CRIMINAL LAW

FELONY-MURDER RULE

AN ASSAULT RESULTING IN HOMICIDE MAY BE USED TO INVOKE THE FELONY—MURDER RULE. *State v. Thompson*, 88 Wn. 2d 13, 558 P.2d 202 (1977).

In *State v. Thompson*, the Washington Supreme Court held by a 5-4 majority that for purposes of the second-degree felony-murder statute[1] an inherent assault[2] does not merge into the resulting homicide.[3]

The defendant, who shot and killed her husband, was convicted of second-degree murder. Minutes before his death, the deceased had beaten his wife, the defendant, with a wine bottle and had threatened to kill her. At trial she claimed that the shooting was in self-defense. The supreme court in affirming the trial court's decision held that the assault inherent in the homicide did not merge with the homicide and could be used to support her felony-murder conviction. This application of the felony-murder rule relieved the prosecution of the burden of proving homicidal intent which is an essential element of the charge of second-degree murder.

Washington virtually stands alone in its position that an inherent assault may be used to invoke the felony-murder rule.[4] In

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1. Ch. 249, § 141, 1909 Wash. Laws at 930-31 (current version at WASH. REV. CODE § 9A.32.050(1)(b) (1976)).

2. Ch. 249, § 169, 1909 Wash. Laws at 936-37 (current version at WASH. REV. CODE § 9A.36.020 (1976)).

3. The court also held that the withholding of the trial court's consent to waiver of defendant's right to a jury trial in a criminal case pursuant to WASH. REV. CODE § 10.01.060 (1976) and WASH. CT. R. (Cr.R) 6.1(a) will not constitute reversible error unless shown to be based on prejudice or abuse of discretion. By virtue of sound reasons given by the trial judge for withholding consent, nothing further need be shown. The court stated that the right to waiver of a jury trial is not a constitutional right. 88 Wn. 2d at 15-16, 558 P.2d at 203. The court also dismissed appellant's contention that there was insufficient evidence to support a verdict of guilty. Pointing to the procedural effects of such a challenge and viewing the evidence in that light, the court found sufficient evidence to send the case to the jury and support the verdict. *Id.* at 16, 558 P.2d at 203. These issues are outside the scope of this case note and will not be addressed further.

4. The majority in *Thompson* was of the impression that Washington's position on

State v. Harris[5] the Supreme Court of Washington first expressly refused to adopt the merger doctrine, which requires that the underlying felony supporting a felony-murder conviction be independent of the homicide. The *Harris* court reasoned that the merger doctrine was not necessary because Washington's statutes did not permit an assault to support a first-degree murder conviction as did statutes in some other jurisdictions where the merger doctrine had been adopted.[6]

The *Thompson* court found no compelling reasons that would require *Harris* to be overruled.[7] The legislature's failure subsequent to the *Harris* decision to create an exception to the felony-murder statute for felonies inherent in the homicide suggested to the court that the legislature approved of the court's strict construction of the statute.[8] The court acknowledged that the rule may be "harsh" and that it "relieve[s] the prosecution from the burden of proving intent to commit murder [but] it is the law of this state."[9]

Before the merger doctrine can be understood, a brief discussion of the felony-murder rule itself is necessary. Through operation of the felony-murder rule a person whose conduct has brought about an unintended death during the commission or attempted commission of a felony is guilty of murder.[10] The rationale behind the rule was that one who had committed a felony was a bad person with a bad state of mind who had caused a bad result, so that society should not worry too much about the fact that the fatal result accomplished was quite different from that intended.[11] Thus, by legal fiction, the felon's intent to commit the felony was substituted for the intent to cause the victim's death.

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the merger of the felony of assault with an ensuing homicide is shared by Maine. As suggested by the dissent in a footnote, Maine has not clearly defined its position. 88 Wn. 2d at 23 n.4, 558 P.2d at 205 n.4. *See* Annot., 40 A.L.R.3d 1341, 1346 (Supp. 1976).

Two states which do appear to have recently considered and rejected the merger doctrine and which are not mentioned in the annotation are Illinois and Georgia. *See* People v. Viser, 62 Ill. 2d 568, 343 N.E.2d 903 (1975); Baker v. State, 236 Ga. 754, 225 S.E.2d 269 (1976).

5. 69 Wn. 2d 928, 421 P.2d 662 (1966).
6. *Id.* at 933, 421 P.2d at 665.
7. 88 Wn. 2d at 18, 558 P.2d at 205.
8. *Id.*
9. *Id.* at 17, 558 P.2d at 205.
10. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 545 (1972).
11. *Id.* at 560.

Originally developed in England during the 17th century, the rule was of little consequence to those subject to it because all felonies were punishable by death.[12] As lesser penalties came to be imposed for different offenses classified as felonies, various limitations were placed on its application.[13] Today, a major limitation is the prohibition of the rule's operation where the felony relied on is an integral part of the homicide.[14]

Washington has codified the "artificial concept"[15] of the felony-murder rule into two separate provisions. One involves homicides that result from the commission or attempted commission of first or second-degree robbery, rape, burglary, arson, or kidnapping. These felonies will support a charge of first-degree murder.[16] The other applies to "any felony other than those enumerated . . .,"[17] and prescribes a charge of second-degree murder. The statute is silent on the specific possibility that an assault that causes death might, as a "felony other than those enumerated" support a felony-murder charge and conviction without regard to the defendant's intent to kill[18] or the circumstances giving rise to the assault. Thus far this potentiality has only been exercised by the state where the assault was caused by a deadly weapon.[19] Nevertheless, even this restricted use of

12. R. PERKINS, CRIMINAL LAW 44 (2d ed. 1969); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 560-61 (1972).

13. *See* Note, *The Doctrine of Merger in Felony-Murder and Misdeameanor-Manslaughter*, 35 ST. JOHN'S L. REV. 109 (1960). *See also* R. PERKINS, *supra* note 12, at 38 for a concise history of the limitations made on the felony-murder rule.

14. *See* Annot., 40 A.L.R.3d 1341, 1345 (1971).

15. People v. Wilson, 1 Cal. 3d 431, 441, 462 P.2d 22, 28, 82 Cal. Rptr. 494, 500 (1969) (quoting People v. Phillips, 64 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1969)).

16. WASH. REV. CODE § 9A.32.030(c) (1976).

17. WASH. REV. CODE § 9A.32.050(1)(b) (1976).

18. It is interesting to note that the relevant portions of the assault statute were recently changed in regard to the degree of culpable intent required. Prior to its revision the statute used the term "willfully" in reference to the actor's conduct. Ch. 249, § 169, 1909 Wash. Laws at 936-37. The new criminal code uses the term "knowingly." WASH. REV. CODE § 9A.36.020(c) (1976).

19. *See* note 2 *supra*. *See also* State v. Williams, 4 Wn. App. 411, 481 P.2d 918 (1971). In State v. Mosley, 84 Wn. 2d 608, 528 P.2d 986 (1974), where the defendant had fatally assaulted his victim with his fist rather than a deadly weapon, the application of Washington's second-degree felony-murder rule prompted the Washington Supreme Court to reconsider its position, acknowledging that it was not the general rule. *Id.* at 609, 528 P.2d at 986. Prior to hearing, however, the defendant fled the jurisdiction, thereby waiving his right to prosecute his appeal, so the previously granted petition for review was dismissed.

second-degree felony-murder raises serious constitutional issues.[20]

Other jurisdictions confronting this problem have dealt with it either by adopting the merger doctrine[21] or by interpreting "felony" to mean a felonious act committed with an independent design and not an inherent part of the homicide.[22] There are good reasons for making this distinction between felonious acts committed with an independent design not an inherent part of the homicide and those which are an essential part of the homicide. To ascertain these, one must look to the theories behind the rule.

The theories underlying the felony-murder rule can be divided into two general areas; the transferred or constructive intent justification,[23] and the deterrence theory.[24] According to the transferred or constructive intent analysis, the purpose of the felony-murder rule is to relieve the state of the burden of proving premeditation or malice: "Since malignant purpose was established by proof of defendant's 'other felony,' malice was redundant with reference to the killing."[25] By proof of the perpetration of a separate felony, general malicious intent is transferred from that crime to the homicide, thus elevating the homicide to the crime of murder. The deterrence theory, on the other hand, posits that "[t]he purpose of the felony-murder rule is to deter felons from killing negligently or accidently by holding them strictly responsible for the killings they commit."[26] Despite these justifications, the rule has been denounced as out-

20. *See* notes 50-61 and accompanying text *infra.*

21. State v. Essman, 98 Ariz. 228, 403 P.2d 540 (1965); People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); State v. Moffitt, 199 Kan. 514, 431 P.2d 879 (1967).

22. *See, e.g.*, State v. Shock, 68 Mo. 552 (1878).

23. State v. Thompson, 88 Wn. 2d 13, 22, 558 P.2d 202, 208 (1977); State v. Branch, 244 Or. 97, _____, 415 P.2d 766, 767 (1966). Use of the term "transferred intent" is indeed unfortunate in that it can be confused with the same term as used in tort. Partially for this reason, some writers analyze this rationale in terms of the felon's general malicious intent being so onerous that although the act has caused a result worse than intended, severe felonious consequences should nonetheless attach to them. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 560 (1972).

24. People v. Washington, 62 Cal. 2d 777, 778, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

25. State v. Branch, 244 Or. 97, ____, 415 P.2d 766, 767 (1966).

26. People v. Washington, 62 Cal. 2d 777, 781, 402 P.2d 130, 133, 44 Cal. Rptr. 442, 445 (1965).

dated[27] and ill-suited to the ends of modern criminal justice.[28] Because the felony-murder rule rests for its validity on either the deterrence or transferred intent theory, it ceases to fulfill its purpose when applied to an assault which is an integral part of the homicide. There exists no separate felony from which malicious intent can be transferred. Without such separate intent, the inference of intent to kill cannot be logically sustained. The "malignant purpose" of an assault, which is fatal, cannot be "redundant" with reference to the resultant homicide when they comprise the same act and purpose.[29] Moreover, in terms of deterrence, holding a felon strictly liable for the resulting homicide will hardly encourage him to assault more carefully.[30]

Of particular concern to defense counsel in *Thompson* was the fact that as a practical matter, permitting the defendant's precedent assault to support a felony-murder charge may hamper the defendant's ability to defend.[31] Elements of justification such as self-defense or acting in resistance to a felony,[32] are

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27. R. PERKINS, *supra* note 12, at 44: "At the present time, with the removal of most felonies from the category of capital crimes, the reason for the rule has ceased to exist."

28. *See* Note, *Felony Murder in Georgia: A Lethal Anachronism?*, 9 GA. ST. BAR J. 462 (1973):

> [D]evelopments have occurred over the years which negate the original logic behind the rule and make its retention in an unrestricted form an unjustifiable and lethal anachronism. First, the great majority of felonies are no longer punished with the same severity as murder. Thus, it can no longer be said that one who commits a felony is automatically subject to the same penalties imposed for an intentional murder. The second important development is the shifting focus of criminal law to the culpability of the defendant. The apparent belief is that an actor's punishment must bear some relationship to the risks his conduct has created.

Id. at 481. *See also* O. W. HOLMES, JR., THE COMMON LAW 57-58 (1881); W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 560-61 (1972); MODEL PENAL CODE § 201.2, Comment (Tent. Draft No. 9, 1959).

29. As noted by the dissent, "there exists no separate actus reus coupled with a felonious intent which may be 'transferred' to the act resulting in death." 88 Wn. 2d at 25, 558 P.2d at 209 (Utter, J., dissenting).

30. While it is conceivable that such strict liability might fulfill the deterrent purpose to the extent that it discourages a felon from committing the felony in the first place, especially where a deadly weapon is involved, this deterrent effect would be in addition to the punishment which commission of a particular crime imposes and, as such, is of doubtful impact.

31. Brief for Appellant at 41-42, State v. Thompson, 88 Wn. 2d 13, 558 P.2d 202 (1977).

32. WASH. REV. CODE § 9A.16.050(1),(2) (1977).

measured by the jury, not in relation to the intended act, assault, but in relation to the fact of a homicide. The jury, by focusing on Mr. Thompson's killing may have concluded that while the defendant might have been justified in assaulting her husband under the circumstances, she surely was not justified in taking his life.[33] With all crimes, though, the focus should properly be on the particular offense intended. The intent was to assault, but the result was homicide. By artificially imputing the intent to kill from the intent to commit the inherent felony, the felony-murder rule has effectively placed an additional burden upon the defendant in presenting his or her own defense.[34]

In contrast to the above reasons for differentiating between independent and inherent felonies when considering the applicability of the felony-murder rule, it is at least arguable that the confusion which is likely to result from application of the felony-murder rule where an assault is inherent in a homicide, may only be compounded when the merger doctrine is applied. The difficulty is in determining which felonies merge to prevent application of the felony-murder rule. One writer suggests use of the "intent" and "act" tests as a useful means of analysis.[35] According to the intent test, the underlying felony would merge where it "was not done with the intent to commit injury which would cause death."[36] By applying the broader act test "the felony and the homicide are merged where they both result from the same act."[37] Both methods provide a rational basis upon which to analyze the facts and circumstances,[38] thereby eliminating much of the possible confusion.

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33. In State v. Wanrow, 88 Wn. 2d 221, 559 P.2d 548 (1977), the court has held that jury instructions which effectively impose the same standard of reasonable force in defense of self for women as for men is prejudicial and constitutes reversible error. *Id.* at 241, 559 P.2d at 559. Mrs. Thompson's assault upon her husband, allegedly committed in self-defense, may well have been measured in a similarly misleading and prejudicial manner.

34. Indeed, as applied in California, where diminished capacity is a viable defense, CAL. PENAL CODE § 26(5) (West Supp. 1977), a felony-murder instruction based on the underlying felony of assault was found to preclude the defense. People v. Moore, 5 Cal. App. 3d 486, 492, 85 Cal. Rptr. 194, 198 (1970) (citing with approval People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969)).

35. Comment, *Merger and the California Felony-Murder Rule*, 20 U.C.L.A. L. REV. 250 (1972).

36. *Id.* at 270 (quoting People v. Mattison, 4 Cal. 2d 177, 185, 481 P.2d 193, 198, 93 Cal. Rptr. 185, 190 (1971)).

37. *See* Comment, *supra* note 35, at 270.

38. Another writer proposed an analysis focusing on the results of the felon's ac-

The most convincing reason for rejecting the merger doctrine is that the authority to charge assault under the second-degree felony-murder rule comes from the legislature and makes an exception only for the felonies listed in the first-degree murder statute.[39] Moreover, the legislature's failure to modify the felony-murder statute during its recent revision[40] of the criminal code could be construed as approval of the court's holding in *Harris* and tacit rejection of the merger doctrine.[41] The refusal of the court to adopt the merger doctrine in *Harris* was based primarily upon the legislature's foresight in having "avoided the [New York] merger problem by specifically designating the felonies which result in a first or second-degree felony-murder charge."[42] While the legislature may have avoided the New York merger problem—that of a homicide resulting from assault being held murder in the first-degree[43]—the legislature did not respond to Washington's problem. In Washington the problem is that of automatically converting into second-degree murder a homicide which should properly be viewed as manslaughter.[44]

Although it is true that the legislature did not change the *Harris* rule when it revised the criminal code, the court should not have allowed this fact to control its decision.[45] Every

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tion: "A possible answer to the confusion of determining which felonies and misdemeanors merge to prevent felony murder charges may be found in the employment of the term 'efficient cause.' Using this concept, the courts determine if the underlying offense was the 'efficient cause' of the homicide or merely contributed collaterally to the homicide. Thus, in a fatal assault, it is the act of the assault itself which produces the homicide." Note, *The Doctrine of Merger in Felony-Murder and Misdemeanor-Manslaughter*, 35 ST. JOHN'S L. REV. 109, 126 (1960).

39. Brief for Respondent at 12, State v. Thompson, 88 Wn. 2d 13, 558 P.2d 202 (1977).

40. WASH. REV. CODE tit. 9A (1976).

41. 88 Wn. 2d at 18, 558 P.2d at 205.

42. 69 Wn. 2d 928, 933, 421 P.2d 662, 665 (1966).

43. *See* People v. Moran, 246 N.Y. 100, 158 N.E. 35 (1927).

44. This flaw in the *Harris* court's reasoning is highlighted by the fact that California, where similar distinctions are made between first and second-degree murder, CAL. PENAL CODE § 189 (West Supp. 1977), and Oregon, whose homicide statute was in pertinent part virtually identical to Washington's, OR. REV. STAT. § 163.010(1)-.020 (1975), have adopted the merger doctrine. *See* People v. Ireland, 70 Cal. 2d 522, 450 P.2d 580, 75 Cal. Rptr. 188 (1969); State v. Branch, 244 Or. 97, 415 P.2d 766 (1966).

45. There is some evidence that the inaction of the legislature represented nothing of the sort. *See* State v. Thompson, 88 Wn. 2d at 26 n.5, 558 P.2d at 210 n.5 (Utter, J., dissenting). *See also*, Petition for Rehearing at 2 n.1, State v. Thompson, 88 Wn. 2d 13, 558 P.2d 202 (1977):

homicide necessarily includes an assault; therefore, when a defendant is on trial for murder or manslaughter he is also on trial for the lesser included offense of assault. To allow an assault to elevate an offense traditionally and explicitly designated as manslaughter to the more serious crime of murder merely because it is included-in-fact in the homicide, would defeat the legislature's purpose in delineating different degrees of homicide.[46] In view of the respective punishments attached to the crimes and the conclusive presumption implicit in Washington's version of the felony-murder rule, preservation of the distinction is necessary to maintain these traditional standards for degrees of culpability.[47]

The most persuasive arguments for adopting the merger doctrine are the constitutional considerations mentioned in passing by the majority and articulated by Justice Utter in the dissent. The dissent asserted that any statutory formulation which negatives the requirement of proof of an essential element of the crime, such as specific intent, is violative of substantive due process.[48] Since the felony-murder rule infers malicious intent from

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While the proposed code revisions were being considered by the Washington Legislature, the Court, in State v. Mosley, [citation omitted] granted a petition to review the "non-merger rule" of State v. Harris, [citation omitted]. Although the petition was dismissed when petitioner escaped from custody, the Court's action in granting the petition signaled the legal community of the Court's intention to overrule the *Harris* decision. There is some reason to believe that the legislature was influenced by the *Mosley* decision.[1] Indeed, contrary to the majority implication that the legislature intended to sustain *Harris*, the opposite conclusion is indicated by the affirmative acts of the legislature in adopting the revised criminal code.

1. Associate Professor John Strait, acting in a consultant capacity for the Senate Judiciary Committee, was informed that in light of the apparent desire of the Court to adopt the merger rule, it would be unnecessary to codify the merger rule through statutory revision.

46. Beyond this issue looms the question posed by the dissenters in *Harris* and reviewed by the dissent in *Thompson*: "The dissenters in *Harris* pointed out that the use of the rule approved by the majority would effectively convert into second-degree murder any crime properly viewed as manslaughter, because manslaughter itself is a felony, and that prevention of precisely such a result was the purpose of the New York court in adopting the felony-merger rule." 88 Wn. 2d at 24, 558 P.2d at 209 (Utter, J., dissenting).

47. Maintenance of such distinction may be mandatory. WASH. REV. CODE § 9A.080.010(3) (1977) provides:

When the grade or degree of an offense depends on whether the offense is committed intentionally, knowingly, recklessly or with criminal negligence, its grade or degree shall be the lowest for which the determinative kind of culpability is established with respect to any material element of the offense.

48. 88 Wn. 2d at 24-25, 558 P.2d at 208 (Utter, J., dissenting).

proof of a separate felony, if the felony relied on is inherent in the homicide, no distinct felonious intent can be "transferred" because the act is an indivisible transaction.[49] In fact, such a "transfer" cannot be reconciled with Washington's strict approach to conclusive presumptions in criminal cases.

In a recent line of cases, the Supreme Court of Washington has established a series of standards designed to test the constitutionality of presumptions in the criminal law. In *State v. Kroll*,[50] and more recently in *State v. Roberts*,[51] the Washington Supreme Court held that Washington's criminal presumption that felonious homicide was murder in the second-degree, impermissably shifted the burden of persuasion and thus relieved the prosecution of proving every element of the crime beyond a reasonable doubt.[52] Further, the court found that in order to withstand constitutional scrutiny under the due process clause, the fact presumed must follow the fact proven beyond a reasonable doubt.[53] In *Roberts*, the presumption of second-degree murder, which includes intent to kill, did not follow the proven fact of homicide by the defendant beyond a reasonable doubt.[54] Similarly, the conclusive presumption of second-degree murder in the felony-murder rule does not follow the proven fact of an assault beyond a reasonable doubt.[55]

The final constitutional issue raised by the dissent was that operation of the felony-murder rule without including the merger doctrine violates equal protection.[56] The net effect of the court's decision in *Thompson* is to preserve the substantial prosecutorial discretion that *Harris* allowed in charging manslaughter or murder in the second-degree for the same homicide. This degree of discretion may be violative of the equal protection clause[57] and the principle of impartial administration of justice.[58] As the dissent stated:

49. *Id.* at 25, 558 P.2d at 209 (Utter, J., dissenting).
50. 87 Wn. 2d 829, 558 P.2d 173 (1976).
51. 88 Wn. 2d 337, 562 P.2d 1259 (1977).
52. *Id.* at 342, 562 P.2d at 1261.
53. *Id.* at 340-41, 562 P.2d at 1261. *See* State v. Alcantara, 87 Wn. 2d 393, 552 P.2d 1049 (1976), State v. Odom, 83 Wn. 2d 541, 520 P.2d 152 (1974).
54. 88 Wn. 2d at 341, 562 P.2d at 1261.
55. 88 Wn. 2d at 21 n.1, 558 P.2d at 207 n.1 (Utter, J., dissenting).
56. *Id.* at 26, 558 P.2d at 210 (Utter, J., dissenting).
57. *Id.* at 21, 558 P.2d at 207 (Utter, J., dissenting).
58. *Id.* at 26, 558 P.2d at 210 (Utter, J., dissenting).

> Thus the prosecution could, by providing precisely the same facts, subject the defendant to substantially different penalties based upon varying proofs, depending upon his own judgment as to the appropriate charge. The broad discretion which results in this instance creates a possibility for unequal treatment under the law which cannot pass constitutional muster.[59]

The Washington Supreme Court's refusal in *Thompson* to adopt the merger rule and overrule *Harris* reaffirms an application of the felony-murder rule which is an extension beyond "any rational function that it is designed to serve."[60] Had the court changed the *Harris* ruling, the legislature's carefully defined statutory scheme of graded offenses intended to differentiate degrees of culpability and relate punishment accordingly, would not now be obscured. In light of these effects and their constitutional implications, the court should change its position in the future.

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59. *Id.* at 27, 558 P.2d at 210 (Utter, J., dissenting). *See also* Yick Wo v. Hopkins, 118 U.S. 350 (1886), where the U.S. Supreme Court held that a law which on its face might appear to be impartial might be applied in such a way as to violate the equal protection clause of the fourteenth amendment.

The prosecutorial decision of what charge to assign in an offense which might otherwise qualify as manslaughter may be motivated by several considerations such as: (1) to reflect press and public pressures (2) to rid society of certain offenders and (3) to promote suspect cooperation with enforcement agencies. It is not clear whether these constitute compelling state interests sufficient to justify exercise of such discretion by the state. F. MILLER, PROSECUTION, THE DECISION TO CHARGE A SUSPECT WITH A CRIME 281-92 (1969).

60. People v. Ireland, 70 Cal. 2d 522, ____, 450 P.2d 580, 590, 75 Cal. Rptr. 188, 198 (1969).