial personality disorder, Dr. Mohandie opined that appellant acted purposefully in the context of rejection by Ms. Epperson. (18 RT 2613.)

Before exploring the problems with Dr. Mohanie's testimony, it is important to keep in mind the principles governing the admissibility and credibility of expert witness testimony. In *Sargon Enterprises, Inc. v. USC* (2012) 55 Cal. 4th 747, this court recently upheld a trial judge's ruling excluding the testimony of an expert witness because it was based on unfounded assumptions and then piled speculation

on top of that. Describing the foundational requirement for credible evidence provided by an expert, this court quoted *Herman Schwabe, Inc. v. United Shoe Machinery Corp.* (1962) 297 F.2d 906, 912 with approval, noting: "'something more than a minimum of probative value' is required. (citation) These comments are especially pertinent to an array of figures conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." (*Id.*, at p. 770.)

Further, "[T]he expert's opinion may not be based 'on assumptions of fact without evidentiary support [citation], or on speculative or conjectural factors .... [¶] Exclusion of expert opinions that rest on guess, surmise or conjecture [citation] is an inherent corollary to the foundational predicate for admission of the expert testimony: will the testimony assist the trier of fact to evaluate the issues it must decide?' (*Jennings v. Palomar Pomerado Health Systems, Inc.* (2003) 114 Cal.App.4th 1108, 1117") (*Id.*, at p. 771.)

Finally, this court observed: ""A court may conclude that there is simply too great an analytical gap between the data and the opinion proffered." *(General Electric Co. v. Joiner*, 522 U.S. at p. 146.") (Id. at p. 771.)

Dr. Mohandie's testimony did not even rise to the level of minimum probative value. His conclusions were essentially speculative because they were not based on anything even approaching the totality of the evidence concerning appellant's mental state. They were based solely on his own tests showing that appellant could malinger. He even admitted that appellant could suffer from a major mental illness, but he had no way of knowing what that illness might be.

Significantly, Dr. Mohandie's diagnosis of anti social personality disorder does not fully account for appellant's behavior. For example, it does not account

for the multiple documented instances of attempted suicide, or for appellant's lifelong paranoia, both of which Dr. Griesemer acknowledged. (16 RT 2310.)

Most important, however, it does not account for appellant's behavior on anti-psychotic medication. As Dr. Vicary explained, during appellant's many stays in psychiatric facilities throughout his life, he was treated with extremely high doses of these medications. These included:1500 milligrams of lithium, 2000 milligrams of depakote, 60 milligrams of haldol - the equivalent of 3000 milligrams of thorazine. (18 RT 2479.)

A person without severe mental illness simply could not tolerate those doses of medication. (18 RT 2479.) Because appellant was getting such large dosages of those kinds of drugs and remaining alert and rational, he clearly needed those drugs for his major mental illness. (18 RT 2480.) There was no doubt that appellant was actually taking those high doses because his blood was repeatedly tested for dosage levels and those test results are contained in appellant's medical records. (18 RT 2481.)

Dr. Mohandie did not even make a credible attempt to respond to the evidence and implication of medication efficacy. Without any further explanation, he first simply noted that he was not authorized to prescribe those kinds of drugs. When pressed further, he suggested that appellant could have cleverly avoided taking these drugs, thus fooling the medical personnel even for a period as long as the 15 years encompassed by his medical records. (18 RT 2645-2646.) When advised that blood tests in the medical records proved that appellant was in fact taking these anti- psychotic drugs at these high doses, Dr. Mohandie simply asserted that such information would not change his opinion that appellant was nothing more than a malinger. (18 RT 2647.) Dr. Mohandie never offered any further

explanation concerning how appellant could tolerate those high doses of anti-psychotic medication if he did not have a major mental illness.

Given this evidence and his failure to address it, Dr. Mohandie's opinion that appellant did not suffer from any major mental illness did not provide the jury with anything more than conjecture. His obdurate refusal to acknowledge the actual nature of appellant's clinical history, or even offer a plausible explanation for appellant's tolerance for the large doses of anti-psychotic medication, does not entitle the jury to give substantial weight to his diagnosis of antisocial personality disorder and subsequent speculation on sanity. (See, e.g., *People v. Samuel, supra,* 29 Cal.3d at p. 498 "'[t]he chief value of an expert's testimony ... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions.' see also *People v. Drew, supra,* 22 Cal.3d at p. 350.)

Absent a credible diagnosis of malingering as a primary cause of appellant's behavior instead of a secondary diagnosis, the jury could not reasonably reject the opinion of the defense experts that appellant suffered from organic brain dysfunction or that he had a major mental illness.

Certainly it is true that even if a defendant suffered from both organic brain dysfunction and a major mental illness, a jury could nevertheless conclude that he was entirely sane at the time of the assault. (See, e.g., *People v. Coddington* (2000) 23 Cal.4th 529, 608.) Such an argument, however, would not be persuasive on the facts of this case.

As appellant conceded in his opening brief and as respondent points out, many of the mental health professionals who diagnosed appellant concluded that he malingered. The difference is that Dr. Mohandie did not thereafter fully pursue his

investigation into appellant's mental health. When he determined that appellant did not fully cooperate on the MMPI and SIRS tests and was therefore a malingerer *on those tests*, Dr. Mohandie simply speculated that appellant must have similarly faked his symptoms when dealing with all the other mental health professionals who treated appellant throughout his life. Dr. Mohandie essentially concluded that because there is some evidence of malingering in appellant's background, and because anti-social personality disorder explained at least some of appellant's behavior, that disorder explained all of appellant's behavior. Manifestly, it does not.

Evidence of appellant's anti-social personality disorder found in appellant's medical records is primarily an Axis II diagnosis, not an Axis I diagnosis. The diagnosis of anti-social persoanlity disorder does not account for appellant's paranoia, his multiple suicide attempts, his abnormal EEG's and PET scans, or his tolerance for large doses of anti-psychotic medications. (17RT 2330-2332, 2374.)

Even if Dr. Mohandie could validly assert his disagreement with a diagnosis of either intermittent explosive disorder or bipolar disease, he explicitly conceded that his examination of appellant could NOT rule out a major Axis I mental disorder. When pressed on the objective factors from the evidence supporting an Axis I diagnosis of either intermittent explosive disorder or bipolar disease, Dr. Mohandie had no credible answers. He merely relied on Dr. Griesemer's opinion that appellant did not suffer organic brain damage arising from childhood epilepsy. Whether or not appellant suffered organic brain damage from epilepsy does not resolve the issue of brain damage. There were other indicators of brain damage or dysfunction such as the abnormal EEG's and PET scans. Dr. Mohandie's response to these objective indicators was to posit that they cannot predict specific behavior.

While partially true, the indicators of brain damage did correlate strongly with abnormal and violent behavior, a fact Dr. Mohandie did not address. The diagnosed types of brain damage and mental illness under which appellant suffered are precisely those leading to uncontrollable rage and an inability to inhibit inappropriate behavior. (34RT 5191-5193.)

Dr. Mohandie dismissed the defense claims of insanity because in his view, appellant acted rationally and purposefully in the context of rejection by Ms. Epperson. (18 RT 2613.) Purposefully to be sure, but not rationally or normally. Even if it could be said that killing a girlfriend in the context of rejection would be a normal or rational reaction - a highly dubious proposition at best - this was not a normal homicide. As the facts cited by both appellant and respondent make clear, this was a particularly brutal assault with multiple instrumentalities.

If killing Ms. Epperson was somehow the rational reaction to being rejected, that much violence would not be required simply to effect her death. This behavior, while goal directed towards killing, is not nearly as consistent with a deliberate premeditated murder as it is with a sudden and insane explosion of violence. (See, e.g., *People v. Anderson, supra,* 70 Cal.2d 15, 21-22; see also *People* v. *Alcala* (1984) 36 Cal.3d 604, 623.) Even an uncontradicted showing that the defendant's actions were goal directed towards the commission of a homicide does not negate a claim of insanity. Being "goal oriented" is fully consistent with being insane. An insane person could intend to kill and take steps to accomplish that goal. The critical difference between criminality and insanity is that an insane person does not understand the difference between right and wrong. That difference is precisely what the defense experts described and precisely why Dr. Mohandie's opinion is not substantial credible evidence of sanity. (*See People v. Duckett, supra,* 162

Cal.App.3d 1115, 1120-1123. [Three doctors found appellant insane but differed on the precise reasons why. Sanity finding reversed because the evidence contrary to the jury's finding was of such weight and character that the jury could not reasonably reject it.]; See also *Strickland v. Francis* (11th Cir. 1984) 738 F.2d 1542, 1547-1555.)

Given the foregoing facts and legal precedent, even when viewing the evidence in the light most favorable to the prosecution in this case, no rational trier of fact could have concluded that appellant failed to prove by a preponderance of the evidence that he was insane at the time of the offense.

PENALTY PHASE ISSUES

VI.

THE TRUE FINDINGS ON ALL OF THE FELONY-MURDER SPECIAL CIRCUMSTANCE ALLEGATIONS MUST BE REVERSED BECAUSE EACH PREDICATE FELONY WAS MERELY INCIDENTAL TO THE HOMICIDE AND DID NOT MANIFEST AN INDEPENDENT FELONIOUS PURPOSE

Summary of Issue

After finding appellant guilty of murder, the jury also found true the special circumstance that he committed murder while engaged in the commission of a predicate felony, i.e., mayhem, torture and rape. These special circumstances findings made appellant eligible for the death penalty. (Cal. Pen. Code § 190.2(a)(17).)

The evidence shows that the predicate felonies were intended solely to facilitate the killing itself. Thus, there is insufficient evidence to support the felony murder special circumstances.[6] This issue is similar to the "*Ireland* merger" issue discussed in Issue I. However, it applies to the special circumstances even if the "*Ireland* merger" rule does not apply to the felony murder itself.

In this case, there was no evidence of an independent felonious purpose. (*See People v. Green, supra,* 27 Ca1.3d at pp. 61-62.) The prosecution's theory of the

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[6] In Issue III, appellant demonstrated that there was insufficient evidence to support a rape or a rape special circumstance. Thus, the rape special circumstance is not valid and not at issue in this argument.

case was that appellant used various instrumentalities to effectively torture, rape and commit mayhem against Ms. Epperson before she died. The evidence, however shows that all the instrumentalities that appellant used were intended solely to facilitate the homicide.

The instrumentalities of the homicide – the flower pot, the lamp base, the ceramic statue and the wooden stool – all simply broke during the assault on Ms. Epperson. These were not objects that appellant brought with him because he intended to use them to commit various felonies against Ms. Epperson. They were objects that were handy in the apartment at the moment appellant lost control. When one object broke, appellant seized another until the assault resulted in Ms. Epperson's death. Nothing in the intrinsic nature of these objects or the way these objects were used demonstrates proof beyond a reasonable doubt that appellant harbored a felonious purpose independent of the intent to kill. These instrumentalities were just the means appellant used to facilitate the homicide.

Summary of Respondent's Argument

Similar to issue I, the essence of respondent's argument is that because of the brutality of the assault, the numerous wounds inflicted show an intent to maim, rape and torture that is separate - even if concurrent - from the intent to kill. Additionally, appellant's statements of jealousy and rage show these separate intents. Finally, even if the evidence would not support one or two of these special circumstances, any error would be harmless. The circumstances of the homicide itself plus appellant's assaults on other women would be enough ensure the death penalty. (Respondent's brief at pp. 272-276.)

Errors in Respondent's Arguments

As with Issues I and II, respondent relies 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. Instead, they are the classic hallmarks of a sudden explosion of violence.

Number and placement of wounds

Respondent first urges that the wounds to Ms. Epperson's neck show an intent to inflict prolonged pain because the cutting instrument was used with some precision and "carefully" missed the carotid arteries and jugular vein. Had the perpetrator cut these vessels, Ms. Epperson would have bled to death quickly. (Respondent's brief at p. 272-275.)

As in Issue II, respondent omits any acknowledgment that the medical examiner never said that the cuts were precise or that the perpetrator "carefully" missed these blood vessels. In fact, Dr. Wang never offered an opinion concerning the precision of these cuts. He said only that there were **jagged** cuts on both sides of Ms. Epperson's throat and that neither the carotid arteries or the major jugular vein was severed. (9 RT 1233-1234.)

Nothing in the medical examiner's testimony showed that the cuts were somehow made with the surgical precision of a knife or scalpel. If these cuts were "carefully" made to inflict severe pain but avoid severing a critical blood vessel, one would expect to see much more precision and controlled force. (*See, e.g.. People v. Elliot, supra*, 37 Cal.4th at p. 467 [torture demonstrated where eyelids were completely severed in a precise straight line by a knife but the eyeballs below were untouched]; *See also, People v. Pensinger, supra,* 52 Cal.3d 1210, 1240 [incision

wounds exhibit a "nearly scientific air" provide "strong evidence" of an independent intent to inflict pain].)

All of these injuries resulted from the struggle between appellant and Ms. Epperson and the prosecution did not contend otherwise. Indeed, the defensive wounds on Ms. Epperson's hands and arms attest to that struggle. (See, e.g., 9 RT 1225.) These neck wounds in particular are inconsistent with the precise and calculated attempt to inflict pain but avoid death. Nothing like the precision cuts seen in *Elliot* and *Pensinger* exist here.

Strangulation

The evidence supporting the purported strangulation wounds is at best marginal. As appellant noted in Issue II, there was no fracture of either the hyoid bone or the larynx, typical injuries in strangulation cases. (9 RT 1234-1235.) Dr. Wang admitted that there were no fingermarks on Ms. Epperson's neck and no significant bruising, an unusual observation in a strangulation attempt. (9 RT 1261.) The only evidence Dr. Wang found of any attempt at strangulation was some hemorrhaging in Ms. Epperson's eyes and slight neck subsurface bruising, but he conceded these injuries might have been caused by the blows to her head. (9 RT 12621.) In any event, nothing in the slight evidence of strangulation shows an intent to inflict severe pain separate and distinct from a sudden explosion of violence. (*See People v. Arcega, supra*, 32 Ca1.3d at pp. 524-525 [evidence victim beaten, strangled, and stabbed "certainly open to the interpretation that the killings were committed in a sudden rage"].)

Appellant's statements and the blood spatter evidence

As appellant argued in Issue I, his statements of rage and jealousy explain *why* he committed an assault and *why* he exploded in jealous violence. Nothing in

those statements evidenced an independent intent to maim or torture.

As for the blood spatter evidence, the only thing such evidence shows is that the beating was severe. There is no question that there was significant blood spatter that took place over the course of the assault and the movement of Ms. Epperson from the bathroom to the living area. Nevertheless, as appellant has repeatedly explained, the otherwise non lethal instruments used and the inefficient way they were used resulted in an assault that was more protracted than most. A brutal but incompetent attempt to kill does not equate to an independent intent to inflict significant pain.

Even if it could be persuasively argued that the evidence showing heat of passion might also be reconciled with a showing of an intent to maim or torture (which it cannot), the prosecution has still failed to carry its burden of proof beyond a reasonable doubt. "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.'" (*Cuppett v. Duckworth, supra,* 8 F.3d at p. 1137; see also *Pennsylvania Railroad Co. v. Chamberlain, supra,* 288 U.S. at pp. 339-340; *People v. Blakeslee, supra,* 2 Cal.App.3d at p. 840; *People v. Snow supra*, 30 Ca1.4th at p. 68.); *Stirk v. Mutual Life Ins. Co. of N. Y. , supra*, 199 F.2d 874, 877, holds similarly: " ...where proven facts give equal support to each of two inconsistent inferences neither of which is established, it is the duty of the court to render judgment against him upon whom rests the burden of proving his case.")

Prejudice

Respondent urges that even if one or more of the special circumstances were set aside, the nature of the assault plus the evidence of appellant's assaults on other women would inevitably result in a death sentence. (Respondent's brief at p. 276.)

As appellant has repeatedly explained, however, nothing in the evidence shows an assault more grievous than the indiscriminate beating resulting from heat of passion. (*People v. Sears, supra,* 2 Cal.3d at pp.186-188.) The nature of the injuries suffered by Ms. Epperson during the struggle do not prove the special circumstances necessary to impose the death penalty. The assaults on other women show exactly the same type of animal fury and indiscriminate beating that is evidenced in the assault on Ms. Epperson.

All of these incidents share an important common trait. They show a severely mentally ill defendant who erupts in violence after his need for intimacy (not just sexual intimacy) is spurned. Understood in this context, it was not inevitable that a jury would award the death penalty to a severely mentally ill defendant who acted out when he was off his medication and surprised by the sudden revelation of his lover's intention to sever their relationship. The fact that the first jury hung on penalty, and the second almost did, is testament to the fact that death was not a foregone conclusion on these facts. (Cf., *People v. Brooks* (1979) 88 Cal.App.3d 180, 188 [hung jury evidence of a close case].)

For these reasons, and the reasons set forth in appellant's opening brief, the evidence presented in this case will not support the special circumstances nor would the jury have inevitably imposed the death penalty.

VII.

IMPOSING THE DEATH PENALTY ON A MENTALLY ILL DEFENDANT VIOLATES THE FIFTH, SIXTH AND EIGHTH AMENDMENTS.

Summary of Issue

As previously explained, the evidence that appellant was (and is) severely mentally ill is simply overwhelming. Like persons with a very low IQ or children whose brain development is not fully formed, the severely mentally ill do not have the requisite ability to conform their behavior to acceptable social norms.

Executing the severely mentally ill for behavior which is only partially controllable does not conform to contemporary values, nor does it serve any viable penological purpose. Absent these justifications, executing the severely mentally ill violates the Eighth Amendment prohibition on cruel and unusual punishment as well as the due process and equal protection clauses of the Fifth and Sixth Amendment.

Summary of Respondent's Argument

Respondent urges that aside from juvenile status and mental retardation, the United States Supreme Court has not prohibited execution of the mentally ill. Instead, it has allowed individual states to determine the limits on mental competence to be executed. Aside from those two limits, California has not imposed a separate limit on executing the mentally ill either. Even if such a limit existed, appellant has not shown that he is mentally ill and should be excluded from the class of persons eligible for the death penalty. (Respondent's brief at pp. 277-283.)

Errors in Respondent's Argument

The two flaws in respondent's argument are (1) the failure to come to grips with the Eighth Amendment requirement for proportional sentencing in capital cases and (2) the failure to fully account for the evidence of appellant's lifelong mental illness and its effect on his ability to conform his conduct to socially acceptable norms.

Turning first to proportional sentencing, as appellant pointed out in his opening brief, the Constitution requires that the death penalty be reserved for the offenders with the greatest moral culpability. (*Atkins v. Virginia* (2002) 536 U.S. 304 at p. 319, 122 S. Ct. 2242, 153 L. Ed. 2d 335.) The whole notion of moral culpability is premised on the assumption that persons have the free will to "steer between lawful and unlawful conduct." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.)

The cruel and unusual punishment clause of the Eighth Amendment bans sentences that are grossly disproportionate to the crime for which the defendant is convicted. (See, e.g., *Solem v. Helm* (1983) 463 U.S. 277 [103 S.Ct. 3001, 77 L.Ed.2d 637].) In *Woodson v. North Carolina* (1976) 428 U.S. 280 [96 S.Ct. 2978, 49 L.Ed.2d 944] the High court mandated individualized sentencing in capital cases. Individualized sentencing requires consideration of the character and record of the individual offender and the circumstances of the particular offense. (*Id.*, at p. 304.)

Significantly for this case, the determination of the proportionality of a capital sentence cannot be based solely upon the magnitude of harm resulting from the offense "[f]or purposes of imposing the death penalty . . . punishment must be tailored to [a defendant's] personal responsibility and moral guilt." (*Enmund v. Florida* (1982) 458 U.S. 782, 801; see also *California v. Brown* (1987) 479 U.S.

538, 545[O'Connor, J. concurring] ["[P]unishment should be directly related to the personal culpability of the criminal defendant."].) Thus, in considering claims that the constitution bars the execution of particular categories of convicted murderers, the Supreme Court has always focused on the offenders' moral culpability and their degree of personal responsibility for the harm resulting from the offense.

This Eighth Amendment requirement is applicable to the States through the Fourteenth Amendment. (*Roper v. Simmons* (2005) 125 S. Ct. 1183, 1190; *Furman v. Georgia* (1972) 408 U.S. 238, 239 (per curiam); *Robinson v. California* (1962) 370 U.S. 660, 666-667.)

As appellant also explained in his opening brief, there is a two part test for determining if the death penalty is appropriate for a particular offense or offender: Does the death penalty comport with contemporary values and does it serve one or both of two penological purposes, retribution or deterrence. (*Gregg v. Georgia* (1976) 428 U.S. 153 at p. 183.)

Appellant explains the application of both portions of the test to this case below.

Contemporary Values and Evolving Standards of Decency

Respondent concedes that there is an evolving standard of decency that prohibits execution of the mentally retarded and juveniles. (Respondent's brief at pp. 277-279). Nevertheless, respondent asserts that since several states have found no problem with executing the mentally ill, there is no evolving standard of decency among the states that would prohibit execution of the mentally ill in California. (Respondent's brief at p. 280.) Citing *People v. Castaneda* (2011) 51 Cal.4th 1292, 1345, respondent points out that this court has held that execution of the mentally ill in California is not an excessive punishment because mental illness is not analogous

to mental retardation or juvenile status for purposes of the death penalty. (Respondent's brief at pp. 279-280.)

Contrary to respondent's argument, however, the same considerations that apply to the moral culpability of the mentally retarded and juveniles apply equally to the severely mentally ill. For example, in *Atkins v. Virginia, supra,* 536 U.S. 304 the High Court held that mentally retarded individuals, "[b]ecause of their impairments, ... have diminished capacities" and noted "their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability." (*Id,* at p.318.) Among the "diminished capacities" of mentally retarded persons noted by the Court was the capacity "to control impulses." (*Ibid.*) The Court noted it was these "cognitive and behavioral impairments that make these defendants less morally culpable." (*Id.*, at p. 320.)

Similar considerations underlie the decision in *Roper v. Simmons* (2005) 543 U.S. 551 concerning the moral culpability of juveniles for murder. First, in persons under age 18, a "lack of maturity and ... underdeveloped sense of responsibility.... often result in impetuous and ill-considered actions and decisions." (*Roper v. Simmons, supra*, 543 U.S. at p. 569, citations omitted.) Second, juveniles "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure." (*Ibid.*, citations omitted.) Juveniles "have less control ... over their own environment." (*Ibid.*, citations omitted.) Therefore, they "lack the freedom that adults have to extricate themselves from a criminogenic setting." (*Id.* at p. 569, quotations omitted].) Third, the Court acknowledged that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed." (*Id.* at p. 570, citations omitted; *Thompson v. Oklahoma* (1988) 487 U.S. 815, 834, quoting *Eddings v. Oklahoma* (1982) 455

U.S.104 at pp. 115-116 ["But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage"]; see also *Johnson v. Texas* (1993) 509 U.S. 350, 367 ["A lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions"].)

These are precisely the same characteristics displayed by the severely mentally ill. (See, e.g., *People v. Danks* (2004) 32 Ca1.4th 269, 322 (conc. & dis. opn. of Kennard, J.) [acknowledging that while the disability at issue in *Atkins* was mental retardation other mental impairments such as schizophrenia may be equally grave because they involve the same "diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others."]; see also *State v. Ketterer* (Ohio 2006) 855 N.E.2d 48, 87 ["The time has come for our society to reexamine the execution of persons with severe mental illness."] .)

While there may be no evolving consensus on executing persons with any degree of mental illness, there is certainly an evolving consensus that persons who have a highly limited capacity to control or understand their behavior are less morally culpable than normal people and should not be subject to the most severe penalties. (See, e.g., *Graham v. Florida* (2010) 560 U.S._·_ [130 S.Ct. 2011, 176 L.Ed.2d 825][categorical ban on life-without-parole [LWOP] sentences for juveniles is required because juvenile offenders are less culpable than adults as they lack maturity, perspective, and are impulsive].)

Retribution and Deterrence

In *Atkins v. Virginia, supra,* the United States Supreme Court reasoned that executing the mentally retarded does not serve either retribution or deterrence. The Court held that because retribution depends on culpability, the lesser culpability of the mentally retarded does not merit the death penalty as an appropriate form of retribution. The court also held that capital punishment can serve as a deterrent only when murder is the result of premeditation and deliberation, that exempting the mentally retarded from the death penalty will not affect the cold calculus that precedes the decision of other potential murderers, and that that sort of calculus is at the opposite end of the spectrum from behavior of mentally retarded offenders. (*Atkins v. Virginia, supra*, 536 U.S. 304, 319.) The Court applied similar reasoning in *Roper v. Simmons, supra*, finding that the lesser degree of moral culpability served neither purpose well. (cite.)

Similar to the rationales in *Atkins* and *Roper*, execution of the severely mentally ill does not serve the penological purpose of either deterrence or retribution. Deterrence is of little value as a rationale for executing offenders with severe mental illness when they have diminished impulse control and planning abilities. Since retribution is based on moral culpability, under the evolving standards of decency, the death penalty for persons who are volitionally impaired is an inappropriate form of retribution.

Although some juries may well seek to punish an offender by death despite the presence of a mental illness impairing self-control does not establish a higher degree of culpability. Allowing a jury to emotionally respond to the horrific details of a sexually violent case and return a death verdict in spite of clear evidence that the person is volitionally impaired is exactly the type of arbitrary result condemned

by Eighth Amendment jurisprudence. "In this context, which involves a crime that in many cases will overwhelm a decent person's judgment, we have no confidence that the imposition of the death penalty would not be so arbitrary as to be 'freakish'". (*Kennedy v. Louisiana* (2008) 128 S.Ct. 2641, 2661, citing *Furman v. Georgia, supra,* 408 U.S. 238.)

Appellant Was (And Is) Severely Mentally Ill

The real crux of respondent's argument is that the evidence will not support a showing that appellant is severely mentally ill. Accordingly, even if there was an evolving consensus that execution of the less morally culpable was prohibited, appellant cannot show that he fits within that protected population. In support of its argument, respondent relies heavily on the testimony of its experts Dr. Mohandie and Dr. Griesemer to the effect that appellant suffered from a mere anti-social personality disorder, not true mental illness. (Respondent's brief at pp. 279-283.)

While it is certainly true that the prosecution experts (and several defense experts as well) noted that appellant suffered from an anti-social personality disorder, respondent fails to fully account for the evidence showing that such a diagnosis was primarily an Axis II diagnosis, not an Axis I diagnosis. There were other significant problems with the prosecution showing as well.

Appellant has an undisputed lifelong documented history of severe mental illness. These diagnoses ranged from epilepsy as a child to a diagnosis of major depression with psychotic features in 1993 (17 RT 2395-2396), a 1995 diagnosis of bi-polar disease (17 RT 2396), a 1996 diagnosis of schizophrenia, bipolar type and a diagnosis of depressive disorder, seizure disorder, and a major mental disorder in the years 1997, 1998, 1999 and 2000. (17 RT 2397.) These latter diagnoses were made primarily by jail and prison physicians - "disinterested state employees" - a

status that gives their conclusions added weight. (See *Strickland v. Francis, supra,* 738 F.2d at pp. 1553-1554.) Even the minority of doctors in the institutions who did not believe appellant had a major mental illness nevertheless noted appellant's lifelong symptoms of mental illness, such as rapid mood swings, hearing voices, suicidal ideation, and that he slit his wrists on 20 occasions. (18 RT 2581.)

Even prosecution expert, Dr. Mohandie, conceded that appellant could be suffering from a major mental illness; he simply could not diagnose it apart from the personality disorder. (18 RT 2602, 2622, 2628.)

As previously explained, the fact that appellant was goal oriented does not preclude a diagnosis of mental illness. Even insane persons can demonstrate goal oriented behavior and often do. (See, e.g., *People v. Duckett, supra*, 162 Cal.App.3d at p. 1121.) Dr. Boone noted that while appellant demonstrated goal oriented behavior by purportedly evading the police for three days (15 RT 2174), his behavior surrounding the offense was almost completely illogical. (15 RT 2174-2175.) The offense was committed with witnesses easily available (15 RT 2179) and appellant left lots of clues making it easy for the police to find him. (15 RT 2192.)

The fact that the abnormal diagnostic tests do not always correlate with or demonstrate a particular behavior does not rule out the likelihood that appellant's abnormal brain activity led to the behavior here. As appellant explained in Issue V-B., although the prosecution's experts asserted that abnormal EEGs and QEEGs are not predictive of specific behavior, that assertion is only partially correct. Appellant argued by analogy that a blood alcohol level of .31 may not be accurately predictive of a specific abnormal driving characteristic such as speeding or weaving through lanes of traffic. Nevertheless, it is beyond dispute that such a high blood alcohol

level has a high correlation with impaired and abnormal driving generally. Thus, a high blood alcohol level is an extremely useful tool in assessing the reasons underlying abnormal driving behavior.

Similarly, an abnormal EEG or QEEG may not be 100% accurate in predicting a specific abnormal behavior such as confused thinking or irrational fear. Nevertheless, there is likely to be a very high correlation between abnormal brain activity and abnormal behavior. It is likely for that reason that, as Dr. Griesemer conceded, clinical practitioners use the QEEG in assessing and treating abnormal behavior. (16 RT 2315.) Further, Dr. Griesemer's opinion fails to account for the additional objective tests done by Dr.'s Boone and Wu showing organic brain dysfunction irrespective of whether it was a byproduct of his youthful epilepsy.

Finally, no prosecution expert fully came to grips with the issue of appellant's medications. As Dr. Vicary pointed out, if appellant was faking mental illness, given the high doses of potent medications he was prescribed at Atascadero and Vacaville, he would have been virtually comatose. (18 RT 2479-2480.) Any person who receives these drugs has to have his or her blood repeatedly tested to be sure that the high doses administered are not toxic or fatal. The blood tests in appellant's medical records confirm that appellant took these high doses. (18 RT 2481.)

As appellant also explained in issue V-B., Dr. Mohandie did not make any credible attempt to respond to this evidence. First, he simply averred that he was not authorized to prescribe theses kinds of drugs. Without any further explanation, the apparent inference the jury was to draw was that he was not totally familiar with them. Nevertheless, when pressed further, he suggested that appellant could have cleverly avoided taking these drugs, thus fooling the medical personnel even for a

period as long as the 15 years encompassed by his medical records. (18 RT 2645-2646.) When advised that blood tests in the medical records proved that appellant was in fact taking these anti-psychotic drugs at these high doses, Dr. Mohandie unreasonably asserted that such information would not change his opinion that appellant was nothing more than a malingerer. (18 RT 2647.)

Nothing in Dr. Mohandie's testimony showed how appellant might have faked the blood test results that showed he ingested large doses of these medications. Dr. Mohandie never offered any further explanation concerning how appellant could tolerate those high doses of anti-psychotic medication if he did not have a major mental illness.

Given this evidence, Dr. Mohandie's opinion that appellant did not suffer from any major mental illness is simply not credible. His refusal to acknowledge the actual nature of appellant's clinical history, or offer a plausible explanation for appellant's tolerance for the large doses of anti-psychotic medication completely undermines his diagnosis of sanity based on antisocial personality disorder. (see *Sargon Enterprises v. USC supra*, 55 Cal.4th at pp. 171-172 [expert opinions based on conjecture do not provide even minimal probative value].) As Justice Mosk observed in *People v. Samuel*, "'[t]he chief value of an expert's testimony ... rests upon the material from which his opinion is fashioned and the reasoning by which he progresses from his material to his conclusions.'" (*People v Samuel*, *supra*, 29 Cal.3d at p. 498; citations omitted; see also *People v. Drew, supra*, 22 Cal.3d at p. 350.)

Absent a credible diagnosis of malingering as a primary cause of appellant's behavior instead of a secondary diagnosis, there is no evidence to dispute the defense showing that appellant suffered from organic brain dysfunction and that he

had a major mental illness.

Finally, procedures authorizing the death penalty for volitionally incapacitated defendants create a constitutionally unacceptable risk that the penalty will be imposed in spite of factors which may call for a less severe punishment. While appellant has not been adjudged insane in the legal sense, he was nonetheless acting under the compulsion of a mental affliction not shared by the public generally. Like the defendant in *Atkins v. Virginia*, *supra*, appellant exhibited a diminished capacity to understand and process information, to abstract from mistakes and learn from experience, to engage in logical reasoning, or to control his impulses. Nonetheless, appellant is being punished as severely as if he premeditated and deliberated a homicide. This sentencing scheme makes no sense in light of appellant's limited ability to control his medical condition.

Because appellant was unable to control his conduct, for which he was convicted and sentenced to death, appellant's execution is barred by the Eighth Amendment's requirement of proportionality. The imposition of the death penalty on offenders so mentally ill that they are unable to control their behavior offends a longstanding collective judgment of the American people, as expressed in their laws and sentencing practices. Such sentences are grossly disproportionate to such offenders' moral culpability, they serve no permissible penological goal, and they carry an enhanced risk of error. Because such an anomalous sentence was imposed upon appellant, the Cruel and Unusual Punishment Clause of the Eighth Amendment requires that the sentence be vacated.

Because appellant's significant mental impairments make him identically situated in all relevant respects to persons whose youth or mental retardation categorically exempt them from the imposition of a sentence of death, appellant's

death sentence also violates the equal protection and due process clauses of the Fifth, Sixth, and Fourteenth Amendments.

VIII.

CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION.

Summary of Appellant's Argument

In his opening brief, appellant argued that many features of California's capital sentencing scheme, alone or in combination with each other, violate the United States Constitution. Because challenges to most of these features have been rejected by this Court, appellant presented these arguments in an abbreviated fashion sufficient to alert the Court to the nature of each claim and its federal constitutional grounds, and to provide a basis for the Court's reconsideration. Individually and collectively, these various constitutional defects require that appellant's sentence be set aside.

To avoid arbitrary and capricious application of the death penalty, the Eighth and Fourteenth Amendments require that a death penalty statute's provisions genuinely narrow the class of persons eligible for the death penalty and reasonably justify the imposition of a more severe sentence compared to others found guilty of murder. The California death penalty statute as written fails to perform this narrowing, and this Court's interpretations of the statute have *expanded* the statute's reach.

As applied, the death penalty statute sweeps virtually every murderer into its grasp, and then allows any conceivable circumstance of a crime – even circumstances squarely opposed to each other (e.g., the fact that the victim was young versus the fact that the victim was old, the fact that the victim was killed at

home versus the fact that the victim was killed outside the home) – to justify the imposition of the death penalty. Judicial interpretations of California's death penalty statutes have placed the entire burden of narrowing the class of first degree murderers to those most deserving of death on Penal Code § 190.2, the "special circumstances" section of the statute – but that section was specifically passed for the purpose of making every murderer eligible for the death penalty.

There are no safeguards in California during the penalty phase that would enhance the reliability of the trial's outcome. Instead, factual prerequisites to the imposition of the death penalty are found by jurors who are not instructed on any burden of proof, and who may not agree with each other at all. Paradoxically, the fact that "death is different" has been stood on its head to mean that procedural protections taken for granted in trials for lesser criminal offenses are suspended when the question is a finding that is foundational to the imposition of death. The result is truly a "wanton and freakish" system that randomly chooses among the thousands of murderers in California a few defendants for the ultimate sanction. The lack of safeguards needed to ensure reliable, fair determinations by the jury and reviewing courts means that randomness in selecting who the State will kill dominates the entire process of applying the penalty of death.

Summary of Respondent's Argument

Respondent urges that all of appellant's arguments have previously been rejected by this court and appellant does not present any compelling reasons for a new review of those issues. Respondent then addresses appellant's arguments by generally setting forth this court's position on the thrust of appellant's argument. (Respondent's brief at pp. 135-145.)

Errors in Respondent's Argument

In his opening brief, appellant acknowledged that this court has approved these statutes generally but explained in detail why the application of these statutes was not appropriate here and why this court should revisit those previous decisions. Since respondent has chosen not to address the merits of any of appellant's arguments, appellant relies on the arguments made in its opening brief rather than simply repeating them here.

IX.

IF ANY COUNT OR SPECIAL CIRCUMSTANCE IS REDUCED OR VACATED, THE PENALTY OF DEATH MUST BE REVERSED AND THE CASE REMANDED FOR A NEW PENALTY PHASE TRIAL

Summary of Appellant's Argument

Even if the errors in appellant's case standing alone do not warrant reversal, the court should assess the combined effect of all the errors. Multiple errors, each of which might be harmless had it been the only error, can combine to create prejudice and compel reversal. (*Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15; *Phillips v. Woodford* (9th Cir. 2001) 267 F.3d 966, 985.)

Appellant has identified numerous errors that occurred at each phase of the trial proceedings. Each of these errors individually, and all the more clearly when considered cumulatively, deprived appellant of due process, of a fair trial, of his right to trial by a fair and impartial jury and to a unanimous jury verdict and of his right to fair and reliable guilt and penalty determinations, in violation of the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments. Further, each error, by itself is sufficiently prejudicial to warrant reversal of appellant's convictions and death sentence; but even if that were not the case, reversal would be required because of the substantial prejudice flowing from the cumulative impact of the errors.

Summary of Respondent's Argument

Respondent urges that there were no errors in this case, thus there could be no cumulative error or prejudice flowing therefrom. (Respondent's brief at p. 293 .)

Error in Respondent's Argument

Respondent does not address the situation where this court might disagree

and find one or more errors in the guilt or penalty phases of appellant's trial. Implicitly, therefore, respondent appears to concede that such errors may be cumulatively prejudicial.

Regardless of any such concession, however, there is a more fundamental problem with respondent's argument. Heightened reliability is required in capital litigation. Reliability, however, is not the primary focus of respondent's answer. Nowhere in respondent's answer does it explain how the challenged procedures in this case contributed to the overall reliability of the penalty phase fact finding process. Instead, respondent's insistence on waiver and harmless error provide little assistance to this court in its duty to ensure fundamental fairness.

The errors in this case are overwhelmingly prejudicial, both individually and cumulatively. More important, individually and cumulatively, these errors undermined the reliability of the death verdict. Our system of justice relies on process. If the trial process is just and fair, then the result will be reliable. (*California v. Ramos* (1983) 463 U.S. 992, 998-999.) If the process is fundamentally flawed, however, it cannot be redeemed by resort to waiver or harmless error analysis. As appellant explained in both his opening and reply briefs, the death penalty process in California is fatally flawed in statute and it was flawed in its application to this case. Therefore, appellant's conviction and his death judgment must be set aside.

CONCLUSION

For the reasons set forth herein and in appellant's opening brief, the multiple guilt phase errors involving an *Ireland* merger violation, insufficient evidence of torture, insufficient evidence of rape, insufficient evidence of first degree premeditated murder, insufficient evidence to show the defendant was sane at the time of the offense, and the improper admission of the gang/tattoo evidence all compel reversal of appellant's convictions.

The penalty phase errors include the gang/tattoo evidence that was presented at both phases of trial, insufficient evidence to support a finding that the mayhem and torture special circumstances were separate and not "incidental" to the homicide, the Constitutional violation in executing the severely mentally ill and the various flaws in California's death penalty statute all combined to undermine confidence that the sentence of death was appropriate. Therefore, the sentence, as well as the convictions must be set aside.

Respectfully Submitted,

R. Clayton Seaman, Jr
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
Tel. No. 928 776 9168
Bar No 126315

CERTIFICATE OF WORD COUNT

I am the attorney for appellant Troy Lincoln Powell. Based upon the word-count of the Word Perfect program, I hereby certify the length of the foregoing brief, including footnotes but not including tables, this certificate or the proof of service, 21,596 is words. (California Rules of Court, rule 8.630 (b)(1)(A).)

I declare under penalty of perjury of the laws of the State of California that the foregoing is true.

Date: November 25, 2013

R. Clayton Seaman, Jr
Attorney at Law
P.O. Box 12008
Prescott, AZ 86304
CA State Bar # 126315

S137730

PROOF OF SERVICE BY MAIL AND DECLARATION
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STATE OF ARIZONA, COUNTY OF YAVAPAI

I, Nancy D. Seaman, declare as follows:

I am over eighteen (18) years of age and not a party to the within action. My business address is P.O. Box 1200, Prescott, AZ 86304. On November 25, 2013 I served the within

Appellant Powell's Reply Brief

on each of the following, by placing a true copy thereof in a sealed envelope with postage fully prepaid, in the US mail at Prescott, AZ addressed as follows:

Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-3600

Clerk of the Court
Criminal Division
210 W. Temple Street
Los Angeles, CA 90012
Attn. Hon. William R. Pounders

Office of the Attorney General
Attn: Pamela Kamenaka
300 S. Spring Street
Los Angeles, CA 90013

California Appellate Project
Attn: Scott Kauffman
101 Second St., Ste 600
San Francisco, CA 94105

Office of the District Attorney
Attn. Vivian Moreno
210 W. Temple St
Los Angeles, CA 90012

Mr. Troy L. Powell V98801
CSP San Quentin
1 - East Block - 4
San Quentin CA 94974

James Bisnow
Attorney at Law
880 West First Street, Suite 304
Los Angeles, CA 90012

I declare that the document was printed on recycled paper. Further, I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct and that I signed this declaration on November 25, 2013 , at Prescott, Arizona.

Nancy D. Seaman