IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA Plaintiff and Respondent, v. JEFFREY SCOTT YOUNG, Defendant and Appellant.	Calif. Supreme Court No. S148462 San Diego Co.Super. Ct. No. SCD173300

APPELLANT' S OPENING BRIEF

Honorable, James M. Thompson, Judge

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Supreme Court

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MISCELLANEOUS

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INTRODUCTION

The crimes at issue here are robbery-felony murders, committed for the usual venal reasons but not from racial animus. The prosecutor did not charge any hate-crime or gang enhancements and did not allege any gang or hate-crime special circumstances, and yet both the guilt and penalty phases were unfairly dominated by irrelevant and prejudicial evidence of appellant's racist tattoos and skinhead beliefs. (Arg. II & VIII.)

Appellant was found guilty of special circumstance murder but after six days the jury could not agree as to the appropriate penalty and a mistrial was declared. A second penalty trial was conducted, and the second set of jurors deliberated for almost six days before finally reaching a verdict of death. Appellant contends that the California statute mandating a second penalty trial after the first penalty jury fails to reach a verdict is unconstitutional under the Eighth Amendment. (Arg. VII, below.)

At the second penalty trial, the trial court had an extremely broad and erroneous view of aggravating evidence, and allowed victim impact evidence by proxy; speculative victim impact evidence; and victim impact evidence as to an unrelated offense that had occurred seven years earlier and in which appellant had not personally caused any injury. (Arg. IX.)

STATEMENT OF THE CASE

Amended Information number 173300 was filed in San Diego County Superior Court on September 16, 2005,[1] charging appellant in counts one and two with the murders of Teresa Perez and Jack Reynolds, respectively, in violation of Penal Code[2] section 187. Multiple murder and robbery felony murder special circumstances were alleged pursuant to sections 190.2(a)(3) & (17). Count three charged appellant with the attempted murder of Daniel Maman, in violation of sections 187 and 664, to which firearm allegations were attached pursuant to sections 120225.3(b)(c) and 12022.5(a)(1). Count four charged appellant with carjacking from James Gagarin in violation of section 215(a); firearm allegations under sections 12022.53(b) and 12022.5(a) were attached. All

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1 The original Information, filed on August 18, 2003, charged David Raynoha as codefendant. (1CT 49.) Although the record is not clear, Raynoha's attorney apparently declared a conflict that delayed Raynoha's ability to proceed to trial; appellant was tried alone. (3RT 388-402.)

2 All further statutory references are to the Penal Code unless expressly stated otherwise.

counts arose from a single incident on the night of July 17-18, 1999. (5CT 1166-70.)

Jury selection began on September 16, 2005 and testimony began on September 29, 2005. (12CT 2713, 2722.) On October 20, 2005, the jury found appellant guilty as charged, with true findings on all allegations. (6CT 1496-1505; 12CT 2751-60.) The penalty phase of the trial began on October 25, 2005. (12CT 2763.) The jury was unable to reach a verdict as to penalty and the trial court declared a mistrial on November 10, 2005. (12CT 2790-92.)

Jury selection for the second penalty phase began on June 14, 2006 and testimony began on June 19, 2006. (12CT 2806, 2810.) On July 24, 2006, after more than six days of deliberations, the jury returned a death verdict. (12CT 2848-58.) On November 28, 2006, the trial court denied appellant's motions for new trial and for reduction of sentence and imposed the sentence of death. (12CT 2861-63.)

Appellant first sets out the facts elicited in the guilt and special circumstance phase of the trial. Because the jury that heard these facts did not reach a verdict at the penalty phase, the facts of the crime were elicited for the second penalty phase jury as factor (a) "circumstances of the crime" evidence. Appellant sets forth the facts of the crime only once, in the following section summarizing the guilt and special circumstance phase of the first trial.

The facts adduced as to the circumstances of the crime at the second penalty trial were similar to those adduced at the guilt phase of the trial, and are not summarized again under the statement of facts for the second penalty trial. However, there were significant differences in the aggravating evidence introduced at the two penalty phases, and those differences are set out and addressed in Argument VI, Part F, pages 139-146, below.

STATEMENT OF FACTS – GUILT AND SPECIAL CIRCUMSTANCE PHASE

A. Evidence Presented by the Prosecution.

1. Background: Torkelson plans the robbery.

The prosecution's theory was that James "Woody" Torkelson, a security guard for City Events Security who was assigned to the Five Star parking lot near the San Diego airport, had orchestrated a robbery; and that appellant, Torkelson's cousin David "Wolf" Raynoha, and Torkelson's friend Max "Tiger" Anderson had carried it out on the night of July 17-18, 1999, while Torkelson was pretending to guard the site.[3]

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[3] The Five Star lot contracted with City Events Security to provide security guards at the lot. City Events president Aaron Johnson testified that Torkelson was hired as a guard in May of 1999, and was issued a temporary state card pending a formal background check. (27RT 2176-79.) All City Events guards were unarmed but were supplied with uniforms and two-way radios. (27RT 2183, 2189-90.)

Torkelson did not show up for his shift on July 12 and was fired, pursuant to company policy. (27RT 2183, 2186-88, 2201-05.) On the night of July 17-18, David Bond was scheduled to work security at the Five Star lot. When Bond arrived, Torkelson was there and told him he could leave. Bond figured it was a scheduling error and left. At midnight, Torkelson told guard Pelvic Reid that he could leave. Torkelson seemed edgy and Reid had heard he had been fired, so he checked with his supervisor who told him he could leave. (27RT 2156-63, 2165-70, 2189.) Both attendants noticed that Torkelson was not taking inventory of the cars in the lot as was usually done at midnight.[4] (24RT 1580-84; 1806.)

Around 12:30 a.m. that night, manager Jack Reynolds and Teresa Perez, a booth attendant who had just gotten off duty, were shot and killed inside the office trailer of the Five Star parking lot.

The case was designated a cold case in 2001. In 2002, Detective McDonald re-contacted Torkelson's girlfriend Paula Daleo who gave information leading to appellant.

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[4] The following day, Torkelson went to the City Events office and asked receptionist Amanda Murdow for his check. He seemed nervous. Murdow asked for his uniforms and he said they were in Arizona. He never returned the uniforms or radio and he did not pick up his last paycheck. (27RT 2190-90, 2216-17.)

2. Summary of facts.

Witnesses at the scene described three gunman. One was stationed at the booth of parking attendant Kenrick Bowman, who was robbed at gunpoint. Two others, one shorter than the other and each with a semi-automatic pistol and one carrying something dark, like a bank bag, were seen running from behind the trailer-office where shots were heard and Perez and Reynolds were found dead. 24RT 1691-95.)

All three men were white and wore stockings over their facts. Appellant was the shortest of the three gunmen and was thus identified as one of the two gunmen running from the trailer. (24RT 1691-92; 25RT 1770-82; 29RT 2560-62.)

The three gunmen attempted without success to drive off in Perez' Dodge. The windows of that car had been shot out and the key was in the ignition upside down.[5] Perez' boyfriend David Maman was on his way to pick Perez up when one of the two gunmen fired a shot at his van. The three men ran to another parking lot across the street, the Five Star lot, where they took customer Jim Gagarin's car at gunpoint.

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[5] Inside the car the police found a Five Star bank deposit bag containing cash and checks, a roll of duct tape, and a "Stater Bros." plastic bag bearing the fingerprints and containing a hair matching Torkelson's friend Max Anderson. (26RT 1891-93; 28RT 2292.) A slug was found in the driver's seat. (26RT 1989.)

3. Witnesses at the scene.

Parking booth attendant Kenrick Bowman was standing outside his booth around 12:30 a.m. when he heard a voice and turned to see a white man pointing a black gun at his chest. Bowman pressed the button on his radio to alert the guard, who did not respond. The gunman told Bowman to lie face down, which Bowman did. The gunman took the money from Bowman's register then told Bowman he was waiting for his ride. (24 RT 1590-97; 24RT 1611-13.)

Bowman heard the creaking bathroom door and assumed it was Perez, whose shift had just ended. The gunman yelled at her to get inside the trailer. Within seconds Bowman heard a gunshot and footsteps running towards the exit. He got up and called 911[6] and then heard a second volley of five to seven shots.[7] Bowman saw two other men running from behind the trailer; following the first gunman towards Pacific Coast Highway. (24RT 1598-1601.)

Torkelson came up while Bowman was on the 911 call and said "187, two down" which Bowman repeated to the dispatcher, although he

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[6] See Exh.7 [911 tape] and Exh. 8 [transcript]. The 911 tape was played to the jury. (24RT 1603.)

[7] Bowman thought that some of the shots he heard might have been fired after the two men ran from behind the trailer. On August 19, he told the police that "it was probably the guy in the booth that fired the [first] shots." (24RT 1615-16; 1624, 1630.) He later testified that he didn't think the gunman at his booth could have fired the shots he heard. (24RT 1632-33.)

did not know what "187" was. On the 911 call, in his police statement, and at trial, Bowman said he saw the first gunman jump into a new white van. (24RT 1603-04; 1625.) Bowman turned the 911call over to Torkelson, and went into the trailer where he saw both Reynolds and Perez face down on the floor with multiple gunshot wounds to the backs of their heads. (24RT 1605.)

Daniel Maman planned to spend the night with Perez and arrived at the parking lot in his green van around 11:35 p.m.; Perez asked him to return at 12:30 a.m. (24RT 1640-43.) He returned a few minutes after 12:30 a.m. and tried to park close to the trailer. He saw a man, about 5'7" tall, with a stocking mask over his head, running down the stairs on the right side of the trailer; he saw a second man whom he could not describe. One of them pointed a gun at him. As Maman sped away in his van,[8] the man with the gun shot at his car. (24RT 1644-51.) The police inspected his van and found no nicks, bullet holes or cracked windows. (26RT 1946.)

Michael Mackey arrived for his shift at the Park and Ride at 11:00 p.m. (24RT 1669, 1672.) Around 12:30 p.m. a customer named Jim Gagarin was warming up his car when noises like fireworks were heard from the Five Star lot across the street. They were followed by what sounded like gunshots. Mackey saw three men run from the trailer, two of

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[8] Maman later returned to the Five Star lot and gave a statement to the police. (24RT 1655-56.)

whom were shooting at the trailer. The third, also with a gun, was running in front of the other two. (24RT 1680-84.) The shorter one (appellant) pointed a gun at Mackey and said "Give me the car." Customer Gagarin and Mackey raised their hands in the air as the gunmen got into Gagarin's car, revved the engine and drove up the hill in the direction the first gunman had gone. (24RT 1695-1700.)

Mackey called 911 and later went to the police station to assist in preparing a composite sketch of the short gunman. (24RT 1701-02, 1705-06; see Exh. 16 [sketch].) Mackey identified the stocky gunman as appellant but was only 75% sure of that identification. (24RT 1711, 1723-25.)

Jim Gagarin testified that the taller gunman pointed a silver gun at his head and said, "Give me the car," while the shorter gunman put a gun to Mackey's face and got in the driver's seat. The taller one got in the other side and after lurching (Gagarin thought they hadn't released the parking brake) they drove off. (25RT 1743-45, 1751, 1755-57, 1768.) Gagarin called his wife to get the license number of his car and then talked to the 911 dispatcher. (25RT 1752-53.) Gagarin's Ford Tempo was found nearby the next day. Inside were a Glock magazine with 12 live cartridges (it could hold 17) that did not belong to Gagarin. A bullet was found under the driver's seat and at the impound lot a casing was found underneath the car. (26RT 1924-28.) Tape lifts showed some apparent gunpowder

particles on the driver's seat. (28RT 2318.) Gagarin's personal items left in the car had not been taken. (25RT 1759-60.)

4. The missing money.

Steve Simmons, the operations manager of the Five Star lot, testified that only the managers had the combination for the safe inside the trailer where the money was kept. The safe was opened when shifts changed so that funds could be deposited. (27RT 2237-38.) There was no damage to the safe at the Five Star lot after the robbery. (28RT 2254-55.) Simmons initially believed that approximately $3400 was taken in the robbery. However, the company's bank deposit bag, containing checks and cash, was found in Perez' car. Simmons then determined that the monetary loss was approximately $2000. (27RT 2245; 28RT 2249-50.) Company policy as set out in the manual and as communicated to all employees was that employees were to comply with robbers and not resist. (27RT 2243.)

5. Testimony by police officers and technicians.

Officers Michael Shiraishi and Chris Veolovich arrived at the scene shortly after the 12:31 a.m. dispatch. (25RT 1814-18; 1826, 1830.) Reynolds and Perez were found dead, face down on the trailer floor with their arms over their heads. (25RT 1820-22, 1827.)

Detective Renee Hill arrived to process the scene around 2:00 a.m. (26RT 1840-41, 1850.) Casings, slugs and a live round were found under

Perez' head. (26RT 1915-18.) Two holes were found in the carpet where the bodies had been, consistent with them having been shot while lying face down on the floor. (26RT 1921.) There was a bullet hole in south wall of the trailer some three feet off the floor; a slug was later found and collected from the hole. (26RT 1906-09.) A bullet was found in Perez' skull during autopsy. (26RT 1922.) The detective saw no signs of struggle inside the trailer. (26RT 1932.) The safe was open; there were no chisel marks on it. (26RT 1952.)

Denys Williams was the primary evidence technician at the scene. (26RT 1969.) She described the bodies inside the trailer with hands over their heads. Two phone wires had been cut. (26RT 1980-81.) Tanya Dulaney testified that the crime scene suggested the victims had been shot while lying down because they had been shot in the backs of their heads and blood had pooled below them; and that Perez' shooter could have been standing on either side of her or straddling her. (28RT 2320-25.) Dulaney also testified that both victims' wounds were contact wounds. (28RT 2324.) She agreed that there were no markings around Perez' wounds such as the apparent muzzle impressions found around Reynolds' wounds and she could not state for certain that the gun was in contact with Perez's head when she was shot. (28RT 2330.)

DNA testing on Perez's clothing indicated that the stains were consistent with having come from Reynolds. Both appellant and Raynoha

were excluded as possible donors. (28RT 2284.) Electrostatic lifts of apparent footwear impressions found on the linoleum floor of the trailer and from the plywood on construction outside the trailer could have been made by Torkelson's shoes. (28RT 2301-02.)

Bill Loznycky, Jr., from the San Diego crime lab determined that the two casings found outside the trailer were fired from the same 9 mm. semiautomatic firearm,[9] which could have been a Tangfolio Witness,[10] a Ruger, or a Beretta. (30RT 2669-72.) The casing found inside the trailer was fired from a Glock 9 mm. pistol, as were two cartridges found inside the trailer. (30RT 2675-77.) Reynolds was killed with the Glock weapon that was fired at least twice inside the trailer. (30RT 2699-2700.) The hard contact wound to Reynolds' neck the imprint of a square consistent with the slide on a Glock pistol.[11] (30RT 2714-156.) Three fired slugs, one

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[9] Seven casings were related to the first gun, possibly the Tangfolio Witness. (30RT 2688-94.)

[10] Officer George Rose arrested David Raynoha on July 29, 1999, in Costa Mesa after a 9 mm. Tangfolio Witness firearm was found in his car. The serial number of the gun had been scratched off. (30RT 2616-22; 60RT 6301-02.) Restoration of the obliterated serial number matched a gun reported stolen in San Diego in April of 1999. (30RT 2624-37; 29RT 2571-72.) The trigger pull on the gun was normal. (30RT 2633.)

[11] Although Reynolds' autopsy photos did not show markings consistent with a muzzle impression, the pathologist looked at a Glock weapon during a break in his testimony and then testified that as "best he could tell" without taking measurements or doing any analysis, and even though he had never qualified as an expert in wound ballistics, the markings on Reynolds' wound were consistent with markings on a Glock gun. (27RT 2095-95, 2123-24.)

recovered from Perez in the autopsy, were all fired from the same weapon, a Rossi .38 or .357. (30RT 2718-19; 2682-85.) This gun was never recovered. (30RT 2719.)

6. Forensic evidence.

Medical examiner Dr. Christopher Swalwell examined the bodies at the scene on July 18 and performed autopsies the next day. (26RT 2028-32.) Perez died from two gunshot wounds to the head (one to each side) resulting in multiple skull fractures. (26RT 2032-34; 27RT 2049-52; 2070.) Soot was found inside both wounds, which was consistent with contact wounds.[12] (27RT 2058-59.) Dr. Swalwell's opinion was that both head wounds were contact wounds, i.e., the gun barrel touched the scalp. (27RT 2065.)

Reynolds also died from gunshot wounds to his head and associated skull fractures. He had one gunshot wound to his right arm and two to his head: one bullet passed through Reynolds' head and penetrated his arm. (27RT 2071-73.) The wounds contained soot, but stippling was absent, indicating that the wounds were contact wounds, made by the gun barrel touching the scalp. (27RT 2084-85.)

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[12] Dr. Swalwell described three categories of gunshot wounds: Contact wounds show soot deposited in the wound and sometimes an abrasion caused by contact between the skin and the gun barrel. Intermediate wounds are from one to three feet and show soot or stippling/tattooing depending on the distance of the gun from the body. Distant wounds show no soot or stippling and result from gunshots more than four feet away. (26RT 2023-26.)

7. Appellant's statements.

Detective Stephen McDonald testified that although the Five Star case was designated a cold case in 2001, the police had always been suspicious of Torkelson. In July of 2002, McDonald re-contacted Torkelson's girlfriend Paula Daleo, who knew appellant by the name "Lil Jeff." He was a friend of Torkelson's, and she and Torkelson had been to parties and meetings with appellant.

Daleo described appellant to the police by his tattoos: "Nigger Thrasher" on his arm and "Thor's Hammer" on his Adam's apple. McDonald learned from a Carlsbad detective that these were tattoos appellant was known to have. (30RT 2745-48.)

Daleo also mentioned a mean named "Tiger." McDonald learned that Tiger referred to Jason Getscher who was in custody in Arizona. After McDonald contacted the Arizona prosecutor and Getscher's attorney, McDonald interviewed Getscher who identified appellant, Torkelson and Max Anderson as the participants in the Five Star robbery. (29RT 2542-44.)

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Getscher suggested calling appellant. McDonald obtained a cell phone so that Getscher could make monitored and tape-recorded calls to appellant from the jail. (29RT 2545-47.) After calls to appellant's relatives to obtain appellant's current phone number, Getscher contacted appellant twice. (29RT 2548-50.) On a recorded call on November 26, 2002, appellant admitted his involvement. After this recording, McDonald wrote to the Arizona authorities commending Getscher for his cooperation, which resulted in Getscher getting four years off his eight-year sentence. (29RT 2499, 2551-53.)

In the taped conversation between appellant and Getscher on November 26, 2002,[13] Getscher said he wanted a crew of three to rob a bank. Appellant said to contact him to let him know when to meet. (6CT 1313.) Getscher described the job as taking a week altogether and said appellant would have to learn scuba diving to approach the bank from the river. Appellant said that would not be a problem. (6CT 1367-68.)

Getscher said he wanted to make sure nothing went wrong in the robbery he was planning and asked appellant what went wrong "the last time." (6CT 1316.)

Appellant said it was a combination of a lot of things; he was nervous, it was not well planned. (6CT 1316.) Appellant said it was basically him being "new at that stuff" and his nerves going and adrenalin.

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[13] See Exh. 86 and Exh. 88 at 6CT 1301 et seq. & 6CT 1366 et seq.

(6CT 1319.) Then they left things behind, like the rope they were supposed to use to tie up the victims, and it started snow balling. (6CT 1318.)

Appellant admitted he was the "first one that fired" and that he shot the girl. He wasn't really scared, it was the adrenalin and he wasn't thinking straight. (6CT 1319-21.) They were supposed to go to one car but the ended up busting the key off of that car and they started to scatter. Getscher asked what made appellant shoot. Appellant didn't know and said "it just kind of happened." (6CT 1320.) The victims were not tied up, because they had forgotten the rope, and appellant was thinking they were going to get away and he didn't want to "go down." He described the event as "a cluster fuck." (6CT 1321.)

Appellant said "shit happens" but "it didn't happen the way I wanted it to [] with no one getting hurt." (6CT 1332.) He described himself as "like adrenalin," and said that he had pointed the gun over somewhere and it went off. He pointed down and had covered up the barrel with his hand and fired a couple times at a man in the car who was looking at him. (6CT 1332-33.)

Appellant said they didn't even get away with very much money because Anderson had forgotten to zip up the backpack where they had put the money and the backpack was left behind. (6CT 1329.)

In a discussion about the skinhead movement, appellant said he had let his hair grow and was not still active or involved in all that. (3CT 543.) (See Exhibit 86 at 6CT 1310-37.)

Detective McDonald testified that he played the tape recording of this phone conversation to appellant after he was arrested. When the recording was finished, appellant said, "You heard it all." (30RT 2756.)

(a) Paula Daleo.

Paula Daleo was 17 or 18 years old in 1999 and lived with her boyfriend James "Woody" Torkelson in her parents' house in San Diego. (28RT 2335-36.) Torkelson was a liar and abusive and controlling. (28RT 2347-48; 2414.) A week before the Five Star incident, Torkelson left for Tempe, Arizona, although he had been working since May with City Events Security. (28RT 2346-47.) Torkelson told Daleo that he was living in Arizona with Jason ("Tiger") Getscher, a friend of Lil Jeff's (appellant). (28RT 2349-51.) Daleo had met appellant through Torkelson some six to eight months before the charged offenses occurred. Appellant had a tattoo "Nigger Thrasher" on his arm, and another "Thor's Hammer" on his Adam's apple. (28RT 2343-44.)

On July 17, 1999, Torkelson was at Daleo's home, having returned from Arizona a day or two earlier with appellant and two others she didn't know. A group of young men were at her house that day for an hour or so. Although Daleo had told the police in 2002 that David "Wolf" Raynoha

was present, at trial she could not remember if he was there. (28RT 2352-57; 2362-63, 2367, 2372, 2410.)

The group left together, then Torkelson returned alone and left again for work sometime before midnight; he was driving Daleo's father's gold Toyota 4 Runner truck. (28RT 2372-73.) Torkelson came home earlier than usual and said there had been a shooting at work; he was wearing booties and said the police took his shoes. (28RT 2375-77.) Daleo had concerns about Torkelson's possible involvement because she knew he had a criminal history but she said nothing; she was afraid of him and also in love. (28RT 2377-78.)

Within days after this Torkelson and appellant left for Tempe, Arizona (along with Daleo's belongings and her dog) to stay at Getscher's house. (28RT 2378-80.) At first, Torkelson called her regularly, but later he failed to even return her calls.[14] (RT 2381.)

In June of 2000, Daleo saw appellant and his girlfriend Becca at a party. The shootings at the Five Star lot came up and someone said that "Jeff got trigger happy." Appellant said, "No, I didn't." (28RT 2388-91.)

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[14] Daleo broke up with Torkelson at the beginning of 2002. She and her father had to pay $500 for money Torkelson owed to Getscher to get her belongings back. (28RT 2383-94.) Daleo threw away the radio Torkelson had kept from his security guard job. (28RT 2382.)

There was a general discussion to the effect that the robbery was planned, and that appellant, Torkelson, and Raynoha were involved, and that they had to ditch the car downtown. (28RT 2392-93.)

When Daleo talked to Detective McDonald in July of 2002, she described appellant's tattoos and sketched his Thor's Hammer tattoo. She did not know appellant's last name. She also looked at old phone records for calls to Arizona and to Raynoha in Lake Elsinore that Torkelson had made from her home phone. (28RT 2294-95; 2398-2400; 2403-05.)

Daleo agreed that when she first reported to the police appellant's alleged statements at the party, she said she was "too drunk to remember some of the specifics of the party" and that she was only "pretty sure" about the things she was saying. (28RT 2439, 2442.)

(b) Jason Getscher.

In late 2000, Jason Getscher was arrested; at the time of trial he was still in custody in Arizona for forgery. Getscher had some 30 convictions in Arizona and at age 34 had spent about 17 years in prison. (29RT 2460-62.)

In 2002, after Daleo talked to the police, Detective McDonald contacted Getscher. (29RT 2542-43; 2533.) McDonald told Getscher he suspected him of helping Torkelson get out of San Diego; Getscher repeatedly asked for guarantees of benefits in exchange for his cooperation as he "wanted to go home" from jail. (29RT 2566.) Getscher decided to

come forward about the Five Star homicides to "prove his innocence" and to get his sentence reduced. (29RT 2498-99.)

Detective McDonald brought a cell phone to the jail in Arizona so Getscher could call appellant (after first calling appellant's grandmother and father to get appellant's current number). Getscher worked on regaining appellant's trust; and then came up with the ruse that he was setting up a robbery and wanted to learn from appellant what went wrong in the San Diego robbery. (29RT 2501-2503, 2528, 2550) Getscher denied any involvement in that robbery and denied supplying weapons for the crime. (29RT 2531-32.)

Getscher met appellant when they were in prison together in Arizona in 1996; they were both skinheads and appellant had all kinds of tattoos, including one that said "Thrasher," a skateboard company. Getscher couldn't remember when the "n-word" was added to that tattoo. (29RT 2463-64, 2467, 2516.) Getscher tried to give appellant guidance and survival skills; appellant was his follower. (29RT 2517-18.)

Getscher was released from prison several months before appellant in 1998 and picked up appellant when he was released. For a while, they hung out at the Tempe, Arizona house of another prison friend, Max Anderson; then Getscher dropped appellant at his father's house in Carlsbad, California. (29RT 2465-69.)

In 1999, appellant came to Getscher's home in Tempe with Torkelson. Getscher also met Torkelson's cousin David "Wolf" Raynoha at this time. (29RT 2469-72.) Around July of 1999, appellant and Torkelson went to a local bank where they tried unsuccessfully to cash some checks Max Anderson (who was also staying at Getscher's home off and on) had stolen from a local scooter shop. (29RT 2472-75.) Around that same time, Getscher learned that appellant, Torkelson, and Anderson were planning a robbery. Torkelson talked about casing out places as a security guard; Torkelson always had some grand plan. Meanwhile, Getscher was teaching appellant the construction trade and tried to talk appellant out of joining Torkelson's plan. Getscher didn't trust Torkelson and Anderson (who was an experienced criminal in contrast to appellant) and didn't feel it was safe for appellant to do anything with them. (29RT 2477.)

Nonetheless, Torkelson, Anderson and appellant left. When they returned to Getscher's home appellant was sweating and seemed adrenalized, and talked vaguely about what he had done. Although appellant was afraid of Torkelson who repeatedly told him not to say anything, appellant did tell Gestcher that things had gone badly and that he shot someone, and that he had burned his hand on the gun barrel. Appellant had red laces in his boots when he returned. Getscher told him he didn't earn them. Appellant thought he had. Getscher responded that appellant

had killed an innocent victim, not an enemy, which is how one earns red laces.[15] (29RT 2479-84; 2530.)

Torkelson ended up moving in to Getscher's home.[16] On July 24, 1999, Getscher, Torkelson and appellant drove to San Diego to pick up Torkelson's (i.e., Daleo's) furniture. Appellant stayed in California and Getscher never saw him again although Getscher occasionally called appellant at his father's and grandmother's residences in California. Getscher also called Torkelson to recover a .45 mini Colt firearm Torkelson had stolen (after the Five Star incident). He talked to Raynoha who assured him that his (Getscher's) prints were no longer on the gun. (29RT 2485-90, 2494-96, 2504.)

7. The attempted bank fraud in Arizona.

Haleigh Rohner was a trainee teller at a bank in Tempe, Arizona on July 12, 1999, when a customer tried to cash a check for $950 written out to "Young" from a scooter shop. Rohner contacted her supervisor who was waiting on another customer who also had a check from the scooter shop. The supervisor told the customers to wait so they could verify the checks.

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[15] Paula Daleo testified she sometimes wore red laces with her black boots which was the fashion for her and others in her group, although the laces could also indicate blood been shed for the cause. (28RT 2447-49.)

[16] Torkelson couldn't hold down a job and in the end stole things from Getscher and skipped out on the rent and phone bill. Daleo's father eventually paid Getscher some of the money Torkelson owed in order to get Daleo's furniture back. (29RT 2490-91.)

The customers took their checks and ID cards (Young had a California driver's license) and left before the police arrived. (30RT 2595-06.) Rohner described Young as nervous, 5'7", stocky, with a brown buzz cut and wearing a white shirt and tie. (30RT 2612-15.) However, she had told the San Diego police in 2004 that the customers were a black guy and a white guy. (30RT 2609.)

B. The Defense Case.

The defense rested on the record and called no witnesses. (30RT 2767, 31RT 2813.) In closing argument to the jury, defense counsel explained that the defense did not claim that appellant was not present in the trailer or that he was not involved in the carjacking. (32RT 2908.) Observing that appellant's taped statement was the chief piece of evidence against him, defense counsel argued that appellant was posturing when he talked to Getscher on the phone – appellant was trying to put himself in the best light in terms of the distorted prison culture from which he and Getscher sprang; and that other evidence showed that appellant was inexperienced, a follower not a leader, and that the tape recording itself showed that appellant was panicked and not "thinking straight." (32RT 2912-18; 2922-23.) The prosecutor argued in the final closing argument that this "concession" was tantamount to a concession of guilt of two counts of first-degree robbery/felony murder. (32RT 2943.)

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STATEMENT OF FACTS – SECOND PENALTY PHASE

A. Aggravating Evidence Presented by the Prosecution.

1. Circumstances of the crime: factor (a) evidence.

As to the facts of the crimes on the night of July 17, 1999, eyewitnesses Pelvic Reid, David Bond, Dawn Zaczkiewicz, Kevin Bowman, Daniel Maman, Michael Mackey, Jim Gagarin, and police officers, technicians and the pathologists gave testimony similar to that in the first trial. Employees and owners of the Five Star lot and the City Events security also testified as they had at the first trial. However, they all gave victim impact testimony at the second trial, and even two police officers who had not testified at the penalty phase in the first trial were permitted to testify as victim impact witnesses at the second penalty trial.

Also introduced as "circumstances of the crime" at the second penalty trial was evidence of appellant's Nazi tattoos and skinhead beliefs.[17] Reid testified that Torkelson had Nazi tattoos and that he had heard Torkelson was a racist. (RT 6183-84.) Paula Daleo also testified about her relationship with Torkelson, and reported that at a party in 2000 someone said "Jeff got trigger happy" and he said "No I didn't." She testified that appellant often accompanied her and Torkelson to Aryan Nations meetings

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[17] Although the bulk of evidence regarding appellant's racist tattoos and skinhead beliefs came in as supposed "rebuttal" evidence, see Arg. VIII, pages 147-160, below, the testimony from Reid and Daleo preceded any presentation of mitigation evidence by the defense.

at which white supremacy was discussed. (59RT 6084.) She testified to the Thor's hammer tattoo appellant had on his neck, describing it as one "lots of white power people used." (59RT 6133.)

2. Factor (b) evidence of criminal activity.

(a) The jail attack on inmate Harger.

Robert Harger[18] was an inmate in the San Diego County jail.[19] On December 24, 2004, a young white man he had met the night before, Johnny Ilacqua, told him to come to a meeting of white inmates in another cell. Harger went to the cell with Ilacqua, who left him there. Five inmates were in that cell, one of whom, like Ilacqua, wore green and was sitting on the toilet/sink; the others wore blue. One inmate hit Harger in the face. All five of the inmates kicked and punched him. As Harger fell to the floor, he saw appellant come towards him. (62RT 6716-28.) However, Harger could not state that appellant participated in stabbing him. (62RT 6750.)

The attack was over in 15 to 20 seconds. When Harger stood and swung at one of his assailants, they stopped hitting him and he walked out. As Harger faced back he saw appellant in the cell. Harger pressed a button for medical attention. He walked 40 feet and lost consciousness and was heliported to a trauma unit. He had 17 puncture wounds to his back.

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[18] Harger's testimony at the first penalty phase is at 38RT 3347 et seq.

[19] Harger was on parole for manufacture of driver's licenses. He had convictions for drug transportation, auto theft, receiving stolen property and possession of controlled substances. (62RT 6718.)

(62RT 6729-35.) Harger was afraid for his life and didn't want to report his assailants; he told the deputies he didn't want to prosecute while he was in custody. (62RT 6738.)

When Harger was shown a photo of appellant with no or minimal hair, he said that "if [the person in the photo] had shoulder length hair in that photo" he could identify him as the assailant in green who was on the sink, because that inmate (whom he testified was appellant) had shoulder-length wavy hair. (62RT 6742-43.) Harger thought the person he identified as appellant was the shot caller named "Joe." He thought the other two were Dreamer and BB/Bones. Aaron "Sickness" was also one of the assailants. Inmate Eiffel threw the first punch. (62RT 6743, 6745-47.)

Deputy Andrew Peterson[20] took Harger to the medical center; he described Harger as distraught and bleeding. (63RT 6810-11.) Deputy Peterson returned to the cell block and locked down each inmate in his cell. The inmates were strip-searched; the common areas and cells were also searched. Three jail-made weapons (shanks) were found in the common areas near or on top of maintenance cabinets. A metal shank was found stuffed between the ceiling and the top of a cabinet that was adjacent to cell 117 and directly under cell 217 (appellant's cell). (63RT 6814-17, 6833.) A similar shank was found on the ground near where Harger fell, and a

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[20] Peterson's testimony at the first penalty phase is at 38RT 3389 et seq.

third shank made from a fiberglass broom handle was found next to the cabinet. (63RT 6822-23.) None of the shanks found on December 24 was in appellant's cell. (63RT 6836.)

On December 26, 2004, Deputy Joseph Gutierrez[21] searched a cell shared by appellant and another inmate and found an eight-inch metal rod wrapped in a towel under the sink. The towel had red blotches on it, but was not preserved. Appellant's hair at that time was "pretty short." (63RT 6858-61, 6875-76.) Appellant freely admitted to Deputy Luis Rios[22] that the rod belonged to him and that he used it for self defense. (63RT 6873-74.) Criminalist Tess Hemmerling tested the metal rod and white cloth and found that there was no blood on it. (67RT 7333-34.)

Deputy Gutierrez testified that appellant's hair at that time was "pretty short." (63RT 6866.) Deputy Peterson couldn't remember the exact length of appellant's hair the night of this incident, but he thought it was short, i.e. shorter than shoulder length (as Harger described the hair of the inmate dressed in green). (63RT 6830-31, 6842.)

Deputy Alex Ramirez[23] recalled appellant as an inmate at the San Diego facility in 2004 and remembered him wearing green clothing (which

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21 Gutierrez's testimony at the first penalty phase is at 38RT 3212 et seq.

22 Rios' testimony at the first penalty phase is at 38RT 3224 et seq.

23 Ramirez' testimony at the first penalty phase is at RT 3194 et seq.

denoted an institutional concern about the inmate having weapons). (62RT 6752-53.) He could not recall appellant's hairstyle. (62RT 6757.)[24] Sergeant Michael French[25] testified that three inmates in appellant's module wore green: Ilacqua and appellant (who were white) and Antonio Garcia (who was Hispanic). (63RT 6847.)

(b) The Arizona assault.

Detective Stephen Wolf[26] of Lake Havasu, Arizona responded to a robbery at a convenience store on the night of September 9, 1992. Five young men, including appellant, were involved. The worker at the store, Lee Alvin, was treated for a wound to his head. Alvin said three young men came into the store and one of them hit him in the head with a rock. (64RT 6896-6902.) Wolf testified that appellant showed no remorse. Wolf recommended to the probation officer that appellant should receive the maximum sentence and psychological testing because it was a "brutal offense." (64RT 6905.)

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[24] Ramirez conducted a search of appellant's cell on September 21, 2004 and found the sharpened end of the arm of a pair of eyeglasses inside a box of colored pencils. (62RT 6754-55.) It was stipulated that appellant told a deputy that the eyeglasses were left by another inmate, and that appellant used the sharpened arm for piercing other inmates' eyebrows. (See Exhibit 188; 68RT 7405.) Ramirez agreed that the piece could have been used for skin piercing or tattooing, which takes place in jail even though it is not allowed. (62RT 6759-61.)

[25] French's testimony at the first penalty phase is at 38RT 3404 et seq.

[26] Wolf's testimony at the first penalty phase is at 37RT 3239 et seq.

Probation officer Frank Musumeci[27] described appellant as "indifferent" and without remorse as to the crime, which appellant termed "a job." (64RT 6923-27; 6930.) Appellant was 18 at the time; he considered himself addicted to meth and alcohol. He was not the assailant and the robbery was not his idea. (64RT 6937

Lee Alvin's son Stephen Alvin[28] testified in place of his father who suffered from dementia at the time of trial. Lee Alvin had a one-and-a-half to two-inch gash from the blow with a rock and needed stitches. Alvin's mother was a nervous wreck and after this incident didn't want to go out or even talk much. Up until the assault, Stephen Alvin's 70-year-old father Lee was healthy but this injury "took the drive out of him" and his health declined. His father had problems with the scar from the wound; the benign growth on it would grow back after being removed. The witness had learned just the day before his testimony that the growth on his father's head was cancerous. However, the doctor did not say the cancer was caused by the injury. (64RT 6914-21.)

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27 Musumeci's testimony at the first penalty phase is at 37RT 3264 et seq.

28 Stephen Alvin's testimony at the first penalty phase is at 37RT 3253 et seq.

3. Factor (a) victim impact evidence.

(a) Teresa Perez.

Carmen Perez,[29] Teresa Perez' mother, testified that Perez was a special daughter. They lived together and shopped and sold things at the swap meet. Teresa bought things for her mother and was happy about getting the job at the Five Star lot. When she left that day she asked her mother for a blessing, as always. (64RT 6951-54.) Carmen Perez testified that she was "dead, but living" and that her life was over after her daughter was killed. (64RT 6955.)

Carmen Romero,[30] one of Teresa Perez' seven sisters, testified that Teresa was happy and that she and her children missed her. (64RT 6956-69.) Elsa Perez,[31] Teresa's youngest sister, testified that Teresa was always smiling and happy; she wanted a family and a husband; her dream was to buy a house for their mother. After Teresa was killed, Elsa felt sad and confused that bad things happened to good people like Teresa. (64RT 6969-75.) Perez' sister Amada Bravo[32] testified that going through the "trials" was hard on the whole family; and the family would feel the pain of

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29 Carmen Perez' testimony at the first penalty phase is at 36RT 3102 et seq.

30 Carmen Romero's testimony at the first penalty phase is at 36RT 3112 et seq.

31 Elsa Perez' testimony at the first penalty phase is at 36RT 3117 et seq.

32 Amada Bravo's testimony at the first penalty phase is at 36RT 3133 et seq.

their loss for the rest of their lives.[33] (64RT 6978.) Joe Bravo,[34] Teresa Perez' brother-in-law, testified that the family was devastated and the fun of a big family was gone. His wife Amada intermittently needs to be alone to cry; she is very sad and will need medical help. His mother-in-law went to her house in Mexico and closed herself in according to the neighbors. The family became fragile after Perez' death. (64RT 6980-84.)

Evangelina Alvarez[35] had worked with Perez at her previous job. When Alvarez left that job to work at Five Star, she told Perez about Five Star. Perez applied and was hired. Alvarez felt guilty because she had suggested Perez get the job. Perez was a good person and friend; they were like sisters, and Alvarez missed her. (64RT 6961-67.)

Anna Arciniega was Perez' friend and roommate. Perez was positive and a good influence. Arciniega missed her.[36] (64RT 6942-44.) Emma Prince[37] met Perez at the parking lot where they both worked. She felt that they would have been great friends. The night Perez was killed at the parking lot, Prince was scheduled to work but Perez had asked if she could

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33 See Arg. VII, Part F, page 144, below.

34 Joe Bravo's testimony at the first penalty phase is at 36RT 3142 et seq.

35 Alvarez' testimony at the first penalty phase is at 36RT 3125 et seq.

36 Anna Arciniega didn't testify at the first penalty phase.

37 Emma Prince didn't testify at the first penalty phase.

work her shift because she needed the money. Prince became paranoid, thinking she could have been killed that night. (64RT 6945-50.)

(b) Jack Reynolds.

James Reynolds[38] testified that during the years preceding his brother Jack Reynolds' death, the two had become closer and talked several times a month on the phone. Jack took care of their mother and started getting involved in the church. (64RT 6985-89.) Mrs. Reynolds was visiting James in Texas when they learned of Jack's death; they were in shock. (64RT 6990-92.) Reynolds blamed himself for his brother's death and had nightmares, then took anti-depressants. He missed having someone he could talk to honestly. (64RT 6993.)

Jack's younger sister Cheryl Delgadillo[39] testified that Jack was "like sunshine." He was happy, and good with animals. He loved his children. (64RT 6994-98.) Jack's daughter died in a fatal accident at the age of 18, three years after Jack's death. She was trying to self-destruct and didn't want to live in a world without her father. Delgadillo had a never-ending sadness and her mother's health had taken a nose-dive. (64RT 6994-7000.)

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[38] James Reynolds' testimony at the first penalty phase is at 36RT 3161 et seq.

[39] Delgadillo's testimony at the first penalty phase is at 36RT 3169 et seq.

Jack's older sister Carol Reynolds-Conrad[40] testified that three weeks after Jack died, her own son died from Hodgkins' disease as a result of exposure to chemicals in the Persian Gulf. (64RT 7002-05.) Jack was teaching Sunday school and helping the homeless, and took care of their mother. (64RT 7007-09.) The stress of Jack's death had affected their mother's immune system and Reynolds-Conrad herself was more overprotective of her mother than before. (64RT 7010.) Jack's son cycles in and out of custody and has mental problems. (64RT 7011.)

Jack's mother Carol Reynolds[41] testified that Jack helped her and took care of her when she was sick and needed him. When he had no job and was hungry she took him out to eat. (64RT 7013-18.) When she learned he had been killed she was numb; she thought of him every day and still heard his voice; she missed his smile and loved him. (64RT 7021-25.)

Paul Chacon, the owner of Five Star Parking, testified that the crimes were "very traumatic" and that he had paid for both funerals, opened a fund for money to go to the families, and offered Crime Stoppers the use of his facility for a crime reenactment. (59RT 6025-27.) Manager Steve

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40 Reynolds-Conrad's testimony at the first penalty phase is at 36RT 3176 et seq.

41 Carol Reynolds' testimony at the first penalty phase is at 36RT 3149 et seq.

Simmons testified he knew both victims well and that their deaths were "extremely difficult" and "very emotional" for him. (59RT 6052.)

B. Evidence in Mitigation.

1. Mitigation of the jail attack on Harger and future dangerousness evidence.

Deputy John Barrios overheard a group of inmates who were being escorted through the courthouse hallway say to appellant who was in the holding tank that he had "nothing to lose" and should "take out a deputy." Appellant did not then or on any other day assault a deputy. (67RT 7362-65.) Appellant said he was stressed but was all right, and told Barrios several times he was prepared for the verdict. Barrios had transported appellant 20 times and appellant had never behaved in any way causing Barrios to be concerned for his safety. (67RT 7366-69.)

Sergeant Michael French investigated the Harger assault. He testified that Harger reported that the "big guy from cell 117" (i.e., not appellant) threw the first punch and that the inmates from cell 205 began stabbing him. He said that he had information that before the attack the inmates in cell 117 were trying to throw a "fishing line" to another cell on the same tier. (63RT 6849-55.)

Aaron Beek was in custody when he testified and had numerous felony convictions. (67RT 7260, 7272-74.)

Beek testified that he stabbed inmate Harger in the San Diego facility on December 24, 2004.[42] In January or February of 2005 he described the incident in a letter to a friend; the letter was intercepted. In the letter Beek admitted stabbing someone 14 times. Beek was the sole defendant charged in the Harger incident. He pleaded guilty without a plea bargain and was sentenced to a total of 15 years, including 10 years on the stabbing incident. (67RT 7260-68.) In the intercepted letter Beek wrote to a friend, he said he had pleaded guilty to take charges off his cousin and "my comrade Jeff." [43]

Beek testified that although he and appellant were in the same area at the same time, Beek acted alone when he stabbed Harger. Appellant was not with him and did not help him. Beek did not feel comfortable with the

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[42] Deputy Efren Juaregui testified that an informant reported that inmate Britan was sharpening shanks and attaching handles to them prior to the Harger stabbing. The informant also said that Beek might have a shank. Beek's cell (number 205) had a drawing of a dagger done in pencil. (68RT 7533-36.) Juaregui thought the line was made in blood. (68RT 7532.)

[43] Beek also wrote a letter to a girl in appellant's name, to get appellant started with the girl as a pen pal. (Exh. 149; 67RT 7260.) The letter identified appellant as a skinhead. The reference in the letter to appellant's Nazi tattoos was to make him look "more attractive" to the girl. The letter also claimed (falsely) that appellant was a member of the American Front and was "highly regarded" in skinhead organizations – again to impress the girl. When Beek wrote in the letter that appellant was going to be the "shot caller" this was not correct and was a "miswriting." (67RT 7276-81.)

allegation that appellant participated in something that Beek did alone. (67RT 7269-71, 7286.)[44]

District Attorney's Office Investigator Robert Baker conducted a taped interview with Harger on January 12, 2005. Harger identified a photograph of Beek as the man who had stabbed him. Harger said that a photograph of inmate Jeffery Dennis "could be the Joe in greens" in the cell, if he had longer hair; but that if he was 5'10" tall then he was "too tall" to be the Joe in green clothing he saw sitting on the toilet. (67RT 7302-08.) Harger also said that the photograph of appellant was the inmate who was dressed in greens who had black curly hair even though he had first described inmate Jeffery Dennis as looking like "Joe" from cell 217. (67RT 7308-10.) Harger also described appellant's hair as shoulder length. (67RT 7311.)

Deputy Stephen Andert testified that at the San Diego jail on July 23, 2004 inmate Rodriguez walked into a cell occupied by appellant and another inmate and started throwing punches. Appellant said he had told

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[44] In another letter written after Beek was sentenced, Beek said he "wanted to rush" the officers in the courtroom after he was sentenced. Beek explained that he was upset with the lengthy sentence imposed on him, and that he wanted to escape. (67RT 7290-92; Exh. 185.)

another inmate snitch that he should get out of the module before he got beat up. (67RT 7334-40.)[45]

2. Appellant's background prior to these offenses.

Appellant's parents separated when he was just one year old. After that, his mother had children with two other men. Appellant had little contact with his father, until he was around 10 to 12 years old[46] when he spent a few months with his father and his father's new family. Appellant ended up in the juvenile system and when he got out, he went to Arizona to live with an uncle, and shortly thereafter ended up in prison for the Arizona robbery of Lee Alvin.

Appellant's mother Marilyn Young testified that she was 19 and unmarried when appellant was born. She broke up with his father, Timothy Vinatieri, shortly after she found out she was pregnant. Timothy didn't want the responsibility of a child and was seeing another woman. However, she and Timothy married seven months later. (66RT 7193-94.) When they were together, Timothy let appellant drink strong beer when appellant was not even one year old. Another time when appellant was just over one year old, the Vinatieri family got him drunk on beer and wine, and

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[45] Andert testified on cross-examination that he understood appellant to be telling the other (Hispanic) inmate to leave or he would beat him up or have someone beat him up: even though this interpretation or version did not appear in the deputy's report. (67RT 7339-45.)

[46] Appellant's father was vague as to how hold appellant was when he visited his father – somewhere from eight to ten years old. Other witnesses seemed to think he was 11 or 12 at that time.

thought it was funny to see the toddler staggering. Marilyn separated from Timothy because of his drinking and marijuana use. Timothy once arrived drunk at the airport to pick her up from a family visit. They had a fight and he hit her; that was the last straw. After the divorce appellant had minimal contact with his father until he was around 11 years old. Timothy hitchhiked and wandered around a lot and rarely provided child support despite a court order to do so. (66RT 7195-99.)

Marilyn had a daughter with another man when appellant was three years old. Appellant loved his sister Jennifer.[47] (66RT 7200.) Marilyn's second son Marcus was half African-American and appellant and Marcus were close. Appellant went to a school with children from 20 different nations. (66RT 7201-02.)

Marilyn was a Baptist and sent her children to Sunday school and Bible programs. Appellant had trouble reading and repeated kindergarten in a Christian school, and then went to public school. Marilyn lost her faith when she was with Marcus' father because she didn't believe God could forgive her for her out-of-wedlock relationship. (66RT 7204-06.)

Appellant always struggled with learning and was in special education in fifth grade. Marilyn learned that appellant and his sister Jenny had both been molested by her 14-year-old nephew when appellant was

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[47] Jennifer went to live with her father in Oklahoma when she was 12 years old. (66RT 7202.)

nine. The boy's mother denied it and the police said appellant and Jenny had instigated it and the boy was not prosecuted. Appellant went to counseling and Marilyn prayed because she hated the nephew whom she forgave (but she did not force her children to be around him). (66RT 7207-11.)

At age 12 appellant went to live with his father for about four months. Marilyn later learned that appellant's father had given appellant marijuana and called him a "mommy's boy" because he missed his mother and siblings. When appellant came back home alcohol was found in his school locker. In 1989, appellant stole $200 Marilyn had from selling cookies. She called the juvenile authorities because she thought he needed to learn a lesson. She called the juvenile authorities because she thought he needed to learn a lesson. Appellant was been admitted to an adolescent psychiatric hospital and put on medication after he had taken hallucinogens and began hearing voices. When appellant came home from the hospital his sister Jenny said she wished he would kill himself. Appellant ended up at a drug rehabilitation center from which he ran away and hitchhiked to his father's house. His father turned him in to the authorities; there was a warrant out for him for running away. Appellant was then sent to a boys' ranch for six months. (66RT 7211-16, 7237.)

Appellant left home for good when he was 18 years old in 1992 (and then went to Arizona and prison). He had no racist views before he left

home but did have tattoos: one that said "Ozzy" and a cross on his hand.[48] (66RT 7218.)

Appellant called his mother from custody in Arizona but she never visited him; she occasionally put $10 or $20 on his book. Marilyn first learned in a phone call from the Arizona prison that appellant considered himself a skinhead; she understood he needed protection in prison. Appellant was always smaller and shorter than other boys his age and failed playing soccer because of his stature. (66RT 7220-21.)

Appellant's grandmother Fern Vinatieri testified that her son and appellant's mother were about 19 or 20 when appellant was born, and the two split up when appellant was about two. Appellant's mother did not allow his father to see him and gave appellant her own last name. When appellant was about 12 years old, her son (appellant's father) arranged for appellant to live with him and that was when the Vinatieri family got to know appellant. Mrs. Vinatieri stayed in contact with him by letters and phone. (65RT 7038-41.)

Appellant's father Timothy Vinatieri testified that appellant was born when he was 19 and appellant's mother was 18. Timothy was young and irresponsible; he drank and partied and held different jobs. Timothy and Marilyn Young (appellant's mother) eventually married, but when Marilyn

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[48] Appellant was a skateboard aficionado but Marilyn did not recall the Thrasher tattoo. (66RT 7220.)

was pregnant and in the hospital she wanted nothing to do with appellant's father. He wasn't always able to pay even minimum child support. He knew appellant lived in Concord, CA but didn't know where. When appellant was about eight or 12 years old he lived with Timothy for three to five months. Timothy was married and had a daughter. The situation engendered jealousy and Timothy's wife was not overly excited about appellant's stay. After appellant returned to his mother, he visited his father a few more times. (66RT 7168-75.)

At some later time, appellant's mother called to say appellant was having problems. Appellant had run away from a drug rehabilitation facility and gone to his aunt's house. Timothy picked him up and drove him to the sheriff's office to turn him in. (66RT 7176-77, 7185) Timothy's brother Charles Vinatieri told him he had read in the newspaper that appellant was in prison in Arizona. After that Timothy did not see appellant for five or six years, when appellant was released from custody. Appellant had the "Nigger Thrasher "tattoo at that time, which confused the family as appellant had never shown any racist tendencies. Appellant wore long-sleeved shirts to hide the tattoos; he was not proud of them and said he wanted to get them removed. Appellant was a good father. (66RT 7178-81, 7188.)[49]

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[49] Appellant's father knew appellant had cuts on his wrists but did not recall ever being told that appellant had attempted suicide. (66RT 7192.)

Appellant's paternal aunt Jane Vinatieri Tellkamp testified to the hostility between appellant's mother and father (who did not provide child support and had another family to support). When appellant was around 12 years old, he came to live with his father. Jane and her sisters also paid for appellant to come to Southern California for holidays, but he was not around the large Vinatieri family too much and it was overwhelming for him. In 1992 appellant went to Arizona with his uncle Charles Vinatieri to learn plumbing. (66RT 7125-29.)

Jane wrote to appellant when he was in prison in Arizona. She did not recall him having tattoos before he went to prison. When he got out of prison, he stayed with her and her three children for about a year; at that time he numerous tattoos, including "Nigger Thrasher." Appellant covered these tattoos by wearing long-sleeved shirts. (66RT 7131.) He was very good with children but at first seemed guarded and scared. He was a follower, not a leader. (66RT 7130-33.) Appellant did have a substance abuse problem before he went to Arizona; this problem was prevalent in the Vinatieri family. (66RT 7151.)

Appellant's aunt Elizabeth Vinatieri also testified to substance abuse problems among her siblings. (66RT 7153-54.) Elizabeth worked as a special education assistant and testified that appellant had a learning disability. When he stayed with his father for several months when he was

12, the family hired a tutor for him. Appellant never "meshed" or felt included in his father's new family and moved back to his mother's home after only a few months. After that he visited the Vinatieris occasionally when they sent money for him but he never felt at ease with their big extended family. (66RT 7153-58.) Appellant had always been kind and respectful and good with children. He was a loving and caring father. (66 RT 7160-61.)

Appellant's uncle Charles Vinatieri testified that appellant worked with him as plumbing assistant for about a month until his arrest for the Arizona assault. Appellant was a good worker and never violent. On one occasion when out drinking, another man pistol-whipped Charles' buddy and appellant stayed in the background. (66RT 7162-64.)

3. Appellant's history after the offenses.

The Five Star robbery took place not long after appellant was released from prison in Arizona. After the Five Star robbery, appellant returned to California. He went to junior college, got an apprenticeship in welding, joined the union, lived with his girlfriend Becca whose young daughter he treated as his own, and had a son with Becca whom he loved and cared for.

Appellant's mother Marilyn Young testified that after appellant was released from prison (where he got his GED) he went to junior college and learned welding. He became a father and was a wonderful attentive father

and stepfather. She believed that he was moving away from the skinhead group a year or so before his arrest in 2003. Although Marilyn had concerns that appellant's son was being raised in a racist household, she never saw the child being taught to hate. After appellant's arrest, the child once expressed fear of a black woman standing in line with them. However, he also said that he played with "brown people," referring to Hispanics. Appellant was not a violent person. (66RT 7220-24, 7247.) Also after appellant's arrest, the boy once asked Marilyn why she "hated their flag" which Marilyn assumed referred to a Nazi flag. (66RT 7248-49.)

Appellant's grandmother Fern Vinatieri testified that when appellant became a father he was thrilled: all he had ever wanted was a family. Appellant brought his young son to see Fern and his grandfather in Washington State. Appellant took care of his son the whole time. (65RT 7043-45.) Appellant got his GED when he was in prison in Arizona and after that learned a trade (welding) and supported his family. (65RT 7045.)

Appellant never denied responsibility for the assault in Arizona and said he deserved his sentence. In his letters and phone calls from prison, he begged for photos and news of his family. Even after he was facing the death penalty, his letters were mostly about staying in touch with his family. Appellant told her he knew that "either way" he would never leave

prison except "in a box" and he accepted that. (65RT 7048, 7051.) Fern asked the jurors to follow their hearts. (65RT 7052.)

Sara Hall, the grandmother of appellant's stepdaughter Lexi and his son Odin, and Rebecca ("Becca") Hall's mother, testified. Becca had been physically abused by the father of her first child Lexi. When appellant stepped in to father Lexi, he dedicated himself to making Lexi's life better and his relationship with her continued after his arrest. From jail, appellant and his children correspond and he calls them once a week. When Lexi wanted a new bike at age ten, appellant asked his family to buy her one with money he had earned and saved from his union work. (67RT 7349-53.)

Sara testified that before appellant's arrest, he picked up Lexi from preschool and taught her to ride a bike; he was a wonderful father and a good provider when he was able to. When Becca was pregnant with Odin, appellant was overjoyed; when Odin needed emergency surgery appellant spent a week at the hospital at his side. (67RT 7353-57, 7359-60.) Lexi makes the honor roll in school and sends all her awards and report cards to appellant. It is important to the children that appellant respond to what they are doing. (67RT 7359-60.)

Sara had been a special education teacher and knew that appellant had a learning disability. Nonetheless, he went to junior college and worked side jobs trying to get ahead until he got into the union apprentice

program. Prior to his arrest he had worked for five to six months in Nevada with the union and slept in his car so he could send more money to Becca and the children. (67RT 7357-58.)

Jay Rojo oversaw the Boilermakers' Union five-year apprenticeship program in welding. Appellant was an apprentice; he never failed a drug test. He worked in a racially diverse crew and had no problems getting along with blacks and Hispanics. He was a good and dependable worker. (66RT 7099-7108, 7118.)

Union member Brenda Marley, who had a high national security clearance and worked at a nuclear facility, had worked and car-pooled with appellant in Nevada. She was aware that appellant had a tattoo that said "Nigger Thrasher" but he never used racial epithets; he worked with other races and never had problems. To the contrary: on one occasion a white worker used the n-word and a group of workers, including appellant, complained and refused to continue working until the offender was reprimanded. (66RT 7119-24.)

4. Expert testimony.

Denise Johnston, founding director of the Center for Children of Incarcerated Parents,[50] testified that when a parent is removed from the

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[50] Ms. Johnston had been a doctor, with a medical degree from Stanford, but while in medical school and as a practicing pediatrician she was also a heroin addict and had been for 25 years. When it all "fell apart," she surrendered her medical license and committed theft crimes to support her addiction and her

family by a human agency, the child's ability to recover from trauma may be impaired. A father can continue to have a meaningful relationship with his children and can make meaningful contributions to the children's development, even if he is confined in prison for life. (66RT 7076-78, 7094.)

Marilyn Cornell had worked as a social worker and probation officer with juveniles and serious adult offenders; she is a licensed marriage and family therapist and part-time professor at San Diego State University. (68RT 7407-09.) She had interviewed appellant and his family and reviewed the records and transcripts in this case. (68RT 7414.) Appellant had a learning disability that was not treated until fourth grade. As a child, he was small and bullied. He was molested by a cousin, which was a serious impediment to his development, left him with anger and a feeling of unworthiness, and impacted his early use of drugs and alcohol. (68RT 7421-24.) His father's interest in him was neither sustained nor consistent, and ended when appellant was 11 or 12 years old, which was experienced by appellant as rejection and abandonment. (68RT 7427-28.) Although the Vinatieri family provided some support he was still the outsider. (68RT 7429.) When appellant was in prison from the age of 18 to 24, a critical time for solidifying his values as a man, he had no support from his family.

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family, and was incarcerated. She was last released from jail in 1987 and had not used heroin since that time. (66RT 7066-68, 7097.)

His earlier issues related to his small size, being bullied, and feeling unsafe, unworthy, and powerless, came to the surface, as did his overriding desire to belong to a group or a family. In prison, an inmate needs a group for protection and appellant started identifying with the skinheads. That affiliation, and his tattoos, made him look and feel tough. (68RT 7435-38.) He was a follower and highly suggestible and susceptible to the influence of others. (68RT 7444.) However, appellant made positive steps in prison, obtaining his GED and getting off drugs. (68RT 7443.) He made a strong commitment to be a good provider and an engaged father to his stepdaughter and his son, a commitment to being a family man that continued after his arrest on the present charges. (68RT 7446-47.)

C. Rebuttal Evidence Presented by the Prosecution.

1. Racism.

Deputy Joseph Gutierrez[51] testified that when he searched the cell shared by appellant and inmate Burnett on December 26, 2004, he found a symbol (he did not know what it was) above the door in appellant's cell that appeared to have been there for a long time and also appeared to have been written in blood.[52] A swastika was also found, which Gutierrez thought

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51 Gutierrez' testimony at the first penalty phase is at 36RT 3212 et seq.

52 Deputy Luis Rios talked to appellant on December 26, 2004. Appellant said he had placed the rune symbol (like an upside-down peace sign) above his cell door; but that he didn't know anything about the swastika outside his cell. (68RT 7542-45, 7546, 7634.)

was inside appellant's cell and also apparently written in blood. (He had no training in identification of blood and took no scrapings for analysis.) (68RT 7449-59.)

Deputy Andrew Peterson[53] was certain the swastika was **outside** appellant's cell in a common area to which many inmates, including skinheads, had access. (68RT 7528-31; Exh. 147, photograph B.)

Deputy Efren Juaregui testified that on July 5, 2006 (a few days previous) he saw appellant trying to pass a piece of paper to Aaron Beek at the jail. Appellant did this in full view of Juaregui and did not try to hide. Nothing about the incident caused the deputy any concern. Appellant has always been a cooperative inmate. (68RT 7520-26.)

Sergeant Jeff Chapman[54] of the Carlsbad, CA police department talked to appellant during a traffic stop on February 13, 1999. Appellant had several "white supremacist" tattoos and appellant agreed to have them photographed by the police. He had the "Nigger Thrasher" tattoo on his right bicep; and large boots on his back. He did not have the German soldier tattoo or tattoos on the front of his neck, or the tree on his arm. Thus it appeared that by March 2003 appellant had a number of new tattoos. (69RT 7565-72, 7578.)

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53 Peterson's testimony at the first penalty phase is at RT 3389 et seq.

54 Chapman's testimony at the first penalty trial is at 40RT 3780 et seq.

Officer Augustine Jones[55] of the Carlsbad, CA police department gang task force compared the 1999 photographs of appellant's tattoos, with the photographs taken on his arrest on March 20, 2003. Additional tattoos on his neck ("Lexi" and "Odin") and chest; the tree on his arm, and the crucified skinhead below his bicep were all new. (69RT 7580-88.) The lettering on the word "Nigger" was completely different from the word "Thrasher" (suggesting the n-word was added at a different time). (69RT 7586-87; see Exh. 150.)

Officer Francisco Sepulveda[56] of the Fullerton, CA police department had a consensual encounter with appellant in September of 1999. Appellant wore red suspenders and shoelaces in his Dr. Martin boots, i.e., typical "skinhead gang attire." He had a skull and 88 on the back of his head; SWP on his biceps, a confederate flag , a swastika, and a German flag on his hand; and on his back "California Skinhead," boots, and "Blood and Honor." Sepulveda did not recall a "Nigger Thrasher" or a crucified skinhead tattoo.[57] (69RT 7591-93.) Appellant said he had been in prison in Arizona for six years and had been a skinhead for about 10 years. A report completed by Officer Peterson a month earlier noted that appellant

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55 Jones did not testify at first penalty trial.

56 Sepulveda did not testify at the first penalty trial.

57 Investigator Robert Baker authenticated Exhibits 151-53, and 155-57 as photographs of appellant's tattoos taken on March 20, 2003 at the time of his arrest. (69RT 7601-02.)

said he was no longer involved in the skinhead movement, and was no longer involved in the skinhead movement. (69RT 7594.)

Joanna Mendelson,[58] director of investigative research at the Southern California Anti-Defamation League, testified that her organization, which is dedicated to fighting anti-Semitism, monitored and analyzed the activities of extremist and hate organizations and how they use violence and crime to advance their goals. (69RT 7621-22.) Mendelson testified that all skinheads were neo-Nazis, although some kinds of skinheads were not racist. (69RT 7628.) She testified that the group American Front was a white supremacist "inherently racist" neo-Nazi organization. (69RT 7631.)

Mendelson reviewed appellant's tattoos and the symbols on letters he had written, such as "14" and "88" and the Celtic cross. She said that 88 signified "Heil Hitler," that "14" stood for the 14 words of a mantra used by white supremacists relating to perpetuating the white race, and that the Celtic cross was the most common white supremacist and neo-Nazi symbol. The rune (an upside down peace symbol) was used by neo-Nazis and white supremacists to signify the purity of blood as used in Nazi Germany and was thus an "inherently racist" symbol, although it was occasionally used by those who practice Asatru or Odinism, which she defined as a belief embraced by neo-Nazis and white supremacists that

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[58] Mendelson's testimony at the first penalty trial is at 40RT 3791-3824.

embraced pagan culture and that was often used as a cover for white supremacist beliefs. (69RT 7631-37.) Mendelson claimed that Odinism was a kind of ruse for prisoners who used the right of freedom of religion as a means of meeting to communicate and get information passed, and to conduct criminal activity and violence from inside the prison. (69RT 7637.)

Mendelson testified at length and in detail to each of appellant's tattoos: a swastika, a variation of a Nazi flag and the Confederate battle flag (symbolizing "segregation"), runic symbols (which she testified didn't correspond with anything specifically that made sense); a Celtic cross (an "inherently racist symbol"), Thor's hammer (not inherently racist, but in conjunction with the other tattoos was "certainly" racist), "Blood and Honor" referring to a racist organization started by the leader of a white power band, and an eagle and "Farewell Ian," the latter referring to the leader who died and was a martyr and symbol for white power; a Nazi death head ("inherently racist") and "skins" (racist when viewed in conjunction with other tattoos); a life rune ("inherently racist"), the Nazi eagle and double lightning bolts used by the German Nazi officer Himmler ("inherently racist"); Doc Martin boots showing the bottom of the boot referred to a "boot party" or carrying out a violent act/stomping a victim; a portrait of a Nazi general with "SS" on the collar, possibly an image of Joseph Dietrich, who was responsible for mass executions; SWP which

stands for supreme white power ("inherently racist"); a Viking warrior, and "Nigger Thrasher" ("obviously" referring to a violent act against an African-American); "14 words" (signifying the slogan "secure the existence of our people and a future for white children"); a crucified life rune showing skinheads sacrificed Jesus-like for their race; skinheads wielding bats and machetes ("racist" because they were directly above a swastika); a spider web (not inherently racist but in context it indicated having served prison time); and a triskele, which she described as a "take-off" of a swastika and "inherently racist;" "SWP" and a noose on a tree, an obvious reference to slavery and lynching, and the words "weiss macht" which she said meant white power. (69RT 7638-58.) Mendelson testified that a tattoo of a skinhead wearing red suspenders would show that someone of another race was harmed, or that their blood had been spilled. (69RT 7646.)[59]

2. Miscellaneous.

Deputy Danielle Benjamin[60] testified that according to the jail visitor log, appellant's son Odin visited appellant four times from March of 2003 to September of 2005. Lexi visited three times and her last visit was in December of 2004. Becca Hall's last visit to appellant was on March 30, 2005. (68RT 7546-52.)

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[59] Mendelson testified that a devoted follower of Asatru who claimed not to be racist "would not be welcome" in the Aryan Nation group. (69RT 7665.)

[60] Benjamin's testimony at first penalty phase is at 40RT 3771 et seq.

D. Sur-rebuttal Evidence Presented by the Defense.

Pedro Zepeda, a Mexican national in local custody since August 11, 2002, had been housed with appellant and had seen some of his tattoos. Appellant had never indicated any intent of violence towards anyone of a different race or creed. While in custody, Zepeda had seen appellant interact with both blacks and Hispanics in the jail without any problems. If appellant had been known to be violent toward a particular race, he would not be allowed to congregate with that race in custody. (69RT 7681-83.)

Around the time of appellant's arrest, Investigator Robert Baker requested that appellant's mail be intercepted and his phone calls taped and preserved. Appellant's mail was sent to him for review; there were few letters but more than five. (69RT 7700-04.)

Denise Leacu, assistant to appellant's attorney Fielding, spoke to Mendelson about appellant getting his tattoos removed. Leacu then contacted 25 to 30 agencies but none would go into the jail; the sheriff's department also stated they would not allow tattoo-removal equipment in the jail. (70RT 7715-17.)

Former deputy Thomas Wesley knew appellant in 2004 when he worked at the county jail. Appellant was in cell 217 with inmate Burnett (who wore blue; appellant wore green). Wesley's report stated that appellant was dressed in blue that day. However, Wesley testified that his report was inaccurate and appellant was actually dressed in green. He

described appellant's hair length as "short" and "straight." (707RT 7724-28.)

Mario Ojito Lopez had been recently acquitted of first degree murder. Appellant's attorney Fielding was his brother's lawyer in that trial. Ojito Lopez was affiliated with the Logan Heights gang and had "Cuban pride" tattooed on his forehead. He knew appellant in custody; they were close friends. Ojito Lopez saw appellant interact with African-Americans and never saw him having problems with anyone because of race or beliefs. He never saw appellant act hateful towards other races. (70RT 7734-37.)

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GUILT PHASE ISSUES

I. APPELLANT'S STATEMENT TO THE POLICE THAT THEY HAD ALREADY "HEARD IT ALL" WAS ELICITED IN VIOLATION OF HIS FIFTH AND FOURTEENTH AMENDMENT RIGHTS AND ITS ADMISSION INTO EVIDENCE AGAINST HIM WAS PREJUDICIAL

A. Introduction to Argument.

When appellant was arrested he asked for his rights. The detective refused, and instead insisted that appellant first had to listen to the tape recording of his (appellant's) conversation with Jason Getscher. The detective had said he would not question appellant, and that after listening to the tape, appellant could go home. Instead the detective asked appellant if he had heard enough, gave him the much-delayed *Miranda* admonition, and then asked appellant if he wanted to continue. Appellant said "you've heard it all." This statement was admitted against appellant at trial.

Appellant contends it was taken in violation of *Miranda* for the following reasons: (1) appellant invoked his rights when he asked for them; (2) playing the tape recording after his invocation was the functional equivalent of an interrogation; (3) giving the *Miranda* warnings midstream, between two interrogation sessions, invalidates any later admission; and appellant did not impliedly waive his rights. The statement was prejudicial because even though in the tape recorded phone call appellant had admitted his involvement in the Five Star homicides, the defense was able to explain that much of appellant's statement was posturing for the benefit of

Getscher, who had been his "leader" in prison. The "you heard it all" statement, relied on heavily by the prosecution, was treated by the prosecution as an affirmation of the tape recording, and thus prejudiced the defense.

B. Summary of Proceedings Below.

Appellant was arrested on March 20, 2003, and the police interrogated him and recorded his responses. After confirming appellant's name and address, Detective McDonald told appellant, "[t]his is regarding a 1999 murder case," and asked appellant if he knew James Torkelson. McDonald said Torkelson, who was in prison on a 30-year sentence, was "looking for deals," and that he had given the police some information on the Park 'N Ride murder case. McDonald said another guy was also "looking to make a deal" and that this was appellant's "opportunity" to tell his side of the story, even though the police had "other evidence," including "a tape he could play." (5CT 1089-90.)

Appellant responded that Torkelson had told him about the murder, then said: "But yeah, I [sic] like my rights if you wouldn't mind. I don't want to be a (inaudible) or anything or (overtalking)." (5CT 1091.) McDonald countered: "**No, but would you like to listen to the tape first? I won't say nothing. I won't ask you any questions. Would you like to [overtalking] OK. And then after we're done, I'm not going to ask you any questions. I'll play a tape and then after the tape, uh, I'll advise**

you of your rights and you can go home. It's up to you." (*Ibid.*; emphasis provided.) Appellant responded, "OK." (*Ibid.*) The officer played the recording (or portions thereof) of Getscher's phone conversation with appellant. McDonald asked appellant, "Is that enough or do you want to continue?" Appellant said, "No, I heard about enough." (5CT 1092.)

McDonald then asked appellant about teaching responsibility to his son, and facing up to mistakes (still not complying with appellant's request for his rights). McDonald repeated that a lot of people want favors, that no one liked Torkelson, and then said, "Let me advise you of your rights . . . . And see if you'd like to continue on. Because basically we've got everything on tape and we'd just like some details from you. Now I'd appreciate your honesty and it would be something at least you could tell your son that hey, I made a mistake and I faced up to it and you should too." McDonald finally read appellant the *Miranda* warnings. (5CT 1092-93.) He finished by asking appellant "Do you want to tell your side of the story now?" Appellant said, "**You heard it all**. I can't really ...." McDonald interrupted, asking, "No? There's a lot of, there's a lot of holes because it wasn't just I [sic] asking these questions." Appellant responded "No." McDonald said, "Um, let's start with the ... ." Appellant said "I'll tell you what ... I ain't gonna talk about no [sic], right here, right now, all right." McDonald insisted, "I respect you for that, but just say I did this, I did that and I did whatever. That's all you have to say if you don't want to

say anything." He warned appellant that other people were talking and throwing out names. McDonald repeatedly insisted: "Well just say 'I did this. I did that.' That's all you have to do is throw it. OK?" Appellant said he had to ask for an attorney and the questioning finally came to a close. (5CT 1095-96.)

The defense challenged the admission of the statement "you heard it all" under *Miranda v. Arizona* (1966) 384 U.S. 436, arguing that the officer's statements and questions made after appellant had asserted his rights was an "impermissible comment" on appellant's invocation of his Fifth Amendment right to remain silent, and an improper "softening up" of appellant under *People v. Honeycutt* (1970) 20 Cal.3d.150, 160. (5CT 1085-87; 19RT 1015-17.) The defense also argued that statement was not an admission but was instead just an acknowledgment of the prosecutor's evidence, and thus "equivocal, irrelevant, confusing" and cumulative under section 352. (5CT 1086.)

At a hearing on September 15, 2005, defense counsel described Detective McDonald as "heavy-handed" in urging appellant to talk despite appellant's repeated invocation of *Miranda* rights, and argued that even though appellant said he would "like [his] rights," and that he would listen to the tape "after [he got his] rights," the detective insisted on first playing the tape, and then continued to question appellant despite his promises to

the contrary, in violation of *Miranda*, and in a clear attempt to lure appellant into making an incriminating statement. (19RT 1014-15.)

The trial court noted its long experience with the detective "over the course of many trials," during which it had determined that the detective was not "heavy handed," and held that McDonald had not violated *Miranda*. (19RT 1018.)

The statement "you've heard it all" was admitted at the guilt phase. (30RT 2756.) At the second penalty trial, the prosecutor reminded the court that the "you've heard it all" statement was ruled admissible; and the court confirmed this ruling. (61RT 6530.) Detective McDonald testified at the second penalty trial that after he played the Getscher tape to appellant, appellant said "you heard it all." (62RT 6643.)

C. Because Appellant Invoked His Right to Silence When He Asked the Detective to Give Him His Rights, and the Detective Blatantly Ignored that Invocation, Any and All Statements Made by Appellant After Asking and Being Refused His Rights Were Taken In Violation of Miranda.

Miranda v. Arizona (1966) 384 U.S. 436 established safeguards to protect the exercise of the Fifth Amendment privilege against self-incrimination by persons interrogated in custody, given the concern that the use of psychologically coercive interrogation techniques and the inherently coercive effect of incommunicado interrogation could cause suspects to incriminate themselves involuntarily. (*Id.* at 448, 455-48.) *Miranda*

required the police to warn suspects of certain constitutional rights, including the right to remain silent and the right to counsel. (*Id.* at 444.) *Miranda* emphasized that the Fifth Amendment privilege is fulfilled only where the accused is guaranteed the right "to remain silent unless he chooses to speak in the unfettered exercise of his own free will." (*Id.* at 460.)

> "[W]ithout proper safeguards the process of in-custody interrogation [] contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely. In order to combat these pressures and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored." (*Id.* at 467.)

(See also *Chambers v. Florida* (1940) 309 U.S. 227, 235-38 [our accusatory system of criminal justice demands that the government seeking to punish an individual produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth].)

Miranda further held that police officers **must cease questioning** any suspect who invokes the right to remain silent or requests counsel. (*Id.* at 473-74.) The courts have repeatedly insisted that *Miranda* imposes mandatory rules on police conduct. (See e.g., *Moran v. Burbine* (1986) 475 U.S. 412, 420; *People v. Peevy* (1998) 17 Cal.4th 1184, 1188.)

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1. Detective McDonald violated *Miranda* by failing to explain appellant his rights prior to interrogating him.

Detective McDonald violated *Miranda* when he refused appellant's request for his rights, and continued to pressure and question appellant despite appellant's request for his rights. *Miranda* held that the "coercive atmosphere of interrogation makes it essential for a suspect to be 'given a full and effective warning of his rights **at the outset of the interrogation process**.'" (*Miranda*, 384 U.S. at 445; emphasis provided.) Under *Miranda*, when the police fail to advise the defendant "of his constitutional privilege . . . at the outset of the interrogation," his decision to speak to the police is not "not made knowingly or completely because of the failure to apprise him of his rights." (*Id.* at 465.) Here, the police failed to advise appellant of his constitutional privilege and thus violated *Miranda.*

2. Appellant invoked his *Miranda* rights even though Detective McDonald wrongly delayed explaining those rights to him.

Detective McDonald clearly understood appellant to be invoking his right to silence because he responded to appellant's demand for by promising not to ask appellant any questions if appellant would just listen to the tape first. *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3d 1054 pointed out that police officers spend their days interacting with ordinary people and are well acquainted with how ordinary people speak, a fact recognized

in *Connecticut v. Barrett* (1987) 479 U.S. 523, 529, which directed that a defendant's words should be "understood as ordinary people would understand them." (*Sessoms*, 691 F.3d at ___; 2012 U.S. App. LEXIS 17206, p. 24.)

Sessoms considered the best test of how a police officer would understand ordinary words is how the actual police officer responded to the defendant's statement. In *Sessoms*, the detective responded to the suspect asking if "there was any way he could have a lawyer present," as his father had told him, by stating that a lawyer would prevent him from giving his side of the story, i.e., a clear indication that the detective knew the defendant was requesting a lawyer. (*Id.* at p. 2.)

Similarly here, Detective McDonald clearly understood appellant's request for his rights as an invocation of his right to silence and a concomitant duty on his part to refrain from questioning appellant, because he responded: "No, but would you like to listen to the tape first? I won't say nothing. I won't ask you any questions. Would you like to [overtalking] OK. And then after we're done, I'm not going to ask you any questions. I'll play a tape and then after the tape, uh, I'll advise you of your rights and you can go home. It's up to you." (5CT 1091.) Because appellant invoked his rights, even in the face of the improper obstacles put up by the detective, his subsequent statement "you heard it all" was inadmissible and in violation of appellant's constitutional rights.

Instead of following the mandate of *Miranda*, the detective proceeded to interrogate appellant prior to giving him the *Miranda* warnings: He used the tape recording as the functional equivalent of an interrogation, which he insisted on playing and then topped it off by asking if appellant had "heard enough" and urging him to model taking responsibility for his criminal activity for the benefit of his son. (5CT 1092-93.)

3. Because appellant requested his rights prior to being given his *Miranda* warnings, the requirement that an invocation be "unambiguous" does not apply.

Appellant anticipates an argument by respondent that appellant's request for his rights was not sufficiently unambiguous as to amount to an invocation. In *Berghuis v. Thompkins* (2010) __ U.S. __ , [130 S.Ct. 2250, 2259-64], after being informed of his *Miranda* rights, the suspect remained silent for three hours before making an incriminating statement. The High Court held that an accused must invoke his right to remain silent unambiguously, and rejected the argument that prolonged silence after the *Miranda* admonition should be deemed an invocation. Similarly in *Davis v. United States* (1994) 512 U.S. 452, the defendant had been given his *Miranda* warnings, waived them, and 90 minutes later said, "Maybe I should talk to a lawyer." (*Id.* at 455.) The *Davis* court held that an invocation of the right to counsel must be unequivocal. (*Id.* at 462.)

However, as explained in *Sessoms,* there is a "critical factual distinction" between statements of invocation made **after** *Miranda* warnings, as in *Berghuis* and *Davis*, and such statements made **before** *Miranda* warnings are given, as in *Sessoms* and as in the case at bar. (*Sessoms*, 691 F.3d at ___; 2012 U.S.App. LEXIS 17206, p. 20.) Both *Berghuis* and *Davis* recognized that a suspect must receive *Miranda* warnings **before** any interrogation. Thus, the requirement of an unambiguous invocation can apply "only after a suspect has been informed of his *Miranda* rights." (*Sessoms*, U.S.App. LEXIS 17206, p. 22.)

> "Not only are the [United States] Supreme Court cases on this point pellucid, their rationale makes eminent sense. A person not aware of his rights cannot be expected to clearly invoke them. Once, however, a suspect has been read his *Miranda* rights, it is reasonable to ascribe to him knowledge of those rights." (*Ibid.*)

Where a suspect invokes his rights prior to being given *Miranda* warnings, the unambiguous or unequivocal invocation rule does not apply. (*Ibid.*)[61]

4. Conclusion.

In sum, Detective McDonald violated *Miranda* by failing to advise appellant of his *Miranda* rights at the outset of the interrogation. Appellant invoked his rights when he asked the detective for his rights, and the

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[61] A recent case by this Court is in accord with this rationale: *People v. Sauceda-Contreras* (2012) 55 Cal.4th 203 held that the police can clarify the defendant's intent to waive or invoke his rights under *Miranda*. The ambiguous statements the police attempted to clarify in *Sauceda-Contreras* were made **after** the defendant had been given his *Miranda* warnings.

detective interrogated appellant despite that invocation when he played the tape recording and asked appellant if he had heard enough. Appellant's response "you've heard it all" was therefore inadmissible at trial.

D. Playing the Tape Recording Was the Functional Equivalent of Interrogation.

Assuming arguendo this Court rejects appellant's claim that he invoked his *Miranda* rights, as set forth above in Part C, appellant contends that any implied or alleged waiver of those rights was invalid. In this section, appellant demonstrates that playing the tape recording was the functional equivalent of an interrogation, an interrogation that took place prior to any *Miranda* warnings, and without any waiver of the *Miranda* rights.

Interrogation for purposes of the *Miranda* rule includes "any words or actions on the part of the police [] that the police should know are reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis* (1980) 446 U.S. 291, 301.) The latter portion of this definition focuses primarily upon the perceptions of the suspect, in order to give the suspect an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police. (*Id.* at 301.) Although the police ought not to be held accountable for the *unforeseeable* results of their words or actions, *Innis* defines interrogation broadly and flexibly so as to capture within its rule police

words or conduct that impose on the suspect an environment of interrogation "created for no purpose other than to subjugate the individual to the will of the examiner." (*Miranda*, 384 U.S. at 457.) The United States Supreme Court has emphasized that a "psychological ploy" of any significance must also be treated as the "functional equivalent" of interrogation. (*Innis*, 446 U.S. at 299, *Arizona v. Mauro* (1987) 481 U.S. 520, 526.)

This Court held in *People v. Sims* (1993) 5 Cal.4th 405, 442, that an officer's statements to the defendant describing the results of the police investigation were the functional equivalent of interrogation, making the results inadmissible under *Innis*. Similarly, *People v. Davis* (2005) 36 Cal.4th 510, 555 held that an officer's advice that defendant "think about that little fingerprint" on the murder weapon was the functional equivalent of interrogation, because the statement implied that the defendant's fingerprint had been found on the weapon and was thus likely to elicit an incriminating response.

The same result is mandated here. Detective McDonald's playing the recording (and his insistence on playing that recording after appellant asserted his rights, and before reading appellant his *Miranda* rights) was the equivalent of what this Court held was an interrogation in *Sims* (a police statement describing the results of the investigation). The tape recording – containing appellant's own conversation about the crimes – was extremely

likely to elicit an incriminating response, especially when that incriminating response was prompted by the detective's taunting question "Is that enough ... ?" (5CT 1092.)

In sum, playing the tape was the functional equivalent of an interrogation of an in-custody suspect, and that interrogation was undertaken without the required *Miranda* warnings; worse, it was undertaken after an express police refusal to accede to the defendant's request for his *Miranda* rights.

E. Appellant Made No Implied Waiver of His Right to Remain Silent Prior to Making The Statement at Issue.

Miranda imposed on the prosecution a "heavy burden" of proving that the defendant knowingly and intelligently waived his rights. Without a proper warning and proof of waiver, "no evidence obtained as a result of interrogation can be used against [the defendant]." (384 U.S. at 479.) "The prosecution must not be allowed to build its case against a criminal defendant with evidence acquired in contravention of constitutional guarantees and their corresponding judicially created protections." (*Michigan v. Harvey* (1990) 494 U.S. 344, 351.)

Respondent cannot meet this burden. Even though an express waiver of *Miranda* rights is not required, and a valid waiver can be inferred "from the actions and words of the person interrogated," *Butler v. North Carolina* (1979) 441 U.S. 369, 373, no such implied waiver can be inferred

in this case. To the contrary, appellant's conduct supports the inference that he did **not** intend to waive his rights when he agreed ("OK") that Detective McDonald could play the tape recording before giving him his rights.

1. The "two-step" police tactic of eliciting incriminating statements by delaying the *Miranda* warnings, giving a midstream *Miranda* admonition, and then re-eliciting the incriminating, renders both *Miranda* and any subsequent "waiver" of the rights ineffective.

At this point, a quick review of the relevant facts is in order: Appellant requested his rights. Detective McDonald ignored that request with a firm "no," telling appellant that he would instead play the tape recording (that is, he would first conduct the equivalent of an interrogation, see Part D, above). Appellant accepted McDonald's offer ("OK"). [62] After the tape was played, McDonald asked appellant, "Is that enough or do you want to continue?" Appellant said, "No, I heard about enough." (5CT 1092.) **This is appellant's first unadvised statement.** After some "softening up" language, appealing to appellant's status as a father, and other codefendants wanting favors, etc. (see Part F, below), McDonald said "Let me advise you of your rights . . . . And see if you'd like to continue on.

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[62] This "OK" cannot be parlayed into to implied waiver of the rights appellant repeatedly requested but was not given, especially since the detective twice promised not to ask him any questions. McDonald's promises should be viewed instead as an acceptance of appellant's invocation (5CT 1091: "I won't ask you any questions.") an invocation which McDonald quickly and unconstitutionally violated. (Part C, above.)

Because basically we've got everything on tape and we'd just like some details from you. Now I'd appreciate your honesty and it would be something at least you could tell your son that hey, I made a mistake and I faced up to it and you should too." McDonald finally read appellant the *Miranda* warnings. (5CT 1092-93.) He finished by asking appellant "Do you want to tell your side of the story now?" Appellant **said**, "**You heard it all**. I can't really ...." (5CT 1095.) **This is appellant's second statement, after the midstream *Miranda* warnings, and the statement used against him at trial.**

This Court must ask why a police officer would refuse a suspect's clear request for his rights, and why that officer would insist that he would only give the suspect his rights after conducting the functional equivalent of an interrogation, and only then, after eliciting an incriminating statement, give the *Miranda* admonition and re-elicit the statement.[63]

In *Seibert v. Missouri* (2004) 542 U.S. 600, the High Court denounced the "two-step" or "question-first" police interrogation tactic, in which the police first question the suspect without *Miranda* warnings, and

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[63] In *People v. Jablonski* (2006) 37 Cal.3th 744, 815-16, the officers decided to continue to question the suspect even if he invoked his *Miranda* rights, and then did so. On appeal, the defendant argued that the repeated *Miranda* violations in themselves rendered the defendant's statement involuntary – and thus improperly prevented him from testifying. Although the Court rejected the claim of involuntariness, *Jablonski* strongly disapproved of the officers' tactics, describing it as misconduct, unethical, and nonproductive in that "in the appropriate case," it would amount to a constitutional violation causing this Court to reverse. Appellant submits this is the appropriate case.

then, after eliciting incriminating information, the police give the warnings and re-elicit the admissions or confession.[64] *Seibert* described the "threshold issue" as whether such delayed warnings could function effectively, as required by *Miranda*, and determined that by any objective measure, the withholding of warnings renders them ineffective: "After all, the reason that question-first is catching on is as obvious as its manifest purpose, which is to get a confession the suspect would not make if he understood his rights at the outset." (*Id.* at 613.) Justice Kennedy, concurring, emphasized that such a two-step technique "distorts the meaning of *Miranda* and furthers no legitimate countervailing interest." (*Id.* at 621 [Kennedy, J., conc.].)

More recently, *Bobby v. Dixon* (2011) ___ U.S. ___ , [132 S.Ct. 26, 31-32][65] reiterated the concern in *Seibert* that he delayed *Miranda* warnings did not "'effectively advise the suspect that he had a real choice

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64 In *Seibert*, the police questioned the defendant, and then after eliciting a confession, advised her of her rights, and then elicited the confession again. *Seibert* held the second confession inadmissible, notwithstanding that it was preceded by *Miranda* warnings and waivers, because *Miranda* had been rendered ineffective by the first step of the two-step interrogation ploy.

65 In *Bobby v. Dixon*, the Sixth Circuit held that the defendant's confession was inadmissible as involuntary and in violation of the *Seibert* rule regarding two-step interrogations. The United States Supreme Court reversed the Sixth Circuit decision, holding that no two-step interrogation had taken place, the defendant had made no prewarning incriminating statements, and a four-hour break took place between the two interrogation sessions, during which there was a "dramatic change in circumstances," ensuring that the that the prior unwarned interrogation did not undermine the effectiveness of the *Miranda* warnings given before the confessions. (*Id.* at 31-32.)

giving a statement because the unwarned interrogation blended into a single 'continuum." (*Id.* at 31-32, citing *Seibert*, 542 U.S. at 612, 617.)

In *United States v. Williams* (9th Cir. 2006) 435 F.3d 1148 the Ninth Circuit considered the plurality opinion in *Seibert* in conjunction with Justice Kennedy's concurring opinion, and stated the test as follows. Suppression of incriminating statements obtained through a two-step interrogation process is required only where the police "deliberately employ a two-step interrogation to obtain a confession and where separations of time and circumstance and additional curative warnings are absent or fail to apprise a reasonable person in the suspect's shoes of his rights." (*Id.* at 1158.)

The courts are to determine whether the delay was "deliberate" and whether the post-admission warning is effective by considering both objective and subjective evidence. Objective evidence includes "the timing, setting and completeness of the prewarning interrogation, the continuity of police personnel and the overlapping content of the pre- and postwarning statements." (*Id.* at 1159, 1158-60.) Subjective evidence could include the officer's testimony. (*Id.* at 1158.)

Here, all evidence points to deliberate delay on the part of Detective McDonald and the ineffectiveness of the post-interrogation warnings. First and foremost, McDonald adamantly refused to give appellant his *Miranda* warnings despite appellant's express request. His conduct is tantamount to

an admission that his delay was a deliberate attempt to obtain incriminating statement from appellant. As *Williams* observed, "there is rarely, if ever, a legitimate reason to delay giving a *Miranda* warning until after the suspect has confessed," and "the most plausible reason for the delay is an illegitimate one, which is the interrogator's desire to weaken the warning's effectiveness." (*Id.* at 1159 and fn. 14.) McDonald's refusal to admonish appellant, and his insistence on playing the tape, make it clear that he believed that delaying the admonitions until after playing the tape (the equivalent of an interrogation), plus a little more massaging (false promises that he would not question appellant and that appellant could go home after submitting to the interrogation), would have the effect of obtaining from appellant an incriminating statement.

The timing and the continuity of police personnel involved in the interrogation similarly support the finding of deliberate delay and the ineffectiveness of the midstream *Miranda* admonition to effectively apprise appellant of his rights: There was no gap in time and no change in personnel. The prewarning interrogation, i.e., the tape recording, was a complete interrogation – McDonald described it as "everything." Finally, appellant's pre-warning and postwarning statements overlap. Appellant said he had "heard enough" and that the police had "heard it all." Immediately before giving the *Miranda* admonition, McDonald told appellant that they "basically" had "everything" against him and it was just

a matter of "details," suggesting that the warnings and any statements appellant would thereafter make were innocuous or unimportant details.[66]

As *Williams* points out, by any objective measure, "it is likely that if the interrogators employ the technique of withholding warnings until after interrogation succeeds in eliciting a confession, the warnings will be ineffective in preparing the suspect for successive interrogation, close in time and similar in content." (*Id.* at 1159.)

In sum, the *Seibert* rationale is wholly applicable to the case at bar. The harm in the police approach here is the same as that decried in *Seibert*: the interviewing technique ignored the underlying rationale and undermined the meaning of *Miranda.* Both in *Seibert* and appellant's case, the police rendered *Miranda* ineffective by delay, and in this case not only by delay in giving *Miranda* but by refusing to do so even when requested by appellant. Detective McDonald's adamant refusal to give appellant his rights indicated to appellant that he had no choice in the matter, and that no matter what appellant did the interrogation was going to continue in the form of playing the tape recording, which the detective established as a prerequisite to giving appellant his rights.

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[66] Statements made by McDonald after the admonition and the statement elicited from appellant shed further light on McDonald's deliberate attempt not only to circumvent *Miranda* at the outset, but to render *Miranda* ultimately ineffective. In classic doublespeak, he told appellant "I respect you for that, but just say I did this, I did that and I did whatever. That's all you have to say if you don't want to say anything." (5CT 1095-96.)

2. Any implied waiver of appellant's *Miranda* rights must be deemed invalid as obtained through improper "softening up."

Moreover, any implied waiver of the *Miranda* rights made by appellant prior to making the statement used against him at trial issue must be deemed invalid as involuntary. *Miranda* requires a valid waiver to be knowing, intelligent and voluntary. (*Miranda*, 384 U.S. at 444.) Inquiry into the validity of an alleged waiver has two dimensions: (1) whether the relinquishment was a free and deliberate choice rather than the result of intimidation, coercion and/or deception, and (2) whether the defendant was fully aware of the nature of his rights and the consequences of waiving them. (*Moran v. Burbine,* 475 U.S. at 421.)

This Court condemned the police tactic of intentionally attempting to elicit incriminating statements by ingratiating themselves to the suspect or otherwise "softening him up" so as to persuade him to waive his rights and to talk to the police. (*People v. Honeycutt* (1977) 20 Cal.3d 150, 160.) The "softening up" in *Honeycutt* consisted of a casual conversation about acquaintances the interrogator and defendant had in common, including a discussion about the victim. *Honeycutt* held that such a softening up procedure vitiates any supposed waiver by the defendant of his right to remain silent. (*Id.* at 106-61 [a waiver resulting from a clever softening-up of a defendant renders the subsequent waiver involuntary].)

Appellant's supposed waiver was clearly not a free and deliberate choice but was instead produced by improper police tactics. After refusing to give appellant his *Miranda* warnings, the detective attempted to "soften up" appellant by promising that if appellant just listened to the tape (that is, if he agreed to the equivalent of an un-*Mirandized* interrogation), he could afterwards hear his rights and then "go home," without any further questioning. The detective also warned appellant that Torkelson and another guy were out there looking for deals and that this was appellant's "opportunity" to tell his side of the story – suggesting that if appellant talked he, instead of Torkelson, could get the "deal" because the police did not "like [Torkelson] too much" and were "not sure [they] want[ed] a deal with him." (5CT 1090-91.) As the final touch, the detective played on appellant's responsibility as a father (5CT 1092-93 ["at least you could tell your son that hey I made a mistake and I faced up to it. You should too."].) This kind of cozying up to a suspect in order to get him to talk, along with the detective's appeal to appellant's fatherhood, and his promise that appellant could "go home," clearly overbore appellant's will, rendering any implied waiver coerced and invalid.[67]

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[67] In *People v. Scott* (2011) 52 Cal.4th 452, 477-78 and *People v. Gurule* (2002) 28 Cal.4th 557, 602, this Court distinguished *Honeycutt* because the police officer did not disparage the victim, discuss appellant's former acquaintances, or engage in other small talk to overbear the defendant's free will. This case cannot be so distinguished. Detective McDonald placed great emphasis on appellant's former acquaintances, repeatedly stating that Torkelson and another guy were

F. Appellant's Statement "You've Heard it All" Should Have Been Excluded as Irrelevant And Unduly Prejudicial.

If this Court rejects the constitutionally-based arguments set forth above, appellant's statement "you've heard it all" should still be deemed erroneously admitted under Evidence Code section 352. As the defense argued at trial, appellant's statement was not an adoptive admission, but "simply an acknowledgment of the People's evidence/stance." At most, it was an equivocal statement that was irrelevant and unduly prejudicial under Evidence Code section 352. (5CT 1086.)

Appellant anticipates an argument by respondent that the "you've heard it all" statement was, even if only marginally relevant, hardly prejudicial, in that appellant's own statement came in through the taped phone call with Getscher. However, it was the "you've heard it all" statement that gave credence to the tape recording, which the defense had argued was posturing of the type appellant, Getscher's prison follower, was likely to make to the alpha male criminal. The telling point, however, is that the prosecutor at trial considered the statement highly significant and important to its case, even repeating it in the second penalty phase trial, where appellant's guilt of murder was no longer at issue. Where the prosecution deems the evidence important at trial, the reviewing court

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"looking to make a deal," that this was appellant's "opportunity," and that if appellant cooperated he could "go home." (5CT 1090-91.)

cannot hold otherwise. (*People v. Powell* (1967) 67 Cal.2d 55-57; *Yohn v. Love* (3d Cir. 1996) 76 F.3d 508, 523-25, fn. 28 [rejecting argument that erroneously admitted evidence was harmless where, at trial, the prosecution relied heavily on that evidence and obviously considered it important].)

G. The Erroneous Admission of Appellant's Statement Was Devastated the Defense and Was Extremely Prejudicial.

The federal constitutional violation requires an assessment of prejudice under the standard in *Chapman v. California* (1967) 384 US. 18, 24, which requires reversal unless the prosecution can show the error harmless beyond a reasonable doubt. This the prosecution cannot do.

The challenged statement was extremely prejudicial. The prosecutor treated it as a confession, i.e., a statement by appellant that affirmed the truth of what was said in the tape recorded telephone conversation between Getscher and appellant (and in Getscher's testimony, repeating the contents of the recorded phone call). The United States Supreme Court has described a confession as the most damaging evidence that can be admitted against a criminal defendant." (*Arizona v. Fulminante* (1991) 499 U.S. 279, 292, 296.) When a jury considers a full confession that "discloses the motive for and means of the crime," there is a high probability that the jury will rely on that evidence alone in reaching its decision. (*Id.* at 296.)

The prosecutor argued to the jury that appellant was guilty based on his taped phone conversation with Getscher. (32RT 2868, 2884-85, 2889,

2894, 2896, 2902-05.) Observing that appellant's taped statement was the chief piece of evidence against him, defense counsel argued that appellant was posturing when he talked to Getscher on the phone – appellant was trying to put himself in the best light in terms of the distorted prison culture which he and Getscher shared; and that other evidence showed that appellant was inexperienced, a follower not a leader, and that the tape recording itself showed that appellant was panicked and not "thinking straight." (32RT 2912-18; 2922-23.) Getscher had acknowledged that appellant was "under his wing" and was his follower, and that appellant looked up to him (29RT 2515, 2517-19.)

However, Getscher was a witness of questionable credibility. He did not come forward until 2002 (three years after the offenses) when he was in custody on unrelated charges. He then decided to come forward in an effort to get his sentence reduced. In exchange for his cooperation, his eight-year sentence with five years of probation was reduced to four and a half years with no probation. (29RT 2499.) Moreover, he was a known thief and liar: his convictions were indicative of a person who was not bound to the truth. Altogether he had some 30 convictions, including three or four convictions for car theft and a similar number for forgery, and had spent 17 years in prison. (29RT 2461-62.)

For these reasons, corroboration of Getscher's testimony and appellant's phone conversation with Getscher was of critical importance.

The defense attack on Getscher's credibility, and the defense argument that appellant was posturing and that Getscher was lying or confabulating was severely compromised by the testimony from Detective McDonald that appellant said, "You heard it all." Appellant would have had no reason to posture with the detective. Thus that one ambiguous statement, admitted in violation of appellant's Fifth and Fourteenth Amendment rights, was devastating to the defense. When erroneously admitted prosecution evidence strikes at the heart of the defense case, it is viewed as prejudicial. (See e.g. *People v. Lindsey* (1988) 205 Cal.App.3d 112, 117 and *People v. Vargas* (1973) 9 Cal.3d 470, 481 [both holding that error striking directly at the heart of the defense is reversible error].)

In sum, the statement admitted in violation of *Miranda* hit the ball out of the park for the prosecution [or, more blandly, "greatly increased the likelihood of a guilty verdict], and requires reversal of appellant's convictions at the guilt phase.

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II. THE TRIAL COURT ERRED IN ADMITTING EVIDENCE OF APPELLANT'S TATTOOS, HIS USE OF RED SHOE LACES, AND HIS WHITE SUPREMACY BELIEFS, IN VIOLATION OF APPELLANT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND A FAIR GUILT TRIAL

A. Summary of Proceedings Below.

1. The defense objection to racist tattoos and white supremacy beliefs was overruled.

On September 28, 2004, the defense filed a motion to exclude reference to appellant as a white supremacist, and to exclude reference to his "unique tattoos" (i.e., "Nigger Thrasher" and "Thor's Hammer"). The defense argued the tattoos were irrelevant, inflammatory, and improper character evidence (showing appellant as a "hater"). The motion was federalized under the Eighth Amendment reliability requirement. (1CT 150-54.)

The prosecutor argued that the tattoos were relevant to identification: Paula Daleo identified appellant as "Jeff" and by his tattoos when she first talked to Detective McDonald. McDonald learned appellant's identity through this information. The prosecutor also argued that appellant's use of red laces was a symbol of white supremacy and thus "highly probative" to show that he had killed. (1CT 265-72.) The prosecutor acknowledged that the tattoo evidence carried "a potential for prejudice" but argued it did not outweigh the probative value.

At the hearing on the motion, defense counsel pointed out that the witness(es)[68] knew appellant and could identify him without reference to the tattoos. The trial court said that the prosecution was entitled to verify the credibility of its witnesses with evidence that appellant bore the tattoos they used to describe him. The trial court's tentative ruling was that unless the defense would stipulate that appellant had the tattoos in question, the prosecution witnesses could use photos of the tattoos in identifying appellant. (4RT 702-03.)

The trial court tentatively excluded references to appellant's supposed white supremacy beliefs unless the prosecution could show the crime was gang related. (4RT 700.) The prosecution argued that even though it was "premature," the evidence of the red laces as an admission of guilt was strong. The court described its gut reaction as creating a tremendous Evidence Code section 352 argument for the defense, and in light of all the other prosecution evidence its probative value was not so great, but just opened a can of worms. The matter was taken under submission. (4RT 705-06.) Although the tattoo ruling was tentative, the court told the prosecutor to prepare the photos. (4RT 707.)

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[68] The prosecutor also argued that appellant made admissions to Heather Stanley and that this admission was linked to appellant by her identification of appellant's "unique tattoos." (1CT 269.) The supposed link was not elaborated and Heather Stanley did not testify at trial. The prosecution's main witness, Jason Getscher, knew appellant and identified him without reference to any tattoos.

On August 26, 2005, the defense objected to the tattoo photos in photoboard 25 (Exh. 68) because they injected "corrupting influences of a political and racial nature." The defense further argued the tattoo evidence was unnecessary since Daleo had identified appellant's photo and composite sketch. The defense again offered to stipulate that distinctive tattoos served to identify appellant. (15RT 882-85.) The court ruled the photographs admissible. The defense objected that the admission of photographs of appellant's tattoos violated his federal constitutional rights under the Sixth and Fourteenth Amendments. (15RT 887.)

On October 5, 2005, after testifying that appellant had tattoos stating "Nigger Thrasher" and "Thor's Hammer," Daleo identified photographs of those tattoos in Exhibit 68, and the photographs were published to the jury over a defense cumulative objection. (28RT 2343-44.) The prosecution asked for clarification of the court's ruling: The court allowed the red laces evidence and evidence of appellant's skinhead status. (28RT 2357-60.)

2. Testimony as to appellant's racist tattoos and white supremacy beliefs was admitted at trial.

At the guilt trial, the following evidence as to tattoos and white supremacist beliefs was admitted:

Detective McDonald and Paula Daleo both testified that Daleo identified appellant, whom she knew as "Lil Jeff" by his tattoos: "Nigger Thrasher" on his arm and "Thor's Hammer" on his Adam's apple.

McDonald learned from a Carlsbad detective that these were tattoos that appellant was known to have, and was thus able to identify him. (28RT 2343-44; 2396-97; 30RT 2745-48.) However, Daleo also referred to "Tiger," whom McDonald was able to identify as Jason Getscher and locate in custody in Arizona. McDonald contacted Getscher, who then telephoned appellant.

Daleo testified that her then-boyfriend Torkelson and appellant both claimed to be skinheads. Torkelson was involved in several groups that were active in the white power movement. She attended meetings with Torkelson; appellant also attended. (28RT 2368-69.)

Jason Getscher testified he met "Lil Jeff" (appellant) when they were both in prison in Arizona in 1996. Both were skinhead comrades, brothers in prison. (29RT 2463-64, 2482.) Red laces, or earning your laces meant, in skinhead culture, that you had drawn the blood of an enemy, and earned your stripes, "a proud standing in skinhead culture." Getscher said that appellant had purchased red laces before returning from San Diego to Getscher's house, and tried to lace them into his boots. Appellant told Getscher that things had gone bad and he had shot someone. (29RT 2479-82.) Getscher took the laces from him, saying he had not earned them because he had killed an innocent victim, not an enemy or in defense. (29RT 2483-84.)

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B. Evidence of Appellant's "Nigger Thrasher" Tattoo Was Inadmissible as Irrelevant and Unduly Prejudicial.

The prosecution did not allege a gang special circumstance, and did not allege a gang motive for this case. The crimes were not alleged as hate crimes. The motive was robbery, the robbers had no intent to kill, and they did not know who would be present when they made their robbery attempt. Indeed, they could not have known that Perez, an Hispanic woman, would be present at the parking lot, since she was not scheduled to work that night, had finished her shift at the time of the robbery, and was present at the time of the attack only by an unfortunate circumstance (she had just come out of the restroom and one of the assailants told her to go into the trailer).

Because money was the motive and there was and could have been no gang or hate-crime motive, appellant maintains that the evidence of appellant's tattoos was inadmissible as irrelevant and inflammatory. Only relevant evidence is admissible at trial. (Evid. Code, section 350; *People v. Babbitt* (1988) 45 Cal.3d 660, 681.) Under Evidence Code section 352, the trial court should exclude evidence where its probative value is outweighed by undue prejudice.

The prosecution argued that the tattoos "Nigger Thrasher" and "Thor's Hammer" were admissible to identify appellant and the trial court ruled that the prosecution could "verify" the credibility of its witnesses

through testimony describing these tattoos. (4RT 703.) It is correct that Daleo identified appellant to the police by his first name and his tattoos. However, Daleo knew appellant, had attended parties with him, and was certainly able to identify him in the usual manner – by looking at his face, in a photograph or in person. Indeed, Daleo identified appellant this way at trial. (28RT 2328.)

It is also correct that the police used the information about appellant's tattoos to complete his identification. But this does not render the tattoos relevant. The fact that the tattoos were used in the police investigation does not render the content of the tattoos admissible. Even if the police investigation had some relevance (which it did not), the police were able to identify appellant by contacting Getscher, whom Daleo had identified as "Tiger" and who Detective McDonald was then able to identify through police contacts, after which he arranged to interview Getscher in prison.

More specifically, the fact that Daleo remembered that the man she knew as "L'il Jeff" had "Nigger Thrasher" inscribed on his arm did not make the details of his tattoos admissible evidence to verify her identification of him. If the issue really were identification, it would have been more than sufficient to testify that he had a tattoo that said "N** T**" or "Thor's Hammer" or simply "a unique tattoo."

Assuming the trial court was correct in ruling that the prosecution was entitled to bolster the credibility of its witnesses with evidence that appellant bore the tattoos they used to describe him, it does not follow that the prosecution was also entitled to cast appellant as a racist through testimony that one of the tattoos used to describe him said "Nigger Thrasher." Daleo could have testified that she described two unique or unusual tattoos sported by appellant; and the officer could have testified that he used those descriptions to track down appellant through other officers. There was no need to describe and/or explicitly state the contents of the "Nigger Thrasher" tattoo. Even if it were somehow deemed necessary and relevant to describe a unique tattoo, that purpose could have been accomplished by using the less inflammatory "Thor's Hammer" tattoo.

More importantly, the contents of the "Nigger Thrasher" tattoo had no relevance to any issue, whereas the inflammatory and prejudicial impact is more than obvious. Prejudice for purposes of Evidence Code section 352 analysis "means uniquely inflammatory without regard to relevance." (*People v. Zambrano* (2007) 41 Cal.4th 1082,1183.) The tattoo was uniquely inflammatory, as shown below, and of no or marginal relevance, as shown above.

In *People v. Lee* (1992) 9 Cal.App.4th 510, 514, the court refused to allow a person to change his legal name to "Mister Nigger." *Lee* held that "no person has a statutory right to officially change his [] name to a name

universally recognized as being offensive." *Lee* described the racial epithet as one "which provokes violence," a word "commonly used and understood as a demeaning and offensive racial slur," an expression "particularly abusive and insulting," a term that "has no place in civil society," etc. (*Id.* at 515-16.) The word is considered so abhorrent and its use so repugnant that common practice when the word must be referenced is to use the euphemism "the n-word."

In short, the probative value of the tattoo was nil (Daleo could and did easily identify appellant, whom she knew as a friend, by his face) and any prosecutorial need or desire to bolster that identification through a "unique tattoo" could have been done through the Thor's Hammer tattoo instead. The jury learned nothing of admissible legal value by learning that appellant had "Nigger" tattooed on his arm. The only possible relevance was the absolutely prohibited one of bad character, i.e., appellant was so devoid of common social values and mores that he advertised on his body one of the most repugnant expressions in use in this country.

The prejudicial impact of the tattoo was therefore necessarily immense. Through the challenged evidence, the jury would have viewed appellant as a loathsome and worthless person, one certainly more likely to be guilty of the charged offenses.[69]

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[69] Cf. *People v. Cox* (1991) 53 Cal.3d 618, 660 [condemning the introduction of evidence of tangentially relevant gang membership, if only

Although this Court has allowed evidence of gang or swastika tattoos in limited circumstances, upholding the admission of the "Nigger Thrasher" tattoo at guilt phase in this case under the guise of bolstering Daleo's identification of appellant would represent a drastic expansion of the present case law. If the fact that appellant had a tattoo saying "Nigger Thrasher" is deemed admissible at the guilt phase in this case, then witnesses who know and can easily identify a defendant through a photograph, and/or in person, would also be allowed to describe any and all tattoos on the defendant, irrespective of the prejudicial impact of the tattoo itself, and even though the description of the tattoo has no relevance to prove anything in the case, under the guise of "bolstering" an identification that needs no bolstering.

In *People v. Medina* (1995) 11 Cal.4th 694, 749-50, this Court reluctantly upheld admission **at penalty phase** of swastika and "Grim Reaper" tattoos for purposes of identification, even though the tattoo evidence was "possibly cumulative" to a photographic identification, stating that "even if error occurred in admitting evidence of defendant's tattoos, the error was surely harmless in light of [substantial other evidence of other

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tangentially relevant, given its highly inflammatory impact]; see also *People v. Cardenas* (1982) 31 Cal.3d 897, 904-05; *People v. Albarran* (2007) 149 Cal.App.4th 214, 231 [the infusion into the trial of gang evidence, including gang tattoos, violated the defendant's constitutional rights to a fair trial].)

crimes properly admitted, so that] admission of evidence regarding defendant's tattoos could not possibly have prejudiced him."

The tattoos at issue in *Medina* were nowhere near as prejudicial as the "Nigger Thrasher" tattoo admitted here, and this Court cannot dismiss the "Nigger Thrasher" tattoo as "not possibly" prejudicial or "surely harmless." The tattoos-as-identification were "possibly" cumulative and unnecessary in *Medina*, whereas in this case, the tattoo-evidence was completely unnecessary because Daleo knew appellant as a friend and could identify him in person. Even if tattoo evidence was "necessary" to "verify" Daleo's identification, the "unique tattoo identification" could have and should have been done through the "Thor's Hammer" tattoo. Finally, *Medina* involved evidence at the penalty phase in which the defendant's character is in issue. In this case, the "Nigger Thrasher" tattoo was admitted at guilt phase, and the prosecution's only theory of admissibility was that it tended to bolster Daleo's identification of appellant. Appellant contends the prosecution's claim was disingenuous, and the court's ruling in error. As set out above, if Daleo's identification needed "verifying" beyond the fact that she knew appellant, knew his name, had attended parties and events with him, and was able to identify him definitively in court, that verification could have been accomplished without reference to the inflammatory and offensive details of the tattoo on his arm (especially since

a Thor's Hammer on his neck would have been more obvious and observable).

In *People v. Ochoa* (2011) 26 Cal.4th 398, 438, this Court upheld admission at the guilt phase of a murder prosecution evidence that the defendant had tattooed on his forehead the number "187," the California Penal Code section proscribing murder. This Court agreed that the trial court "properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt," and was thus "highly probative, as it would be unlikely that an innocent person would so advertise his connection to murder," i.e., the defendant in *Ochoa* had tattooed himself with "187" after the homicides, and was thus at least akin to an admission. Since the tattoo was on the defendant's forehead, it was visible to all – like appellant's "Thor's Hammer" tattoo on his neck, but unlike the "Nigger Thrasher" tattoo which was on appellant's arm. (*Ibid.*) Finally, *Ochoa* was a gang case with testimony from a gang expert; the crimes took place in the middle of a gang war; and the crimes were related to gang activity. (*Ibid.*) Thus, evidence of gang membership and gang involvement was highly relevant in *Ochoa*, as compared to the non-relevance of any white supremacy affiliation or beliefs appellant's "Nigger Thrasher" tattoo supposedly represented.

Even assuming arguendo that the "Nigger Thrasher" tattoo represented an admission by appellant that he "thrashed niggers," or a

manifestation of his guilt for doing so, such evidence was in no way admissible to prove that he was involved in a robbery felony murder, in which no African-American was killed.

In sum, the trial court erred in admitting evidence of appellant's "Nigger Thrasher" tattoo. The evidence was of marginal or no relevance, but highly inflammatory. Infusing the trial of a felony murder with evidence of appellant's racist tattoos and beliefs violated his federal constitutional rights to due process and a fair trial. (*Estelle v. McGuire* (1991) 502 U.S. 62 [error rendering trial fundamentally unfair may violate federal due process]; *Jamal v. VanDeKamp* (9th Cir. 1991) 926 F.2d 918, 919 and [accord]; *Albarran*, 149 Cal.App.4th at 231 [erroneously admitted gang evidence violated appellant's federal constitutional rights to due process and a fair trial].)

C. Evidence of Appellant's Use of Red Laces and His Beliefs in White Supremacy or the Skinhead Culture Was Inadmissible as Irrelevant and Unduly Prejudicial.

1. Summary of procedural facts.

Appellant moved to exclude all references to white supremacy. (1CT 150-54.) The prosecutor argued that appellant's "use of red laces [] after the killing [was] highly probative," because according to witnesses "familiar with the defendant's [white supremacy] beliefs, the use of red laces is a statement that the wearer has shed blood or killed someone."

(1CT 269.) The prosecutor argued that the evidence was meaningful "**only in the context of [appellant's] white supremacy beliefs**," and as such the red laces amounted to "an admission" and circumstantial evidence of his guilt. (1CT 271; 4RT 704-05 [emphasis provided].)

The trial court's initial reaction was that such evidence "create[d] a tremendous [Evidence Code section] 352 argument for the defense;" noting that the prosecution had a wealth of evidence that appellant was the shooter, the court described the probative value of the red laces evidence as "not much." The court deferred ruling. (4RT 705-06.)

Prior to Daleo's testimony, the prosecutor requested a clarification of the court's ruling. The trial court stated that it had "already resolved" the admissibility of the red laces testimony and that it was admissible. (28RT 2359.)

2. Summary of trial testimony on red laces and skinhead beliefs.

Paula Daleo testified that Torkelson and appellant both claimed to be skinheads, and that she, Torkelson, and appellant had attended meetings of several groups active in the white power movement. (28RT 2368-69.)

Jason Getscher testified he met "Lil Jeff" (appellant) when they were both in prison in Arizona in 1996. Both were skinhead comrades, brothers in prison. (29RT 2463-64, 2482.) In skinhead culture, red laces, or earning your laces meant that you had drawn the blood of an enemy, a "proud"

statement in skinhead culture. Appellant had red laces that he tried to lace into his boots when he came back to Getscher's house, saying that things had gone bad and he had shot someone. (29RT 2479-80.) Getscher took the laces from him, saying he had not earned them because he had killed an innocent victim, not an enemy or in defense. (29RT 2483-84.)

3. The red laces and skinhead beliefs testimony was irrelevant and prejudicial.

The argument, ruling and testimony at trial makes one thing clear: As the prosecutor herself pointed out, testimony that appellant used red laces after the homicides is significant **only** in the "context" of appellant's supposed white supremacy beliefs. (4RT 704-05 RT.) The threshold question, therefore, is the admissibility *vel non* of evidence of appellant's beliefs in the tenets of white supremacy philosophy. Appellant submits the evidence was inadmissible as irrelevant, and as the trial court initially pointed out, more prejudicial than probative under Evidence Code section 352.

This case was not tried as a hate crime or a gang-related crime. The crimes were prosecuted as felony murders and had no indicia of gangs in general, or white supremacy in particular. The robbery was for money and the victims and their races (white and Hispanic) were contingencies. The only known motive for the crime was robbery.

This Court has permitted evidence of white supremacist beliefs in cases where the defendant's statements about those beliefs tended to prove intent and motive. In *People v. Bivert* (2011) 52 Cal.4th 96, the defendant, leader of a group of white inmates, was charged with homicide and assault. The homicide victim was a white child molester. The assault victim was a white inmate who refused to follow the defendant's orders to assault a white child molester who had purchased drugs from a black inmate. This Court held that there was no error in admitting defendant's statements that tended to prove his attitude towards his victims, his intent and his motive. The evidence admitted included evidence that the defendant was in charge of the white inmates in prison, and his duties included actions to "clean up" the white race by eliminating child molesters (the homicide victim) and to punish white inmates who associated with inmates of other races (the white pedophile who bought drugs from a black inmate). The defendant had made statements that the white race had gotten soft, that the gene pool should be cleansed of all persons with any kind of defect – a "sort of Hitler concept" -- and that each race in prison was responsible for dealing with its own pedophiles. (*Id.* at 116.) This Court observed that such evidence was admissible because it "tended logically to prove defendant harbored the intent and motive to assault [one victim] because he purchased drugs from an inmate of another race, and to kill [the homicide victim] for being a child molester." (*Id.* at 117.)

Here by contrast, there was no evidence of any statement by appellant that white supremacist beliefs were the incentive for the offenses. Consequently, the general statements of Getscher regarding the white supremacist philosophy did not tend logically to prove appellant's intent or motive to rob or to kill.[70]

People v. Lindberg (2008) 45 Cal.4th 1 involved a hate-murder special circumstance prosecution under Penal Code section 190.2, subdivision (a)(16); the defendant was white and the victim Vietnamese. On appeal, the defense challenged the admission of evidence that the defendant was a follower of the White supremacy movement, and that he had a "particular racial animus against Asians," including his admission that he had killed the victim "for racial movement." (*Id.* at 40.) This Court held that "the challenged evidence was relevant to establish defendant's state of mind at the time he killed [and whether he killed the victim] because of his "race, color, etc.," as required for the hate-murder special circumstance. (*Id.* at 45.) Because the evidence demonstrated "more than defendant's

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[70] Motive is the emotional urge that induces a particular act but is different from intent: A person may intend to kill another and will be guilty regardless of his motive. (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1126-27, quoting Witkin, *Criminal Law* (2000), Elements, section 4; *People v. Hillhouse* (2002) 27 Cal.4th 469, 504 [motive describes the reason a person chooses to commit a crime, but is different from a required mental state such as intent or malice].) Intent and malice are states of mind a person harbors at the time an offense is committed.

abstract beliefs about White supremacy," it tended to prove the defendant's motive for the killing. (*Ibid.*)

Here by contrast, the prosecution was not for a hate crime, nor was it gang-related. There was no evidence whatsoever that the motive was based on white supremacist philosophy or that any racial animus incited or induced appellant to kill. Getscher testified that appellant obtained and used red laces **after** the homicide, but that post-homicide conduct was after the fact and did not logically tend to prove that appellant killed for racial hatred. Indeed, even Getscher understood that, pointing out that appellant hadn't "earned" the red laces, i.e., the victim was an innocent bystander, not a racial target or "enemy."

The more salient point, however, is that acknowledged by the prosecutor, i.e., the red laces evidence was only even arguably relevant if first placed in the context of the abstract beliefs of the white supremacy movement. And appellant's abstract beliefs are not admissible unless, as in *Lindberg*, there was some evidence of appellant's *particular* racial bias that motivated or incited him to kill Teresa Perez. (*Lindberg,* 45 Cal.4th at 40.) No such evidence existed. Consequently, evidence of appellant's abstract beliefs in white supremacy was inadmissible because it had no tendency in reason to prove any element of the offenses. The red laces evidence, which depended on the white supremacy context to render it relevant, was also necessarily inadmissible. Even assuming arguendo that there was some

slight probative value to the red laces evidence, the trial court correctly gauged its impact when it tentatively ruled that given the ample evidence that appellant was the shooter, the red laces evidence was of marginal value and "create[d] a tremendous [Evidence Code section] 352 argument for the defense." (4RT 705-06.)

The prosecution had a tape recording of appellant in a phone conversation with Jason Getscher in which he admitted shooting and killing Perez. Getscher himself also testified to the conversation. As the trial court pointed out, in light of appellant's statements – the strongest possible evidence of his involvement in the felony murder – the red laces evidence had little probative value, and what little value it had was greatly outweighed by the prejudicial impact of the white supremacy evidence. This Court has repeatedly held that gang-related evidence is not permitted when, like here, it has only tangential evidence, because its prejudicial effect is so significant. (*People v. Cox* (1991) 53 Cal.3d 618, 660.) This is particularly true, again like here, where the limited probative value of the challenged evidence has been established by other evidence. (See e.g., *People v. Cardenas* (1982) 31 Cal.3d 897, 904 [prejudicial effect of gang evidence outweighed limited probative value when used to establish witness bias when that bias had already been established by other evidence]; *People v. Perez* (1981) 114 Cal.App.3d 470 [accord].) Because appellant's conduct as a participant in the robbery and as Perez' killer was

established by other admissible evidence, to wit, the taped phone call with Getscher, any slight probative value of the red laces/white supremacy beliefs evidence is necessarily outweighed by the prejudice from the challenged evidence.

Even when evidence is relevant, trial courts should carefully scrutinize such evidence before admitting it because it may have a highly inflammatory impact on the jury. (See e.g., *People v. Champion* (1995) 9 Cal.4th 879, 922 *People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Albarran*, 149 Cal.App.4th at 224.)

People v. Waidla (2000) 22 Cal.4th 690, 724 held that evidence is substantially more prejudicial than probative for purposes of section 352 analysis if it "poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome.'" (Internal citations omitted.) This definition describes exactly the red laces/white supremacy evidence. The trial court's admission of this evidence was erroneous, and in violation of appellant's federal constitutional rights to due process and a fair trial. (*Estelle v. McGuire*, 502 U.S. 62; *People v. Albarran*, 149 Cal.App.4th at 231.) His conviction and sentence must be reversed.

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D. The Admission of Appellant's Tattoos and White Power Beliefs Violated his First Amendment Rights.

The admission of appellant's "Nigger Thrasher" tattoo and his white power beliefs also violated appellant's First Amendment objections to the challenged evidence.

Dawson v. Delaware (1992) 503 U.S. 159, 166-67 found constitutional error in the admission of a stipulation that the defendant was a member of the Aryan Brotherhood prison gang which held racist beliefs. Because the charged murder was not shown to be tied in any way to the Aryan Brotherhood gang, the evidence of the defendant's gang membership invited the jury to draw inferences that tended to prove nothing more than his abstract beliefs, which were protected by the First Amendment. The same conclusion is mandated here.

People v. Lindberg, 45 Cal.4th at 37 and *People v. Bivert*, 52 Cal.4th at 118 rejected claims that the defendants' First Amendment rights were violated by the admission of evidence of the defendants' white supremacist beliefs. Both cases are distinguishable because in each case the defendants' beliefs were closely tied to the charged offenses.

Lindberg was a hate-murder special circumstance prosecution for the homicide of an Asian victim. Evidence of defendant's involvement in the white supremacy movement, including his "particular racial animus against

Asians," and his admission that he had killed the victim "for racial movement" was thus clearly relevant to establish defendant's state of mind in the hate-murder special circumstance case.

Bivert, in which both the homicide and assault victims were, respectively, a white child molester and a white inmate who refused the defendant's order to assault a white child molester, held that there was no error in admitting defendant's statements that tended to prove his attitude towards his victims, and intent and motive. The evidence admitted included evidence that the defendant was in charge of the white inmates in prison, and his duties included actions to "clean up" the white race by eliminating child molesters (the homicide victim) and to punish white inmates who associated with inmates of other races (the assault victim who had bought drugs from an inmate of another race).

By contrast, the offenses charged here were not tied in any way to the white power movement or skinhead culture. A group of friends and acquaintances planned an ill-conceived robbery ending in the felony murder of two employees. The planning and carrying out of the offenses were not motivated by white power, racist, or skinhead beliefs. Appellant made no racist or white power statements tending to show his attitude towards the victims or his motive or intent to kill non-white people. That appellant tried to put red laces in his boots **after** the crime did not tend to show his motive or intent prior to or at the time of the crime. In fact, statements that

he made about the offense tended to show the shooting was an unpremeditated blunder.

The prosecutor argued that appellant's reference to red laces was relevant in the "context" of his white power beliefs. That is, the prosecutor argued that *if* the trial court were to admit evidence of appellant's abstract beliefs, *then* the red laces would become relevant, an acknowledgment of the fact that getting red laces after the crimes proves nothing in and of itself. As Daleo testified, red laces were often a simple skinhead "fashion statement." The prosecutor's reasoning, adopted by the trial court, works backwards. Appellant, apparently unclear as to some basic skinhead tenets, bought red laces after the offenses. This proves nothing and does not pave the way for an exception to appellant's First Amendment beliefs.

Had appellant bought red laces prior to the crimes, intending to kill a non-white victim, or had he made statements that he wanted to earn his red laces and then committed the crime, *Bivert* and *Lindberg* might apply. Because no such evidence existed, the rule of *Dawson* applies instead, rendering the admission of this evidence a violation of appellant's First Amendment rights.

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E. The Admission of the Evidence of Appellant's "Nigger Thrasher" Tattoo and His White Power Skinhead Beliefs Prejudiced Him and Requires Reversal of the Guilty Verdicts.

Because the errors are of federal constitutional dimension, as set out above, this Court must review for prejudice under the *Chapman* standard, which requires reversal unless the prosecution can show the error to be harmless beyond a reasonable doubt. (*Chapman v. California,* 386 U.S. at 24.) Appellant contends that such a showing cannot be made.

First, the erroneously admitted evidence was of the most inflammatory kind of evidence, i.e., a racial epithet described in *Lee* as being "universally recognized as being offensive," a word that "provokes violence" and is commonly used and understood as a demeaning and offensive racial slur," and an expression "particularly abusive and insulting" that "has no place in civil society," etc. (*Lee*, 9 Cal.App.4th at 515-16.) The tattoo was much worse than the mere gang evidence held prejudicial in *Albarran*, 149 Cal.App.4th at 231 because it included not just appellant's racist beliefs but his offensive and repugnant tattoo as well. Secondly, the evidence suggested to the jury that appellant should be convicted for his malicious views rather than the evidentiary facts. Third, Jason Getscher was the critical witness against appellant, and he had stayed silent for years and only decided to come forward with information when it was to his advantage. And the only evidence of appellant's supposed reference to the

red laces came from the hardly reliable Getscher, years after the fact. Fourth, even though appellant made incriminating statements in the phone call with Getscher, these could have been explained (as the defense maintained) as the kind of posturing appellant would be expected to do as an underling to his mentor, the prison-wise and crime-wise Getscher.

Fifth, the prosecutor exploited the error in argument. This Court has held that prosecutorial argument exploiting error "tips the scale in favor of finding prejudice." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1071; accord *People v. Woodard* (1979) 23 Cal.3d 329, 341.) The prosecutor in this case not only exploited the error (when she argued to the jury that appellant considered the killings a "badge of honor" and "something he could be proud of"), but the erroneously admitted evidence led her to make a further argument that was improper in and of itself, when she asserted that the red laces themselves showed that appellant had "no remorse at all." (32RT 2904-05, 2953.) *People v. Dykes* (2009) 46 Cal.4th 731, 768 explicitly held that "remorse is irrelevant at the guilt phase" unless the defendant opens the door to the matter in his case-in-chief, a circumstance which certainly did not occur here. (See also *People v. Jones* (1998) 17 Cal.4th 279, 307.)

Finally, this Court must consider the cumulative prejudicial impact of the various trial errors. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the

level of reversible prejudicial error].) Here, the evidence of appellant's "Nigger Thrasher" tattoo and his white supremacy beliefs, operated like a catalyst to the prosecutor's case -- the evidence that appellant was a despicable person who harbored no remorse (even though this was irrelevant as well) was so inflammatory that it was reasonably likely to have smoothed over every deficiency in the prosecution's case against appellant, so that even if Getscher was deemed less than credible, and even if the defense had convinced the jury that the taped phone call was puffery rather than a confession, the jury was likely to convict the white supremacist who literally wore on his sleeve his racist and "remorseless" attitude as a killer.

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III. THE PROSECUTORIAL ERROR IN CLOSING ARGUMENT DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL

Prosecutors have a special obligation to promote justice: their duty "is not merely that of an advocate" nor is it "to obtain convictions" – rather it is "to fully and fairly present the evidence." (*People v. Kasim* (1997) 56 Cal.App.4th 1360, 1378; *United States v. Kajayan* (9th Cir. 1993) 8 F.3d 1315, 1323 [prosecutor's job is not just to win but to win fairly by "staying well within the rules"].)

The prosecutor in this case did not comply with her obligation to stay "well within the rules". In closing argument at guilt phase, the prosecutor stated, "We know that Teresa Perez and Jack Reynolds were completely compliant with the robbers' demands [and that] they laid down with their faces to the carpet, ultimately, I'm certain, very fearful . . . ." (32RT 2874.) Defense counsel objected to the prosecutor's statement as a form of vouching ("I'm certain") and asked the court to assign error. (32 RT 2905.) The trial court declined to find error, even though it stated that the prosecutor should not have used the first person pronoun "I." (32 RT 2906-08.)[71]

Appellant contends that the prosecutor's argument was doubly

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[71] The trial court also overruled defense objections to the prosecutor twice describing appellant as an animal. (32RT 2869, 2872, 2905-06.)

erroneous.[72] First, the argument urged the jurors to look at the offense through the victims' eyes; and secondly, the prosecutor improperly vouched for her interpretation of the victims' conduct and feelings.

A. The Prosecutor Made an Improper and Blatant Appeal to the Jury's Natural Sympathy for the Victims.

People v. Stansbury (1993) 4 Cal.4th 1017, 1057 held that the prosecutor improperly appealed to the passions of the jury when he urged them to look at the case through the eyes of the victim. "We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt." (See also *People v. Fields* (1983) 35 Cal.3d 329, 362 [it has long been settled that appeals to passion or sympathy exceed the bounds of proper guilt phase argument].)

People v. Vance (2010) 188 Cal.App.4th 1182, 1188, 1199-1200, found prejudicial prosecutorial error where the prosecutor told the jurors they had to walk in the victim's shoes and relive in their minds what he was experiencing, declaring that such an argument was "universally condemned" as misconduct "because it is a blatant appeal to the jury's

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[72] *People v. Hill.* 17 Cal.4th at 822-23 & fn. 1 explained that prosecutorial "misconduct" is a misnomer; prosecutorial error is the more apt description. Bad faith is not a prerequisite for gaining appellate relief based on the prosecutor's actions because the injury to the defendant occurs whether the conduct was committed inadvertently or intentionally.

natural sympathy for the victim." *Vance* declared the error prejudicial because of the court's "passive reaction" and "refusal to give the admonition requested by the defense." (*Id.* at 1202.)

The prosecutor here made the same error – her comment that the victims were totally compliant and fearful was a blatant and improper appeal to the jurors' natural sympathy for the victims.

B. The Prosecutor Erred by Vouching for The Victims' Conduct and Feeling.

United States v. Brooks (9th Cir. 2007) 508 F.3d 1205, 1209 described typical forms of improper prosecutorial vouching as (1) placing the government's prestige behind a witness by expressing a personal belief in the witness's veracity; and (2) suggesting that information known to the prosecutor but not presented to the jury supported the witness's testimony. Prosecutorial vouching for a witness is improper because the conduct "make[s] the prosecutor his own witness – offering unsworn testimony not subject to cross-examination." (*Hill*, 17 Cal.4th at 828; see also *People v. Williams* (1997) 16 Cal.4th 153, 257 [impermissible vouching occurs where the prosecutor suggests that information not presented to the jury supports the prosecution's case]; *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, 1204-06 [reversing where the prosecutor suggested extrajudicial information supported the prosecution's theory of the case and the

prosecutor expressed his personal belief that the process resulted in truth-telling by prosecution witnesses].)

As explained in *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053, a prosecutor "has no business telling the jury his individual impressions of the evidence. Because he is the sovereign's representative, the jury may be misled into thinking his conclusions have been validated by the government's investigatory apparatus."

The prosecutor clearly violated these principles when she told the jury she was "certain" the victims were compliant and very fearful; although the trial court did not find error, it did acknowledge the wrongfulness of the prosecutor's statement, declaring that she should not have used the first person pronoun "I." (32 RT 2906-07.)

C. The Error Was Prejudicial.

A prosecutor's intemperate behavior violates the federal constitution when it comprises a pattern of conduct so egregious that it infects the trial with unfairness. The result is a denial of the federal constitutional guarantee of due process. (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 642-43; *People v. Hill*, 17 Cal.4th at 818; *People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Consequently, the error should be assessed for prejudice under the federal constitutional standard of *Chapman v. California*, 386 U.S. at 24, which requires reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless.

1. The improper argument was prejudicial because it shifted the focus from the evidence to the emotional realm.

First, as pointed out in *Vance*, the improper argument shifted the jury's attention from the evidence to the "all too natural response" of empathizing with the victims, and "[o]nce such emotions are unbridled, they are hard to rein in." (188 Cal.App.4th at 1206.) The remarks are not the sort that people can disregard or forget. (*Ibid.*)

2. The jury would have understood the emotion-based argument as significant because the prosecutor played on their emotions throughout the trial.

Secondly, prejudice from improper prosecutorial argument is analyzed by considering how the improper remarks would or could have been understood by the jury in the context of the entire argument. (*People v. Dykes* (2009) 46 Cal.4th 731, 771-72; *United States v. Rudberg* (9th Cir. 1997) 122 F.3d 1199, 1205-06.) Here, because the remarks were both of the kind that cannot be disregarded and because the prosecutor put her prestige behind them, the jury was likely to consider the comments as legally significant, i.e., the jury would have understood that it could consider the victims' compliance and fear in reaching its verdict.

Furthermore, the prosecutor played to the jurors' passions throughout the trial, thus accustoming them to viewing the evidence through an emotional prism, and leading them to think that such a focus was proper

analysis. For example, when the prosecutor asked Detective Hill to describe the crime scene, Hill said, "I don't want to cry," and asked for a moment. She then described the photograph showing Perez and Reynolds face down in the trailer. (26RT 1911.) The prosecutor took the trouble to emphasize Hill's emotional reaction, and asked, "Detective Hill, this was obviously a very difficult scene, correct?" Hill answered in the affirmative. The prosecutor continued, "Being on the homicide team for ten years, I imagine this was probably one of the more difficult scenes for you to be in?" Hill answered, "Yeah. It's a shame." (*Ibid.*)

Whether the scene was personally "difficult" for Detective Hill was of no relevance whatsoever to any issue in the case. Whether it was one of the "most difficult" scenes in over ten years as a homicide detective was even less relevant. Detective Hill's emotions, and her personal reaction to this scene vis-à-vis other homicide scenes, have no tendency to prove any element at issue. Yet after improperly emphasizing and eliciting further emotional reaction from Detective Hill, the prosecutor began her argument to the jury by noting that a veteran homicide detective was "crying" and saying this was "such a shame." (32RT 2867.)

Similarly, over numerous relevancy objections, the prosecutor repeatedly asked eyewitnesses "what were you thinking?" when you saw

this or that.[73] Over vague and lack of foundation objections, the prosecutor repeatedly asked witnesses what the victims were like.[74] After the ninth defense objection to this improper testimony, the trial court finally ruled, "[I]t can end here." (27RT 2224.)

The questions posed were improper and the evidence elicited inadmissible. The prosecutor's course of conduct in posing these questions to the eyewitnesses and the detective, and then emphasizing their responses in closing argument showed a clear tactical purpose in manipulating the jury to consider the emotions of the witnesses and the personalities of the victims rather than, or in addition to, the evidentiary facts.

In sum, the prosecutor's improper closing argument was prejudicial because the jury would have understood the improper remarks in the context of the prosecutor's emotion and passion-based presentation of the case – one which reduced a hardened homicide detective to tears and because the prosecutor was certain the friendly, family-oriented and

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[73] See 24RT 1599 [I was thinking someone has to got be injured or killed]; RT 1609 [when he heard door open he "assumed" it was Perez]; 24RT 1651-52 [I was sure they were going to kill me and get the car and run away]; 24RT 1685 [I was thinking they were coming to my booth]; 24RT 1697 [I was scared and thinking I should get a look at them but not let them know I was getting a look for fear of retribution].)

[74] See 24RT 1582 [Perez was friendly and nice to work with]; 25RT 1796 [Perez was friendly, smiled a lot, witness enjoyed working with her]; 25RT 1798 [Reynolds was good manager, concerned about us, had lot of good ideas about safety]; 25RT 1804-05 [Reynolds very nice and showed photos of his family to the witness]); 27RT 2224 [Five Star owner loved Reynolds' mother and knew the whole family].

hardworking victims were in fear and terror. Appellant had a right to be tried based on the facts, and not on the emotional reactions of witnesses, homicide detectives, or prosecutors, and the concomitant emotions evoked in the jurors.

3. This Court must consider the cumulative prejudicial impact of the errors.

Even assuming arguendo that this error was not prejudicial standing alone, this Court must review for prejudice in the context of the other errors in this trial. (See *People v. Hill*, 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error]; *Taylor v. Kentucky* 436 U.S. at 487, fn. 15 [cumulative effect of trial court errors can violate federal due process rights].) Appellant addresses the cumulative prejudicial impact of the guilt phase trial below, in Argument VI, pages 127-129.

IV. THE TRIAL COURT VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR TRIAL AND DUE PROCESS AND HIS EIGHTH AMENDMENT RIGHTS TO A RELIABLE SENTENCING DETERMINATION BY PERMITTING APPELLANT TO BE TRIED IN RESTRAINTS DESPITE THE ABSENCE OF EVIDENCE OF A MANIFEST NEED

This Court has consistently denounced the imposition of unnecessary restraints on a defendant during trial because of "possible prejudice in the minds of the jurors, the affront to human dignity, the

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disrespect for the entire judicial system which is incident to unjustifiable use of physical restraints, as well as the effect such restraints have upon a defendant." (*People v. Duran* (1976) 16 Cal.3d 282, 290.)

Even though the prosecution conceded that there was no evidence of manifest need, appellant was placed in restraints during his trial in violation of his Sixth and Fourteenth Amendment rights to a fair trial and due process.

A. Appellant Objected on Federal Constitutional Grounds To Courtroom Restraints.

Prior to trial, and citing appellant's Sixth and Fourteenth Amendment rights and *Deck v. Missouri* (2005) 544 U.S. 622, appellant objected to being tried while in restraints, as there was no showing of manifest need. (2CT 459-65; 13RT 835-36.) The trial court stated that appellant would be restrained with a leg chain and the table would be draped. The trial court ruled that appellant posed a security threat because he had "a problem with authority" as evidenced by problems he had in custody "involving other inmates and threats and weapons in other cases." (13RT 830-31.) Defense counsel countered that the "problems with authority" the trial court alluded to were unproven allegations. (13RT 832.)

Defense counsel cited the rule requiring the prosecution to show a manifest need to justify restraints; he argued that even if the table was draped the jurors might hear the chains rattling and see the shackling either

in the courtroom or during transportation to and from the courtroom. (13RT 831-32.) In its briefing, the prosecution conceded that "there [wa]s currently 'no manifest need' to subject appellant to shackles or other physical restraints while [] in court for his trial." (2CT 476.) Nonetheless, the trial court overruled appellant's objection to being tried while restrained, stating that despite the prosecution's concession, the court itself "vehemently opposed" the defense objection to physical restraints in the courtroom. (13RT 830.) The trial court acknowledged that the "only authority" it had for its ruling was that "these dudes in the brown shirts who [--] they generally have problems with in custody," i.e., the courtroom bailiffs generally had problems with in-custody defendants. (13RT 831.)

In addition to the shackles, the trial court permitted an "inordinate" number (the trial court's own characterization) of deputies in the jury lounge during the time the prospective jurors were present to pick up their questionnaires and request hardship excusals. (17RT 981-82.)

The court instructed the guilt phase jury that the "fact that physical restraints have been placed on the defendant during the course of this trial must not be considered by you for any purpose." (6CT 1416 [CALJIC No. 1.04]; 31RT 2186.) Appellant was also restrained during the second penalty phase trial, but no cautionary instruction was given to the second jury. (70RT 7773-74.)

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B. The Trial Court Committed Clear Error by Allowing Appellant To Stand Trial While Shackled Even Despite the Undisputed Record that There Was No Manifest Need for Restraints.

1. Unjustified shackling violates the defendant's rights to a fair trial, his right to a present a defense, and his right to a reliable sentencing proceeding.

In *Deck v. Missouri* (2005) 544 U.S 622, the High Court held that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury during the penalty phase of a capital proceeding," reasoning that shackling is "inherently prejudicial.'" (*Id.* at 633, quoting *Holbrook v. Flynn* (1986) 475 U.S. 560, 568; accord *People v. Duran*, 16 Cal.3d at 290-921.) *Deck* explained that visible shackling undermines the presumption of innocence and the fairness of the factfinding process; similarly, restraints can interfere with the defendant's ability to communicate with counsel and his ability to participate in his own defense. (*Deck*, 544 U.S. at 630-31.) Thus, where a court orders visible shackling "without adequate justification," the defendant need not demonstrate actual prejudice to make out a due process violation. Rather, the prosecution must prove beyond a reasonable doubt that the shackling error did not contribute to the verdict. (*Deck*, 544 U.S. at 635.)

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2. The trial court erred by ordering appellant to stand trial in restraints, based on the generalization that in-custody defendants posed security problems, despite the concession that there was no evidence of manifest need for such restraints.

The trial court's decision to shackle appellant was clear error as the record shows beyond dispute that there was no evidence of manifest need. The prosecution conceded as much, and the trial court noted as its sole authority for the order that deputies generally have problems with in-custody defendants. (13RT 831.) There was no showing that appellant threatened to escape or behaved violently before coming to court or while in court. As set out in *People v. Duran*, 16 Cal.3d at 293, and more recently in *People v. McDaniel* (2008) 159 Cal.App.4th 736, 745, the fact that a defendant has prior convictions and is accused of a violent crime cannot, without more, justify the use of restraints. Nor can a court adopt a general policy of imposing such restraints.

The trial court here ignored the rules of this Court in *Duran* and the High Court in *Deck v. Missouri* and frankly admitted that it relied on a generalization rather than specific evidence of a manifest need in imposing restraints on appellant as an in-custody defendant. The trial court's order was clear error and in violation of appellant's federal constitutional rights.

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C. The Unjustified Shackling Prejudiced Appellant.

This Court has stated that "any unjustified or unadmonished shackling" should be deemed harmless where there was no evidence that the jury saw the restraints. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-84.) However, where, as here, the trial court has admonished the jury to disregard the restraints, "it is reasonable to infer that the jury saw them," as such advisements are "'given only when shackles are visible.'" (*People v. Miller* (2009) 175 Cal.App.4th 1109, 1115, quoting *People v. McDaniel*, 159 Cal.App.4th at 744.)

Although this Court has not determined which harmless error standard applies when a defendant is visibly shackled without manifest need, the United States Supreme Court and the lower courts use the *Chapman v. California* (1967) 386 U.S. 18, 24 standard for review of prejudice from federal constitutional error, i.e., reversal is required unless the prosecution can show the error to be harmless beyond a reasonable doubt. (*Miller*, 175 Cal.App.4th at 1115; *McDaniel*, 159 Cal.App.4th at 742; *Deck*, 544 U.S. at 635.)

The critical factors in assessing the prejudice from unjustified restraints are (1) the impact on the defendant's ability to participate at trial, and (2) the potential for juror prejudice." (*People v. Anderson* (2001) 25 Cal.4th 543, 596.) Applying these factors shows that appellant was

prejudiced in two ways, and not that the improper use of restraints was harmless.

1. The trial court's instruction to the guilt phase jury to disregard the physical restraints assured that the entire jury knew that appellant was shackled, thus prejudicing the jury.

Appellant foresees an argument by respondent that appellant's erroneous shackling should be deemed harmless because the trial court admonished the jury to disregard the shackling and not to consider it as evidence of guilt. The opposite, however, is true. During the jury instruction conference, the prosecutor included CALJIC 1.04, the admonition regarding restraints. Defense counsel stated that appellant had told her that "some of the jurors did see him when he was brought to court one day" in restraints, but did not request the admonition. (31RT 2775.) The trial court questioned whether the instruction applied to restraints outside the courtroom but decided to give the instruction. (31RT 2775-76.)

The trial court's instruction prejudiced appellant in that it assured that the entire jury knew that appellant had been restrained in the courtroom. According to the trial court, the jury would "certainly" conclude in any circumstance that appellant was in custody "considering the type of charges he's facing." (31RT 2775.) Being in custody is not the same as being shackled and restrained. (*McDaniel*, 159 Cal.App.3d at 745 [the effect of knowing that a defendant is a prison inmate is not equivalent

to the impact of knowing that the defendant was shackled in court].) In-custody status means only that one is accused, and is to be presumed innocent; being shackled and restrained undermines that presumption of innocence and signals to the jury that the in-custody defendant is not just accused, but is to be considered uncontrollably violent. The trial court's erroneously given instruction thus prejudiced the entire jury.[75]

2. The unjustified restraints resulted in a coerced waiver of appellant's presence.

This Court has recognized that shackles may affect the defendant's mental state during trial, and may also impair his ability to cooperate or communicate with counsel. (*People v. Hill*, 17 Cal.4th at 846; *Duran,* 16 Cal.3d at 288 [physical shackling "inevitably tends to confuse and embarrass" the defendant's mental faculties].) This negative effect was multiplied in this case, where the trial court placed appellant in a quandary, suggesting that because of the "inordinate" number of deputies in the

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[75] Although courts generally presume that jurors can follow such admonitions, the general presumption should not apply where restraints are used without justification. "[I]f reviewing courts automatically find that an admonition and presumption that jurors follow it cure the failure to make a determination that shackling is necessary, trial courts could shackle prison inmates as a matter of routine, knowing that a subsequent admonition and appellate presumption would in most cases render any abuse of discretion harmless." (*McDaniel*, 159 Cal.App.4th at 747, fn. 9.) The result "would undermine the trial court's sua sponte obligation" to make a finding of manifest need based on the record. (*Ibid.*)

courtroom during jury selection, appellant should "choose" to waive his presence for those proceedings.[76] (17RT 981-82.)

The trial court described a "practical consideration" which informed his determination that appellant should be shackled:

> "In my courtroom, over your objection, I know, you can eliminate a little bit of the problem associated with [shackling]. Down there [in the jury lounge], I'm not going to have that luxury. [¶] There are going to be tons of marshals with two [defendants], one of which is a capital guy. It may leave an impression that your clients don't want to start out with in this trial. But by numbers, in a death case, a capital case, given these guys' history and problems that each have had in custody [referring, as the defense pointed out, to unproven allegations] the sheriff's department is going to put an inordinate number of [deputies] down there.... There's going to be a marked sheriff presence in that room." (17RT 980-81.)

The trial court stated that it would be "preferable" for appellant to waive his right to presence. (*Ibid.*) In effect, appellant's waiver of his constitutional right to presence was coerced by the trial court's erroneous ruling on

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[76] In *People v. Hernandez* (2011) 51 Cal.4th 733, 742, this Court held that stationing a guard near an unshackled defendant while he testified was not so inherently prejudicial as to require a showing of manifest need. The Court emphasized, however, that it was error to employ such a security practice based on a general policy, as the trial court did, without specific facts justifying the practice. *Hernandez* considered the error harmless under the state standard for assessing prejudice, distinguishing the use of one deputy guarding an unshackled defendant from federal constitutional error involving unjustified visible physical restraints. The circumstances of this case are vastly different from those comprising state law error in *Hernandez* . In this case, in contrast to *Hernandez*, (1) appellant would have been visibly restrained; and (2) "a ton of deputies," rather than just one, were employed as a security measure. These two facts were used by the trial court to coerce appellant into waiving his right to presence. The use of an "inordinate number" of courtroom deputies, in combination with visible restraints and a coerced waiver of the right to presence clearly amount to federal constitutional error, requiring review under the *Chapman* standard for prejudice.

restraints, clearly impacting his ability to participate in the initial jury selection proceedings.

3. Summary.

The trial court's erroneous ruling allowing appellant to stand trial shackled, without any evidence of manifest need, and the resulting impairment of appellant's ability to focus on the trial and communicate with his attorneys, together with the coercion to waive his right to presence during portions of jury selection, and the instruction ensuring that all the jurors knew appellant was shackled in court, require this Court to reverse his convictions, and remand for a fair trial.

V. THE TRIAL COURT ERRED AND VIOLATED APPELLANT'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE, TO A FAIR JURY TRIAL, AND TO DUE PROCESS BY EXCLUDING PROFFERED DEFENSE EVIDENCE OF THIRD PARTY CULPABILITY

A. Summary of Proceedings Below.

On August 5, 2005, the prosecution filed a motion in limine to exclude evidence of Jack Reynolds' criminal history. (3CT 553.) The defense argued that Reynolds' priors were relevant to the possibility of an "inside job" on the grounds that (1) Reynolds had a skinhead tattoo and (2) had told his brother he might be coming into some money. The trial court denied the defense request without stating reasons. (13RT 809.)

On August 26, 2005, the defense requested clarification as to the trial court's ruling on the extent of evidence admissible regarding Reynolds. (14RT 870.) At two different proceedings, the defense made an offer of proof as to third party culpability on the theory that Reynolds was involved in the robbery plan. The proffer included evidence that Reynolds had prior convictions for robberies similar to the charged robbery; that he had a skinhead Viking tattoo and, according to his brother, racist attitudes; that he told his mother he might be coming into some money and had promised he'd send her to the Cayman Islands; that at the time of his death, Reynolds had only $6 in his account, and a number of pawn tickets; that he had told the employees to prepare and not fuss if there was a robbery; and that he had talked to Torkelson that night outside the trailer. The court excluded this testimony as insufficient under third party culpability rules. (13RT 805-08; 15RT 920-23; 27RT 2040-41 [Court Exh. 51, Reynolds' Viking tattoo similar to a Viking tattoo appellant had].)

B. Appellant's Proffer Satisfied the Liberal Standard for Admissibility of Third Party Culpability Evidence.

Third party culpability evidence is generally relevant and its exclusion violates the Sixth and Fourteenth Amendment rights to present a defense and to due process and a fair trial. (*House v. Bell* (2006) 547 U.S. 518, 555 [evidence of third party culpability satisfied the standard for obtaining federal review despite a state procedural default].) In *Thomas v.*

Hubbard (9th Cir. 2001) 273 F.3d 1164,[77] Ninth Circuit reversed a state murder conviction where the trial court excluded third party culpability evidence that would have consisted of cross-examination of the key prosecution witness. (See also *DePetris v. Kuykendall* (9th Cir. 2001) 239 F.3d 1057, 1062 [erroneous exclusion of critical defense evidence may violate both the federal constitutional right to due process and a fair trial and the Sixth Amendment right to present a defense].)

In *People v. Hall* (1986) 41 Cal.3d 826, this Court established a relatively liberal standard for admitting third party culpability evidence: "To be admissible, the third-party evidence need not show 'substantial proof of a probability' that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt." (*Id.* at 883-84.) Mere opportunity or motive, however, is not enough; what is required is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime... ." (*Id.* at 883; see also *People v. Robinson* (2005) 37 Cal.4th 592, 625-28 [following *Hall*].) Thus, third party culpability evidence must identify a suspect and implicate him in criminal activity.

Hall cautioned that trial courts "should avoid a hasty conclusion that evidence of [the defendant's] guilt was incredible," as such determination is

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[77] *Thomas v. Hubbard* was overruled in part on other grounds in *Payton v. Woodford* (9th Cir. 2002) 346 F.3d 1204. However *Payton* was vacated by the United States Supreme Court at 538 U.S. 975.

the province of the jury. (*Id.* at 834.) Moreover, the proffered evidence must be considered as true: neither the prosecution's nor the trial court's beliefs regarding the weight of the evidence are to be considered in determining admissibility. (*Id.* at 836.)

Appellant's proffered evidence satisfied the liberal standard established by this Court in *Hall.* The proffer included evidence of motive, presence, an order to the employees to cooperate in any robbery, a potentially racist tattoo similar to that sported by appellant, communication with the mastermind Torkelson immediately preceding the crime, and the fact that the crime was an inside job and Reynolds was the manager.

The trial court's exclusion of this evidence violated appellant's Sixth and Fourteenth Amendment rights to present a defense and to due process, requiring reversal. (See *Holmes v. South Carolina* (2006) 547 U.S. 319, 324-30 [one-sided rule for determining admissibility of third party culpability violated the defendant's right to present a defense]; *Miller v. Angliker* (2nd Cir. 1988) 848 F.2d 1312, 1323 [exclusion of evidence of third party culpability violates constitutional rights to present a defense and to due process].)

C. The Trial Court's Asymmetrical Application of the Rules of Evidence Violated Appellant's Rights to Present a Defense and to Due Process.

The trial court erred in yet another way by refusing to allow the defense to introduce the proffered evidence. At guilt phase, the trial court

allowed the prosecution to present evidence of an extravagantly inflammatory tattoo to "verify" a witness' identification of appellant, even though her identification of appellant was established in other ways (she knew appellant and had socialized with him various times). The trial court thus allowed the prosecution to use highly prejudicial evidence to "prove" something that was already proven (appellant's identification by Daleo) – even though it proved nothing except his despicable racist attitudes. At the same time, the trial court prevented the defense from introducing evidence of Reynolds' much less inflammatory tattoo, to prove his complicity/third party culpability.

Gray v. Klauser (9th Cir. 2002) 282 F.3d 633, 645-46 held that the asymmetrical application of evidentiary standards is unconstitutional. A state may not arbitrarily prevent a defendant from presenting evidence that is material, trustworthy, and important to his defense; and when the trial court allows the prosecution to present similar evidence, it is a violation of the constitutional prohibition against arbitrary application of evidentiary standards to defendants.

Gray noted that the United States Supreme Court has repeatedly focused criticism on the unjustified and **uneven application** of evidentiary standards in a way that favors the prosecution over defendants. (*Id.* at 645-46, citing *Wardius v. Oregon* (1973) 412 U.S. 470 [holding that discovery must be a two-way street]; *Washington v. Texas* (1967) 388 U.S. 14, 22

[state rule applying unequal standards to defendants and the state held unconstitutional]; *Green v. Georgia* (1979) 442 U.S. 95, 97 [exclusion of defense proffer based on state hearsay rules violated due process where the state rules allowed the state to introduce the same evidence in a co-defendant's trial]; *Webb v. Texas* (1972) 409 U.S. 95, 97-98 [judge's admonition to defense witness which was not given to prosecution witnesses violated due process and right to present a defense].)

The trial court's expansive ruling allowing evidence of appellant's tattoos to come before the jury, while excluding evidence of a skinhead/Viking tattoo Reynolds had that was almost identical to a tattoo appellant had is a clear example of asymmetrical application of the rules of evidence in favor of the prosecution and to the detriment of the defense, in violation of appellant's federal constitutional rights to present a defense and to due process.

D. The Ruling Prejudiced Appellant.

The prejudice from this constitutional error must be considered together with the cumulative prejudice from the other trial errors discussed above. (See *People v. Hill*, 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [cumulative effect of trial court errors can violate federal due process rights].) The exclusion of third party culpability evidence was particularly

prejudicial to appellant in this sense: Although the prosecutor was allowed to present appellant as a racist and white supremacist, the trial court's ruling prevented appellant from rebutting or blunting the impact of that evidence by showing that Reynolds was also involved, and that while the robbery might have been planned and carried out by some who were or had been skinheads, it was not a crime intended to further skinhead/white supremacy goals. Appellant contends that the trial court erred in allowing the prosecution to "play the race card" in this case. But having allowed that play, the trial court's refusal to allow appellant to rebut it prejudiced him. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J. concurring [defendant's right to rebut the prosecution's evidence is the "core requirement" and "hallmark" of due process].)

VI. THE CUMULATIVE PREJUDICE FROM GUILT PHASE ERRORS REQUIRES REVERSAL

As explained in *People v. Hill*, 17 Cal.4th at 844, it is settled law that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error. (*Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

Here the use of appellant's statement taken in violation of *Miranda* was the critical piece of evidence argued by the prosecutor to corroborate

the Getscher's testimony and appellant's statements in the taped phone call with Getscher. Although appellant made admissions in that taped phone call, the defense provided evidence and argument that appellant was posturing with Getscher, and Getscher, in his testimony, was lying or confabulating. This defense was devastated by the erroneous admission of appellant's statement "you heard it all."

The evidence of appellant's racist tattoos and beliefs and the prosecutorial misconduct in argument had a synergistic effect. The erroneously admitted evidence of Nazism, racial hatred, and white supremacy was exploited by the prosecutor to paint appellant as a racist and remorseless monster; the prosecutor then committed further prosecutorial error by playing to the jurors' emotions and passions by eliciting evidence and then vouching for the victims' feelings.

The result was a trial based not on the evidence alone, but on irrelevant and prejudicial information about the victims' feelings and appellant's supposed racism. This Court should reverse for a fair trial on guilt.

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PENALTY PHASE ARGUMENTS

VII. HOLDING A SECOND PENALTY TRIAL AFTER THE FIRST PENALTY PHASE JURY FAILED TO REACH A UNANIMOUS DECISION VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

A. Introduction.

Appellant's first penalty trial began on October 20, 2005, and ended in a hung jury and mistrial on November 10, 2005, after six days of deliberations. (12CT 2775-2792.) On March 21, 2006, the defense filed a motion requesting the trial court to declare that a retrial of the penalty phase after a mistrial was cruel and unusual, and against evolving standards of decency, in violation of the Eighth Amendment and the California Constitution. (9CT 2050-79.) The court denied the motion. (50RT 4174.) The evidentiary portion of the second penalty trial began on June 19, 2006. Deliberations began on July 14, 2006, and continued on July 17, 18, 19, 20, and 21, 2006. The verdict was reached at 10:00 a.m. on July 24, 2006, after almost six full days of deliberations. (12CT 2848-56.)

As set forth below, the California statutory scheme, mandating that a capital defendant undergo a second penalty phase trial after the first penalty phase jury failed to reach a verdict, is contrary to evolving standards of decency, and in violation of the Eighth Amendment prohibition against cruel and unusual punishment; the second penalty trial also violated appellant's state and federal constitutional rights to a fair jury trial, a

reliable penalty determination, due process and equal protection as guaranteed by the Sixth, Eighth and Fourteenth Amendments, as well as state constitutional protections in article I, sections 1, 7, 15, 16 and 17 of the California Constitution.

B. California's Statute Mandating Retrial Of the Penalty Phase of a Capital Trial Violates the Eighth Amendment Requirement That Punishment Conform to Evolving Community Standards and that the Penalty Determination In a Capital Trial Be an Individualized Decision.

Penal Code section 190.4(b) *mandates* that if the penalty phase jury is unable to reach a unanimous verdict, the trial court "**shall** order a new jury impaneled to try the issue as to what the penalty shall be."

Of the 33 states with a death penalty, only California and Arizona[78] *require* the defendant to face a second penalty phase jury if the first jury fails to reach a verdict, and only seven *permit* retrial after the first penalty jury fails to impose the death penalty: Alabama, Delaware, Florida, Indiana, Kentucky, Montana and Nevada.[79] Thus, of the 33 jurisdictions that allow capital punishment, only seven permit a retrial, and only California and one

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78 A.R.S. §13-752(K).

79 Ala. Code, § 13A-5-46(g)(2009); Del. Code Ann., tit.11, § 4209 (c)(3)(b)(1) (2009); Fla. Stat.Ann. 921.141(2) (2009); Ind. Code Ann. § 35-30-2-9(f) (2009); Mont. Code Ann. § 46-18-305 (2009); Nev. Rev. Stat. Ann. § 175.556(1) (2009). The Kentucky statute is silent but case law suggests that a retrial is permitted. (*Skaggs v. Commonwealth* (Ky. 1985) 694 S.W.2d 672, 681.)

other state require a second penalty trial.[80] California is vastly at odds with the evolving standards of decency on this issue.

In the touchstone case on Eighth Amendment jurisprudence, *Furman v. Georgia* (1972) 408 U.S. 238, Justice Stewart declared that the death penalty as it was then being imposed was "cruel and unusual in the same way that being struck by lightning is cruel and unusual." (*Id.* at 309-10.) That is, the rarity or unusual imposition of the death penalty (on "a capriciously selected random handful" of the totality of convicted murderers) was strong evidence that it was being imposed in an arbitrary and capricious manner violative of the Eighth Amendment.

The *mandatory* provision of the California statute -- calling for empanelment of a new jury and retrial after a deadlocked penalty phase jury fails to return a verdict -- violates the two fundamental principles underlying the constitutionality of capital punishment, i.e., the required consistent application of the death penalty (it cannot be "unusual"); and the required individual judgment of each penalty phase juror.

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[80] Indeed, California treats capital defendants differently than non-capital defendants. In any other case where the jury deadlocks, a retrial is optional, and not mandatory. (Pen. Code, section 1149 [after mistrial "the cause may be tried again"].)

C. The California Statute Mandating a Second Penalty Phase Trial Is Vastly at Odds with Evolving Standards of Common Decency and Thus Violative of the Eighth Amendment.

Appellant contends that the empanelment of a second penalty jury to retry the penalty phase constitutes federal constitutional error by departing from the evolving standards of decency in this country.

The basic concept underlying the Eighth Amendment is "nothing less than the dignity of man," and the Amendment thus "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." (*Trop v. Dulles* (1958) 356 U.S. 86, 101.) The Supreme Court has held that the "'clearest and most reliable objective evidence of contemporary values is the legislation enacted by the country's legislatures.'" (*Atkins v. Virginia* (2002) 536 U.S. 304, 312 quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331.)

Appellant acknowledges that in *People v. Taylor* (2010) 48 Cal.4th 574, 634 this Court rejected a similar Eighth Amendment claim, declaring "that California is among the 'handful' of states that allows a penalty retrial following jury deadlock on penalty does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency that mark the progress of a maturing society.'" Appellant disagrees.

First, California is not one of "a handful of states" that allows a penalty retrial: it is **one of only two states that mandates a penalty**

retrial. Secondly, the United States Supreme Court has made it clear that Eighth Amendment jurisprudence draws its meaning from the evolving standards of decency, and that state legislation provides the clearest and most reliable evidence of those standards, as set forth in *Trop v. Dulles,* the very case this Court cited in *Taylor* for the proposition that evolving standards as shown by state legislation are not enough to find an Eighth Amendment violation.

The United States Supreme Court has recently prohibited imposition of the death penalty in a number of cases, because "evolving standards of decency" rendered the death penalty out of step with contemporary values and thus in violation of the Eighth Amendment. In *Roper v. Simmons* (2005) 543 U.S. 551, 570-78, the High Court held that the death sentence for juveniles was cruel and unusual, noting that 30 states prohibited execution of minors, including 12 that had abandoned the death penalty for any offender. Similarly in *Atkins v. Virginia* (2002) 536 U.S. 304, 313, 321, the High Court declared unconstitutional the death sentence for the mentally retarded, relying on the evolving community standards evidence that 30 states prohibited execution of mentally retarded including 12 that barred death penalty altogether. *Ford v. Wainwright* (1986) 477 U.S. 399, 408-11 held that the Eighth Amendment prohibited execution of an incompetent defendant, relying on the objective indicia that 26 of the 41 states with a death penalty statute explicitly required suspending execution

of an incompetent prisoner, while others have more discretionary procedures for suspension of the sentence and only one had no specific procedure governing the issue.

The same analysis requires a finding by this Court that a second penalty retrial violates the "evolving standards" doctrine of the Eighth Amendment. As set out above, in Part B, an overwhelming majority of states that allow the death penalty to be imposed do not permit retrial of the penalty phase after the first jury as been unable to reach a unanimous verdict. The death penalty is barred in 17 states, the District of Columbia and Puerto Rico; of the 33 states that have the death penalty, 24 (or 73%) of them require that if the (first) penalty jury is unable to reach a unanimous verdict, the defendant must be sentenced to life without possibility of parole.[81] There is no provision for a retrial on penalty. The same holds true

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[81] Ark. Stat. Ann. § 5-4-603(c) (1993); Col. Rev. Stat. § 18-1.3-1201(2)(b)(II)(d) (2003); Ga. Code Ann. § 17-10-31.1(c) (Supp. 1994); Id. Code § 19-2512(7)(c) (2003); Ill. Ann. Stat. ch. 720, § 5/9-1 (Smith-Hurd 1993); Kan. Stat. Ann. § 21-4624(e) (Supp.1994); La. Code Crim. Proc. Ann. art. 905.8 (West Supp. 1995); Md. Ann. Code art. 27, §§ 413(k)(2), 413(k)(7) (Supp. 1994); Miss. Code Ann. § 99-19-103 (1994); Mo. Ann. Stat. § 565.030(4) (Vernon Supp. 1995); NH Rev. Stat. Ann. § 630:5(IX) (Supp. 1994); Nev. Rev. Stat. § 175.556 (2003); NC Gen. Stat. § 15A-2000(b) (Supp. 1994); Ohio Rev. Code Ann. § 2929.03(D)(2) (Anderson 1993); Okla. Stat. Ann. tit. 21, § 701.11 (West Supp. 1995); Or. Rev. Stat. §§ 163.150(1)(e), 163.150(1)(f), 163.150(2)(a) (2001); Pa. Stat. Ann. tit. 42, § 9711(c)(I)(v) Purdon Supp. 1995); SC Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); SD Codified Laws Ann. §§ 23A-27A-4 (1988); Tenn. Code Ann. § 39-13-204(h) (1991); Tex. Crim. Proc. Code Ann. art. 37.071(2)(g) (Vernon Supp. 1995); Utah Code Ann. § 76-3-207(4) (1995); Va. Code Ann. § 19.2-264.4 (1990); Wash. Rev. Code Ann. § 10.95.080(2) (Supp. 1995); Wyo. Stat. § 6-2-102(e) (Supp. 1994).

in federal courts.[82] Only seven of the 33 death penalty states permit a retrial; and only two (California and Arizona) require it. Thus, of the death penalty states, only two out of 33, or 6% mandate a second penalty phase trial. The California scheme is an anomaly and stands with only nine other states in allowing a retrial on penalty, and with only one other state in mandating a retrial.

In short, requiring appellant to defend himself against possible execution more than once is contrary to our country's "evolving standards of decency" in violation of his Eighth Amendment rights.

D. Retrial of the Penalty Phase Contravenes the Constitutional Requirement that Each Juror Must Make an Individualized Determination.

After *Furman*, many states, including California, reenacted death penalty statutes. In upholding many of these statutes, the United States Supreme Court emphasized one principle: The law must allow each juror to make an individualized moral decision in deciding between a death or life sentence at penalty phase. (*Saffle v. Parks* (1990) 494 U.S. 484, 492-93 [the law requires a moral response to the evidence concerning the imposition of the death penalty. That is, each juror's unique weighing of aggravating evidence against mitigating evidence is not just permitted, or contemplated, but *required.* (See e.g., *Woodson v. North Carolina* (1976)

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82 18 U.S.C.A. section 3593(3) (West Supp. 1995); 21 USCA section 848(1) (West Supp. 1995).

428 US. 280 [striking down death penalty statute which removed from the individual judgment of the jurors the consideration of the defendant's character and circumstances]; *Mills v. Maryland* (1988) 486 U.S. 367, 375 [each individual juror must be free to identify and consider any evidence in mitigation].)

Gregg v. Georgia (1976) 428 U.S. 153, 181 held that in addition to state legislation, "[t]he jury also is a significant and reliable objective index of contemporary values because it is so directly involved." Accordingly, "one of the most important functions any jury can perform in making [] a selection [between life imprisonment and the death penalty] is to maintain a link between contemporary community values and the penal system." (*Ibid.*)

When the jury is unable to make that selection, as appellant's first penalty phase jury was, the divergence of the individual jurors' conclusions should not be dismissed as a failure to reach a verdict. Rather, the lack of agreement is an "objective index" of the community's values as to the appropriate punishment for the defendant, i.e., that in this case, the death sentence was not appropriate. The prohibition of a retrial of the penalty phase is based on the deep respect for the individual conscience and moral judgment of each juror deciding a capital defendant's fate. (*Mills v. Maryland,* 486 U.S. at 375.)

A mandatory retrial after the penalty phase jurors are deadlocked sends a message to the community that the individual moral judgment of each juror is not trusted or valued, despite the instructions given to the jurors to decide appellant's penalty as individual moral beings. (See CALJIC 8.88; 73RT 8083, 8085-86.) Such a message conflicts with the Eighth Amendment focus on evolving standards of decency in our society and the importance capital jurisprudence places on the individual conscience of each juror.

E. Appellant's Death Sentence Is Unconstitutional Because It Is Arbitrary and Capricious.

The second jury's decision cannot be considered a reliable determination that death was the appropriate punishment since the two juries heard much of the same evidence and yet reached different conclusions. This is particularly so in that both juries deliberated for six days before deadlocking in the first instance, and reaching a verdict of death in the second – in short, the facts are far from a convincing showing that appellant deserves to die.

Either the death verdict in this case is plainly arbitrary – the result of throwing the dice twice to obtain a one-out-of-two chance of getting a death sentence – or the differences in the details of the evidence presented at the two trials prejudiced appellant.

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F. The Different Evidence at the Second Trial Demonstrates Prejudice and Requires Reversal Of Appellant's Death Sentence.

Although both juries heard almost the same evidence relating to the offenses themselves, the evidence of victim impact at the second penalty trial was quite different.

1. The embellished victim impact testimony admitted at the second penalty trial prejudiced appellant.

The victim impact evidence at the second trial was somewhat different from that at the first trial. For example, at the first trial eyewitnesses James Gagarin, Daniel Maman, Kenrick Bowman, David Bond, James Mackey, and Dawn Zaczkiewicz testified only at guilt phase, and did not testify at the first penalty phase trial. At the second penalty trial, they testified as follows:

Maman testified that Perez was a "great personality" who was "always happy" – even though he admitted knowing only a little about her, not even her last name. Maman also testified that although he did not go to the memorial service, learning of her death was "going to stay with [him] until the rest of [his] life." (56RT 5599-5605; 5596; 5582.)

Although at the guilt phase of the first trial Gagarin testified that he had heart medications in his car at the time of the offense, and did not testify at the first penalty trial, at the second penalty phase he testified that the event "had a tremendous impact" on him. (57RT 5732, 5739.) As to

the suspects taking his car, with his medications in the glove box, Gagarin testified, "[M]y thought was great, so if I didn't get shot and if I didn't bleed to death, now my heart is going to go out of rhythm and I won't be able to stop it." (57RT 5729.) Gagarin said that he had "a lot of heart procedures since this happened and [he] believed a lot of it was caused by it." However, as evidence by the medications in the glove box, Gagarin had a heart condition at the time, and had had heart problems for since 1996, three years before the charged crimes occurred. (57RT 5740.) He testified that he was angry and knew that he would have to call his young son and tell him "that it's all right, you know, dad's still alive." (57RT 5728.)

Bowman testified at the second trial that both victims were "executed" although he didn't witness it.[83] He explained that he meant that they had shots to the heads and were found face down, then added that it was "very traumatic to see those bodies right there, two innocent people being killed in that form," that "he kept seeing the bodies in his mind every time" he went back to the facility, that he "kept seeing visions of the incident," that he went for days without sleep afterwards, and that it had "interfered with [his] life pretty much a whole lot. (56RT 5547-51.)

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[83] At the first trial, the trial court had ruled that Bowman could not testify to an opinion that the shootings were executions but could testify to his observations. (23RT 1512-13.)

James Mackey testified that the experience was "traumatic" and he felt "vulnerable" working in the booth with nowhere to hide. (57RT 5654-55.) David Bond testified that when he found out about the crimes after the fact he was shocked and devastated, and when he returned to work, it was "scary" and "unsure." (60RT 6218.) Dawn Zaczkiewicz testified that when she heard about the shootings it was hard, she was in shock and wasn't able to work, and she went into counseling and went on medication. When she returned to work it was still "scary." (60RT 6235-37.)[84]

Even police officers managed to testify to "victim impact" evidence at the second penalty trial. Officer Shairishi told the jury that he "remembered the scene" because it "stuck out in his mind" as "pretty horrific." (57RT 5696.) Detective Denys Williams testified that the scene was "sad" and "shocking." (57RT 5785.)

Those witnesses who had testified as penalty phase witnesses at the first trial[85] provided embellished versions of their testimony at the second penalty trial:

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[84] Another co-worker, Emma Prince, testified for the first time at the second penalty phase trial that she had just met Perez at the Five Star but felt they would have become great friends. Perez had taken over Prince's shift that night and Perez afterwards was paranoid. (64RT 6945-50.)

[85] Manager Steve Simmons and owner Paul Chacon did not testify at the penalty phase at the first trial. At the second trial, Simmons testified that it was "the most difficult situation" he had every been put through, and that it was "devastating." (59RT 6053.) Chacon testified that it was "very hard" and "very traumatic." (59RT 6025-27.)

Lee Alvin, the victim of the unrelated Arizona assault admitted as factor (b) evidence, suffered from dementia, so his son Steven Alvin testified as a proxy for him at both trials. At the first trial, the son testified that after the assault (not committed by appellant) his father had a gash on his head, which kept getting benign growths on it, and that after the incident his father gradually lost all his drive and appetite. (37RT 3256-58.) However, Alvin's son agreed that his father's dementia was that which occurs with most old people (his father was in his 80's) and includes this lack of drive. (37RT 3261.)

At the second trial, Lee Alvin's son claimed that the assault "took the drive out of" his father, and that he had just learned that the growth on his father's head was cancerous. Although the doctor did not say the cancer was caused by the injury, the implication was made. (64RT 6914-21.)

Similarly, at the first trial, Detective Wolf testified to the facts of the assault on Alvin and that the incident stood out in his mind because the victim, 71 years old, was an "elderly man." (37RT 3252, 3259.) At the second trial, Wolf testified that appellant "showed no remorse," and that he had recommended appellant should receive the maximum sentence and psychological testing because it was a "brutal offense" -- although he did not mention that the brutality was not committed by appellant who did not hit anyone in the head with a rock. (64RT 6903, 6905.)

The victim-impact witnesses relating to victim Reynolds also enhanced their testimony at the second penalty phase. Reynolds' sister Cheryl Delgadillo testified at the first penalty trial that Reynolds was "close" to his daughter and was devastated by his death. (36RT 3172.) However, at the second penalty trial, Delgadillo[86] testified that Reynolds' daughter died in a fatal accident three years after Reynolds' murder (which was before the first trial) because she was "trying to self-destruct" and didn't want to live without her father. (64RT 6998-99.)

Reynolds' sister Carol Lee Reynolds-Conrad also blamed the death of Reynolds' daughter on his murder, telling the second penalty jury (but not the first) that his daughter self-destructed because her father was everything to her, and that Reynolds' son cycled in and out of police custody and had mental problems. (64RT 7012.)[87] She also suggested that the stress from his death was responsible for damaging both her and her mother's immune systems and their bodies starting to break down. (64RT 7010.)

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[86] Delgadillo's first name was spelled as "Cheryl" at the second penalty trial. (64RT 6994.)

[87] At the first penalty trial, she testified that Reynolds' two children were already "very self-destructive" but "even more so after" Reynolds was killed, saying that the son had "rebel's anger" that "proved him no good since his father is gone" whereas the daughter "internalized it." (36RT 3182-83.)

Reynolds' brother testified at the second penalty that the impact on him was that he lost a lot of friends, that he had been having nightmares, and that he felt like he was going to explode. Finally, after talking to someone at the Veteran's Administration about whether it was "Desert Storm bottled up" inside him or whether it was "Jack that's bottled up" he started taking anti-depressants and felt much better. (RT64 6992-93.)[88]

Whether the testimonial flourishes and amplifications to the witnesses' penalty phase testimony were inadvertent or not, whether they were due to changes in memory over time, or to the additional stress of undergoing a second penalty phase trial is not the critical point. What matters is that the second penalty trial, which should not have taken place, prejudiced appellant in specific ways by allowing for these flourishes and amplifications to occur.

2. Penalty phase witnesses testified to the emotional stress of the second trial.

Defense counsel objected to testimony by the victims' relatives as to the stress of enduring two penalty trials, pointing out that appellant "had no control" over the first mistrial. The trial court overruled the objection, stating that it was "not so sure that it is not victim impact having to come to

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[88] At the first penalty trial, he testified about the pain of having to tell his children that their uncle had died, and how he missed his brother and felt guilt that he couldn't protect him and anger that the police hadn't solve the crime immediately, but he but did not testify to nightmares or losing his friends, or his need for antidepressants. (36RT 3161-66.)

the trial and sit through trial, two trials, however many trials. . . . [T]hat's exactly what victim impact is aimed at." (65RT 7027-28.)

Perez's sister Amada Brava testified that at first it was just too hard for her to come to the trial. The prosecutor then asked if it had "been very hard on [her] and all of the members of [her] family, **to have to go through these trials.**" Brava said it was extremely difficult and she even got nauseous. (64RT 6977-78.)

Reynolds' brother James testified, when asked by the prosecutor if "going through a trial part of what" made it "so very hard right now," that it was "the leading up to the trial, the anticipation" that was difficult. (64RT 6993.)

Although the trial court later instructed the jury that "the impact of the judicial process" on the witnesses was to be disregarded, 10CT 2386, the court's initial ruling, and the witness's testimony were the direct and prejudicial results of the erroneous second penalty phase trial.

3. The prosecutor argued evidence from the first penalty trial at the second penalty trial at which no such evidence existed.

The prosecutor began her closing argument by stating that "seven years ha[d]n't dulled the pain of the brutal horror" of the crimes which made "seasoned police officers cr[y] on the stand," and showed appellant's "callous disregard for anyone's humanity." (72RT 7900.)

There was no evidence at the penalty phase that any seasoned police officer cried on the stand, much less that more than one police officer so conducted him or herself on the witness stand) cried on the stand. Nor is there any indication that such conduct took place. Detective Hill had cried (or nearly cried) at the guilt phase in the first trial,[89] but she did not testify at the second trial. The prosecutor's argument seems likely to have been based on her memory of the first trial, thus another indication of prejudice from the constitutional error in mandating a second penalty trial after the jurors cannot reach a unanimous decision at penalty phase.

F. Conclusion.

In conclusion, the national consensus against death penalty retrials, the recognition that "death is different" and the required individualized juror determination on penalty, require a prohibition against a repeated attempts by the state to sentence a defendant to death. As shown above, the second penalty trial gave the prosecution an unfair and unconstitutional advantage and prejudiced appellant. This Court must vacate appellant's death sentence and impose instead a sentence of life without the possibility of parole.

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89 See 26RT 1911.

VIII. THE TRIAL COURT VIOLATED APPELLANT'S FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO FREE SPEECH AND ASSOCIATION, TO A FAIR TRIAL AND DUE PROCESS, AND TO A RELIABLE SENTENCING PROCEEDING BY ALLOWING THE JURY TO CONSIDER APPELLANT'S RACIST/NAZI TATTOOS AND WHITE SUPREMACY/SKINHEAD BELIEFS AT PENALTY PHASE

A. Introduction.

Although neither gang nor hate crime allegations were made against appellant in this robbery murder case, the trial court allowed a mountain of evidence of appellant's supposed white supremacist beliefs and Nazi tattoos, including expert testimony pronouncing that almost every tattoo appellant had was "inherently racist." The prosecutor relied on urged the this improperly admitted evidence to argue that appellant should receive the death penalty **because of** his offensive beliefs: "That's who he is." (72RT 7957.) Appellant contends that his First and Eighth Amendment rights were thereby violated.

B. Procedural History.

As set out above, at the guilt phase, evidence was introduced over defense objection that appellant had a tattoo "Nigger Thrasher," and that he (attended white supremacy meetings etc.) (See Arg. II, above.) Similarly, at the first penalty phase, the trial court admitted over defense objection testimony as to appellant's skinhead beliefs and racist and Nazi tattoos (9CT 2080, 2103) and expert testimony interpreting and elaborating on the

meaning of those tattoos. (4RT 700-04, 13RT 785-86, 14RT 882-87, 927-28, 28RT 2341, 2359-60, 2396-97; 40RT 3790; 40RT 3798-3822.) The trial court also admitted evidence of a rune painted on appellant's cell wall "for protection," and a swastika ("possibly in blood") found on the prison wall/door outside appellant's cell after the Harger assault, on the ground that the jury was entitled "to the whole picture" of appellant. (34RT 3007-09; 40RT 3770.) The trial court later ruled that although the rune and swastika were not statutory aggravants, they would be admitted once appellant put his character at issue. (35RT 3032-34.)

Prior to the second penalty trial, the defense renewed its objections to any and all evidence or argument regarding appellant's tattoos and his affiliation or membership in any white supremacy organization, arguing that it was improper evidence of bad character, irrelevant, prejudicial, and in violation of the First and Eighth Amendments. (9CT 2080-87.) The prosecution argued (as it had done successfully at the first trial) that appellant's "Nigger Thrasher" tattoo and his white supremacy beliefs were relevant to Daleo's identification of appellant (even though appellant's identity was not in issue at the second penalty trial) and that testimony of appellant's supposed use of red shoelaces was a circumstance of the crime. (9CT 2103-23.) The trial court noted that possible changes in the rulings at the second trial would occur only if there was a change in the defense

presentation of factor (k) evidence that could prevent the prosecution from going "hog-wild on the tattoo stuff." (46RT 4080.)

The trial court overruled appellant's objections to this evidence, and ruled that because the penalty phase jury had not heard the guilt phase evidence, the only question was when the evidence would come in, because all the racist tattoo and white supremacy beliefs evidence would be admissible to rebut any good character evidence presented by the defense. (50RT 4169-70; 4152; 62RT 6668.)

At the second penalty trial, the following testimony was admitted over defense objection: Paula Daleo testified that appellant believed in the tenets of the white power movement, and that she had seen him at Aryan Brotherhood meetings. (59RT 6083-84, 6133-34, 6145, 6147.) Pelvic Reid, who worked at the Five Star parking lot also testified that Torkelson had a shaved head and Nazi tattoos. Reid had heard that Torkelson was racist and strange. (60RT 6185.) This testimony was preceded the introduction of any mitigation evidence by the defense.

After defense testimony by appellant's grandmother, the trial court ruled that appellant's "overall character" had been put in issue, and testimony as to appellant's "Nigger Thrasher" tattoo was admissible in rebuttal. (66RT 7037, 7062-64.)

The following racial animus testimony was also admitted in rebuttal. After the Harger prison assault, deputies saw a "Nazi symbol" on the wall

outside appellant's cell, and a swastika (painted in what looked like blood) in a common area across from where Harger was attacked. The deputies did not know who had made the symbols. On the wall of appellant's cell was a rune[90] that appellant admitted having made for his protection. (68RT 7529-30; 7541; 7543-44.)

In a field interview in Carlsbad in 1999, appellant wore black boots and had several white supremacist tattoos, including "Nigger Thrasher" on his right bicep, and a pair of boots on his back. (69RT 7565-72; Exh. 150.) He also had an "88" on his neck, a swastika on his left arm, the word "skins" on the back of his head, and skinheads on his back. Appellant did not yet have tattoos portraying Thor, a tree, a crucified skinhead or German soldier tattoos which he was known to have in 2003.[91] (69RT 7582-85.) In a police encounter in Fullerton in 1999, appellant was described as appearing in "typical skinhead attire:" a shaved head, black boots, red suspenders and shoelaces. He had the following tattoos: on his head "88" and a skull, "SWP" on his bicep, a confederate and German flag and a swastika on his hands, boots, "skinhead," "blood and honor" and

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90 Runes are letters in a set of related alphabets that were used to write various Germanic languages before the adoption of the Latin alphabet. (See <en.wikipedia.org>.)

91 Photographs of appellant's tattoos at the time of his arrest in 2003 included the "Nigger Thrasher" tattoo, with the lettering on the word "Nigger" markedly different than the "Thrasher" lettering. (69RT 7600-01; Exh. 151-53, 155-57.)

"California" on his back. (69RT 7590-93.) The Carlsbad officer testified (over a speculation objection) that despite appellant's denial, he appeared to be still involved in the skinhead movement because of his shaved head, red fashion accessories, and tattoos. (69RT 7599.)

Joanna Mendelson, the director of investigative research for the Southern California Anti-Defamation League then testified as an expert in Nazism and skinhead symbols and ideology,[92] that all skinheads were neo-Nazis, although some kinds of skinheads were not racist, and that the group American Front was a white supremacist "inherently racist" neo-Nazi organization. (69RT 7628, 7631.)

Mendelson reviewed appellant's tattoos and the symbols on letters he had written, such as "14" and "88" and the Celtic cross. She said that "88" signified "Heil Hitler," that "14" stood for the 14 words of a mantra used by white supremacists relating to perpetuating the white race, and that the Celtic cross was the most common of white supremacist and neo-Nazi symbols. She described the rune (an upside down peace symbol) as an "inherently racist" symbol, and said that appellant's religion of Asatru or Odinism was often used as a "cover" for white supremacist beliefs, or by

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[92] The defense reiterated its objections to this testimony. The trial court deemed the objections remade and denied on the same grounds. (69RT 7563-64.)

prisoners as a means of meeting to communicate and to conduct criminal activity and violence from inside the prison. (69RT 7631-37.)

Mendelson testified at length and in detail to each of appellant's tattoos: a swastika, a variation of a Nazi flag and the Confederate battle flag (symbolizing "segregation"), runic symbols (which she testified did not correspond with anything specifically that made sense); a Celtic cross (an "inherently racist symbol"), Thor's hammer (which she said was not inherently racist, but in conjunction with the other tattoos was "certainly" racist), "Blood and Honor" referring to a racist organization started by the leader of a white power band, and an eagle and "Farewell Ian," the latter referring to the leader who died and was a martyr and symbol for white power; a Nazi death head ("inherently racist") and "skins" (racist when viewed in conjunction with other tattoos); a life rune ("inherently racist"), the Nazi eagle, and double lightning bolts used by the German Nazi officer Himmler ("inherently racist"), Doc Martin boots showing the bottom of the boot referred to a "boot party" or carrying out a violent act/stomping a victim; a portrait of a Nazi general with "SS" on the collar, possibly an image of Joseph Dietrich, who was responsible for mass executions; SWP which stands for supreme white power ("inherently racist"); a Viking warrior, and "Nigger Thrasher" ("obviously" referring to a violent act against an African-American); "14 words" (signifying the slogan "secure the existence of our people and a future for white children"); a crucified life

rune showing skinheads sacrificed Jesus-like for their race; skinheads wielding bats and machetes ("racist" because they were positioned directly above a swastika); a spider web (which she admitted was not inherently racist but in context indicated having served prison time); and a triskele, which she described as a "take-off" of a swastika and "inherently racist;" "SWP" and a noose on a tree, an obvious reference to slavery and lynching, and the words "weiss macht" which she said meant white power. (69RT 7638-58.) Mendelson testified that a tattoo of a skinhead wearing red suspenders would show that someone of another race was harmed, or that his or her blood had been spilled. (69RT 7646.)

The trial court instructed the jury that "certain evidence was admitted [] with regard to the defendant's beliefs, allegiance, and tattoos. This was done in rebuttal to the presentation by the defense of evidence of the defendant's good character. Such beliefs, allegiance, and tattoos are constitutionally protected by the First Amendment []. Such evidence may be considered by you only for the limited purpose of evaluating the credibility or strength of witnesses who were asked about the defendant's character. Such evidence cannot be considered by you as an aggravating circumstance." (72RT 7881.)

As set out below, the admission of this plethora of evidence of appellant's tattoos, beliefs, and expert testimony interpreting those tattoos and beliefs was prejudicial constitutional error.

C. The Trial Court Violated Appellant's First and Eighth Amendment Rights by Admitting the Evidence of His Racist Tattoos and Skinhead Beliefs.

Appellant maintains that the evidence of his tattoos, his use of red laces, his skinhead allegiance and beliefs, and expert testimony interpreting the tattoos and symbols and the skinhead ideology was inadmissible as irrelevant and unduly prejudicial, and as improper bad character evidence. Appellant argued that the challenged evidence was inadmissible at the guilt phase on these grounds. (See Arg. II, above. Pages 81-105.) The same argument applies to the second penalty trial, and appellant thus adopts and incorporates by reference the arguments made above at pages 85 to 105.

1. Testimony as to appellant's racist tattoos and skinhead beliefs violated his First Amendment rights to free speech and association.

The lay and expert testimony regarding appellant's racist and Nazi tattoos and beliefs violated his First Amendment rights to free speech and association. *Dawson v. Delaware* (1992) 503 U.S. 158, 166 held that where evidence of the defendant's allegiance to the Aryan Brotherhood "was not tied in any way" to the murder, the evidence "had no relevance to the sentencing proceeding." The High Court acknowledged that in some cases "associational evidence might serve a legitimate purpose," for example to show future dangerousness. "But the inference which the jury was invited to draw in this case tended to prove nothing more than the

abstract beliefs" of the defendant, and thus violated his First Amendment rights." (*Id.* at 167.) In short, the First Amendment prevents the state "from employing evidence of a defendant's abstract beliefs at a sentencing hearing when those beliefs have no bearing on the issue being tried." (*Id.* at 168; see also *Wisconsin v. Mitchell* (1993) 508 U.S. 476, 485-86 ["a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge"].) *United States v. Fell* (2d Cir. 2008) 531 F.3d 197, 230-31 followed *Dawson* in holding that evidence and argument pertaining to the defendant's alleged satanic beliefs and "666" tattoo was not strong enough to make the evidence "constitutionally admissible."

As shown directly below, appellant's abstract beliefs were not admissible in rebuttal. Nor were they tied to the murder. (See Arg. II, above, pages 92-105.) The single fact in support of the prosecution's theory that the murder was connected in some way to appellant's racist/Nazi/skinhead beliefs was the testimony that he bought or used red shoelaces after the crimes. The prosecutor acknowledged that this evidence was only even arguably relevant if first placed in the context of the abstract beliefs of the white supremacy movement. (1CT 271.) But under *Dawson* and this Court's decision in *Lindberg,* 45 Cal.4th at 40, appellant's abstract beliefs are not admissible in the absence of evidence of appellant's *particular* racial bias that motivated or incited him to kill Teresa Perez. No such evidence existed. The plethora of evidence of appellant's Nazi and racist

attitudes introduced in this case at penalty phase hangs, literally, by the slender red thread of a pair of red laces.

2. The evidence of appellant's tattoos and racist/skinhead beliefs was not properly admitted as "rebuttal" to mitigating evidence of his good character.

With respect to the admission of such evidence in rebuttal, in *Dawson* the High Court noted that the defendant's "mitigating evidence consisted of testimony about his kindness to family members, as well as evidence regarding good time credits . . . ." The prosecution argued that this "good" character evidence opened the door to "'bad character' evidence in rebuttal, including that concerning the Aryan Brotherhood." (*Id.* at 167-68.) *Dawson* explained that evidence rebutting the defendant's good character is generally permissible; however, such evidence must be relevant in its own right. In *Dawson* the evidence that the defendant associated with an Aryan Brotherhood prison gang that entertained racist beliefs was not admissible in its own right. (*Id.* at 166-68.)

Dawson is on all fours with the facts of this case. The trial court expressly admitted the evidence of appellant's racist and Nazi tattoos, and his allegiance to and beliefs in the skinhead or white supremacy movement, to rebut any good character evidence introduced by appellant. (50RT 4170; 61RT 6668.) But, as in *Dawson*, the challenged evidence was not admissible in its own right:

a. The "Nigger Thrasher" tattoo. The trial court acknowledged that this tattoo was excludable as more prejudicial than probative because identity (on which ground it had been admitted in the guilt trial) was not much of an issue and would only be admissible in the second penalty trial in rebuttal of defense mitigation. (50RT 4148.)

b. Appellant's tattoos and his association or allegiance to the white supremacy/skinhead movement. As set out above in Argument II, above, pages 85-102, and adopted and incorporated by reference here, the evidence of appellant's tattoos and his skinhead/white supremacy association or allegiance was not admissible because "elements of racial hatred were [] not involved in the killing." (*Dawson,* 503 U.S. at 166.). The same is true here. This case was not tried as a hate crime or a gang-related crime. The crimes were prosecuted as felony murders and had no indicia of gangs in general, or white supremacy in particular. The robbery was for money and the victims and their races (white and Hispanic) were contingencies, unknown to the perpetrators beforehand. The Harger assault, admitted as factor (b) evidence was also not tied to any element of racial hatred. The Nazi swastika was not found in appellant's cell and there was no evidence he had any connection to it, and the rune found in his cell was not racist.

As set out in detail above (see pages 95-98) this Court has permitted evidence of white supremacist beliefs where the defendant's statements

about those beliefs tended to prove intent and motive. (See e.g., *People v. Bivert*, 52 Cal.4th at 116-17 [evidence of defendant's statements that he was in charge of the whites in prison and had a mission to "clean up" the race by eliminating child molesters was admissible because it tended to prove the defendant had killed the victim for being a child molester]; *People v. Lindberg*, 45 Cal.4th at 40, 45 [evidence of defendant's involvement in the white supremacy movement, and that he had a "particular racial animus against Asians," and his admission that he had killed the victim "for racial movement" was relevant to establish defendant's state of mind in hate-murder special circumstance case with an Asian victim].)

Here by contrast, there was no evidence whatsoever that the motive for the robbery-murders was based on white supremacist philosophy or that any racial animus incited or induced appellant to kill. Consequently, testimony as to appellant's skinhead tattoos, and his association with the skinhead/white supremacy movement proved nothing appellant's intent or state of mind.[93]

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[93] As to testimony about the red laces, appellant refers this Court to his discussion above, Arg. II, pp. 92-95: the prosecutor acknowledged that the red laces evidence was only even arguably relevant if first placed in the context of the abstract beliefs of the white supremacy movement. (1CT 271; 4RT 704-05.) However, under this Court's rulings, appellant's abstract beliefs are not admissible unless, as in *Lindberg*, there was some evidence of appellant's *particular* racial bias that motivated or incited him to kill Teresa Perez. (*Lindberg,* 45 Cal.4th at 40.) No such evidence existed in this case. As noted above, the evidence of appellant's Nazi and racist attitudes introduced in this case at penalty phase hangs, literally, by the slender thread of a pair of red laces.

3. The challenged evidence rendered appellant's sentencing proceeding unreliable under the Eighth Amendment.

Even assuming arguendo that this Court were to reject the arguments set out above, the challenged evidence of appellant's tattoos and beliefs would still amount to a violation of the heightened reliability requirement of the Eighth Amendment.

> "The decision to exercise the power of the State to execute a defendant is unlike any other decision citizens and public officials are called upon to make. Evolving standards of societal decency have imposed a correspondingly high requirement of reliability on the determination that death is the appropriate penalty in a particular case." (*Mills v. Maryland,* 486 U.S. at 383-84; see also *Lockett v. Ohio* (1978) 438 U.S. 586, 604.)

The transformation of the penalty phase proceedings into an attack on appellant as a "racist" rendered appellant's death sentence unreliable. The penalty phase evidence is supposed to be confined to statutory aggravating evidence and evidence rebutting the defendant's case in mitigation. But through the expert testimony of Anti-Defamation League researcher Mendelson, this case – which was *not* a hate crime or gang case -- metamorphosed into an attack on appellant as a violent racist Nazi. For example, Mendelson testified repeatedly that appellant's tattoos – even a Celtic cross and a rune -- were "inherently racist" and "certainly" racist, and "obviously" violent. She also testified that "all" skinheads were neo-Nazis, and that appellant's Odinism religion was just a "ruse" for prisoners who

used the right of freedom of religion to conduct crimes and violence inside the prison.

D. Appellant's Death Sentence Must Be Vacated.

The erroneous admission of the testimony of appellant's racist and Nazi tattoos, his skinhead/white supremacy allegiance, and the expert testimony on this subject violated appellant's Eighth Amendment right to a reliable sentencing proceeding error and must be reviewed for prejudice under *Chapman v. California*, 386 U.S. at 24: the error must be deemed reversible unless the prosecution can show it harmless beyond a reasonable doubt. This cannot be done.

In the first place, the copious amount of testimony (two lay witnesses, six police officers, and an expert witness from the Anti-Defamation League) the prosecution dedicated to showing that appellant was a Hitler-loving Nazi "monster" who believed everyone but white people were devils transformed the penalty phase – which was not a gang-related or a hate-crime prosecution -- into a trial on appellant's white supremacist beliefs.

The case law holds that prosecutorial reliance in argument on inadmissible testimony is a powerful indicator of prejudice. (*People v. Minifie* (1996) 13 Cal.4th1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"]; see also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [prosecutor's argument can enhance

immensely the impact of inadmissible evidence]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1385 [prosecutor's reliance in argument on erroneous jury instruction exacerbated the prejudicial impact].)

The prosecutor here relied on Mendelson's testimony and appellant's tattoos to argue that under the Aryan Nation or skinhead ideology, "whites are the chosen people and everyone else is the devil." (72RT 7928.) She said his tattoos made him a "walking billboard of hate" and that appellant did not become a skinhead for protection in prison but he became a skinhead "because that's who he is." (72RT 7955-56.) The tattoos, according to the prosecutor also showed that appellant was not a good father, since he spent a lot of money on the tattoo of a German soldier (although there was no evidence of this) instead of spending money on his children. (72RT 7956.) Appellant's German soldier and eagle tattoos also showed, according to the prosecutor, that appellant had not "renounced his views" of white supremacy. (72RT 7955.) Rather, appellant was "a follower of Hitler." (72RT 7960.)

Appellant anticipates that respondent will argue that any error with respect to this evidence should be considered cleansed by the trial court's limiting instruction. The trial court instructed the jury that

> "certain evidence was admitted [] with regard to the defendant's beliefs, allegiance, and tattoos. This was done in rebuttal to the presentation by the defense of evidence of the defendant's good character. Such beliefs, allegiance, and tattoos are constitutionally protected by the First Amendment []. Such evidence may be

considered by you only for the limited purpose of evaluating the credibility or strength of witnesses who were asked about the defendant's character. Such evidence cannot be considered by you as an aggravating circumstance." (72RT 7881.)

Appellant contends that the instruction was cynical in its attempt to circumvent the rule limiting aggravating evidence to the statutory factors, and ineffective in result. First, the instruction was self-contradictory in telling the jury that appellant's beliefs and tattoos were "constitutionally protected" but could still be used to evaluate his good character witnesses. If appellant had a constitutional protection under the First Amendment,[94] then that "protection" should have prevented the use of the evidence altogether. To say that the testimony is not an aggravator but that it could be used to evaluate the credibility or strength of the mitigating witnesses denies the "protection." Because the penalty determination is a weighing process, evidence improperly used to diminish the strength or credibility of mitigating testimony is necessarily prejudicial.

Moreover, the "limitation" proposed in the instruction sets out a meaningless distinction. There is only one way the jury could "consider" the evidence of racist tattoos, Nazism and white supremacy: it is cognitively impossible to ignore the clearly aggravating "monstrous" impact of this evidence and "consider" it only in assessing the credibility of

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[94] Appellant did have a First Amendment right that should have precluded the admission of this evidence. (See Part C, above, pages 154-160.)

a witness. In "considering" the evidence of appellant's "Nigger Thrasher" and Nazi tattoos, and allegiance to white supremacy, and all the expert opinion elaboration thereon in their evaluation of the good character opinion, the jurors necessarily have to accept the negative and aggravating impact of the challenged evidence. It could have no other impact. The fact that appellant had "88" and "Nigger Thrasher" tattooed on his body would not otherwise render defense mitigation witnesses liars or less than credible: particularly since they testified that he did had those tattoos and that they knew he had those tattoos. (See e.g. 66RT 7120, 7131, 7179, 7218.) At a minimum, the evidence improperly diminished the impact of appellant's mitigating evidence, and was thus prejudicial, especially given the long deliberations in this case.

Moreover, the evidence was so provocative that the court's instruction was completely ineffective in wiping away its explosive effect. The prosecutor relied on this improperly admitted evidence to argue that appellant should receive the death penalty **because of** his offensive beliefs: "That's who he is." (72RT 7957.)

The case law is replete with holdings rejecting the notion that jury instructions are sufficient to obliterate prejudice. (See e.g., *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1054; *United States v. Simtob* (9th Cir. 1990) 901 F.2d 799, 806; *Goldsmith v. Witkowski* (4th Cir. 1992) 981 F.2d 697, 703; *People v. Laursen* (1968) 264 Cal.App.2d 932, 939; *People v.*

Bracamonte (1981) 119 Cal.App.3d 644, 650, quoting *Krulewitch v. United States* (1949) 336 U.S. 440, 453 ["'The naïve assumption that prejudicial effects can be overcome by instructions to the jury . . . all practicing lawyers know to be unmitigated fiction.'".)

Finally, the prejudicial impact of this error must be considered in conjunction with the other penalty phase errors addressed below. As explained in *People v. Hill* (1998) 17 Cal.4th 800, 844, it is settled law that "a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error]; *United States v. Frederick* (9th Cir. 1995) 78 F.3d 1370, 1381 [reversing for cumulative prejudicial impact of various errors]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

IX. THE ADMISSION OF VICTIM IMPACT EVIDENCE ON FACTOR (B) CRIMES VIOLATED APPELLANT'S FEDERAL CONSTITUTIONAL RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WHICH RESULTED IN AN UNRELIABLE PENALTY PHASE DETERMINATION

A. Introduction.

The defense moved to exclude victim impact evidence on crimes other than the capital charges on the grounds it violated appellant's federal constitutional rights under the Eighth and Fourteenth Amendments. (10CT 2228-31.) The trial denied the defense motion. (50RT 4133.)

Although this Court has permitted victim impact testimony relating to uncharged crimes, appellant contends that the United States Supreme Court has never expanded the constitutional boundaries of victim impact testimony to include other crimes unconnected to the capital crime. Furthermore, the victim impact testimony on the unconnected crimes admitted in this case exceeded even the boundaries of the case law by this Court in that it included victim impact testimony by proxy and speculation.

B. *Payne v. Tennessee* Did Not Allow for Admission Of Victim Impact Evidence of Crimes Unrelated The Circumstances of the Capital Murder.

In *Booth v. Maryland* (1987) 482 U.S. 496, the United States Supreme Court held that evidence relating to the victim and the impact of the victim's death was inadmissible at a capital sentencing hearing. *Gathers v. South Carolina* (1989) 490 U.S. 805, extended the *Booth* prohibition to prosecutorial argument relating to the impact of the victim's death. A few years later, *Payne v. Tennessee* (1991) 501 U.S. 808, 830 disagreed with *Booth* and *Gathers* but expressly limited its holding to overrule those cases only to the extent that they barred the admission of "evidence and argument relating to the victim and the impact of the victim's death on the victim's family [] at a capital sentencing hearing." (*Payne*, 501 at 830, fn. 2.)

Payne v. Tennessee did not open wide the doors to any and all kinds of victim impact evidence. It held only that there was "no per se bar" to evidence or argument as to the personal characteristics of the victim or the

impact of the murder on the victim's family. (*Id.* at 827.) It did **not** hold that victim impact evidence or argument as to other crimes unrelated to the circumstances of the capital murder was admissible. As stated above, its holding was expressly limited to "evidence and argument relating to the victim and the impact of the victim's death on the victim's family" and further provided that where victim impact evidence is unduly prejudicial, it can violate the Fourteenth Amendment guarantee of due process. (*Id.* at 830, fn. 2.)

Despite this explicit limitation of victim impact evidence in *Payne*, this Court has expanded the ruling to include victim impact evidence of other crimes. An analysis of this Court's case law shows the reasoning to be flawed.

For example, in *People v. Karis* (1988) 46 Cal.3d 612, 641 – which dealt not with the introduction of victim impact evidence but rather the "presentation of live testimony by the actual victim of a capital defendant's prior crimes to prove those crimes" -- this Court reasoned that *Booth* "appears to have [] distinguished the impact of a capital offense on the family of the murder victim from the impact on a direct victim of a crime . . . ." (*Id.* at 641, fn. 2.) However, *Karis* wrongly claimed that *Booth* "cite[d] with approval" a lower court case, *People v. Levitt* (1984) 156 Cal.App.3d 500, 516-174, in support of a "suggestion" that *other crimes* victim impact evidence might be admissible: What *Booth* stated was that

victim impact statements "may well be admissible because they relate directly to the circumstances of the crime." (*Booth*, 482 U.S. at 509, fn. 10.)

People v. Clark (1990) 50 Cal.3d 583, 628-29 correctly noted that *Booth* and *Gathers* had suggested that victim impact evidence related to crimes other than the capital crime might be admissible "in a particular case *if related directly to the circumstances of the crime,*" but then cited *Karis* for proposition that the impact of the defendant's "past crimes by the victims of those crimes is relevant" – referring to victim impact evidence "related almost exclusively to the injuries that led to the death [of the capital victim] and injuries of others" in the same charged capital incident. Thus, the *Clark* holding limits victim impact testimony to those injured by the defendant in the same incident as the capital murder. Only that testimony is a circumstance of the capital crime.

People v. Price (1991) 1 Cal.4th 324, 479 then held that "[a]t the penalty phase, the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts." *Price* relied on three previous cases, *People v. Benson* (1990) 52 Cal.3d 754, *People v. Clark*, 50 Cal.3d 583 and *People v. Karis,* 46 Cal.3d 612. However, none of these cases held admissible victim impact evidence of past crimes unrelated to the circumstances of the capital crime.

Benson explicitly did **not** decide whether *Booth* or *Gathers* applied to prohibit argument as to victim-impact evidence of other crimes unrelated to the capital crime. (*Id.* at 797, fn. 7.) Declining to decide whether victim impact evidence was barred (before *Payne v. Tennessee* permitted some types of victim impact evidence) is not support for a holding that such evidence is admissible after *Payne*. As set out above, *People v. Clark* relied on *Karis* and a footnote in *Booth* that this Court described as a "suggestion" that "other crime victim impact evidence might be relevant" *if related directly to the circumstances of the crime*. (50 Cal.3d at 629.)

Price relied on *Karis* as supporting the assertion that victim impact evidence relating to past crimes is relevant, yet *Karis* does not so hold. *Karis* dealt not with victim impact evidence of unrelated other crimes, but addressed the question whether the *Booth* prohibition on victim impact evidence would preclude "live testimony by an actual victim of the defendant's prior crimes to prove those crimes." (*Id.* at 641.)

Consequently, appellant contends that *Price* is wrong under the relevant United States Supreme Court precedent, and unsupported by the cases cited in its rationale.

Appellant does not dispute the possible relevance of victim impact evidence of another crime that relates directly to the charged capital crime. But that proposition does not support a rule that an unrelated other crime admitted in aggravation opens the door to victim impact evidence on the

unrelated other crime, such as occurred here when Lee Alvin's son testified to actual (and speculative) injuries suffered by his father when he was hit on the head with a rock by one of appellant's co-defendant's in the Arizona case.

A number of cases have since upheld victim impact testimony by victims of crimes "related directly to the circumstances of the crime." (See e.g., *People v. Mitcham* (1992) 1 Cal.4th 1027, 1063 [impact testimony by surviving victim of defendant's homicidal conduct deemed admissible because it "related" to the circumstances of the capital murder]; *People v. Taylor* (2001) 26 Cal.4th 1165, 1172 [accord].) Other cases uphold victim impact testimony regarding crimes unrelated to the circumstances of the capital offense. (See e.g., *People v. Davis* (2009) 46 Cal.4th 539, 618; *People v. Mendoza* (2000) 24 Cal.4th 130, 185-86; *People v. Garceau* (1993) 6 Cal.4th 140, 167-68; *People v. Bramit* (2009) 46 Cal.4th 1221, 1241. However, because these cases trace their holdings back to *Price* and *Clark*, they suffer the same defects discussed above. Because *Price* and *Clark* wrongly interpreted United States Supreme Court case law, the cases following and relying on *Price* and *Clark* are also wrongly decided. Under *Payne v. Tennessee*, victim impact evidence and argument is limited to that relating to the capital crime.

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C. Other States Interpret *Payne v. Tennessee* as Limiting Victim Impact Testimony to the Victim of the Capital Crime.

The holdings of courts in other states bear out appellant's contention that this Court has wrongly interpreted and expanded[95] the holding of *Payne v. Tennessee*. *People v. Hope* (Ill. 1998) 702 N.E.2d 1282 held "that *Payne v. Tennessee*, 501 U.S. 808 clearly contemplates that victim impact evidence will come only from the survivor of the murder for which the defendant is presently on trial, not from survivors of offenses collateral to the crime for which defendant is being tried." (*Hope*, 702 N.E. 2d at 1288, *Payne*, 510 U.S. at 830, fn. 2.) *Hope* reversed a death sentence because of prejudicial error in admitting "evidence about victims of other, unrelated offenses" which it described as "irrelevant." (*Id.* at 1289.) Similarly, *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914 held that "the evidence of the impact which a previous murder had upon the previous victim" was not relevant. In *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891, fn. 11, the Tennessee Supreme Court "reiterate[d] that victim evidence of another homicide, even one committed by the defendant on trial, is not admissible." The Colorado Supreme Court held, in *People v. Dunlap* (Colo. 1999) 975

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95 In the years since *Payne* was decided, the High Court has left the lower courts "unguided in their efforts to police the hazy boundaries between permissible victim impact evidence and its impermissible, 'unduly prejudicial' forms." (*Kelly v. California* (2008) 555 U.S. 1050, 1024, Stevens, J. dissenting from denial of writ of certiorari.)

P.2d 723, 744-45 that evidence of "the perceptions of the victims" of the defendant's prior crimes was not admissible at penalty phase. The Texas Supreme Criminal Court of Appeals agreed in *Cantu v. State* (Tex.Cr.App. 1997) 939 S.W.2d 627, 637, holding that *Payne v. Tennessee* did not contemplate admission of victim impact evidence of a non-capital murder and assault even though those crimes were related to the capital crime because the victim of the noncapital crime was not "the 'victim' for whose death" the defendant was being tried. (See also *Tong v. State* (Tex.Cr.App. (2000) 25 S.W.3d 707, 713-14 [victim impact evidence should relate only to the impact of the underlying capital offense, not other offenses].)

D. Even if Some Victim Impact Evidence on Unrelated Crimes Is Admissible Under the Eighth and Fourteenth Amendments, the Testimony Admitted in this Case Went Far Beyond Any Permissible Bounds.

Appellant acknowledges that this Court deems admissible victim impact testimony from victims of factor (b) crimes [uncharged violent crimes introduced as aggravating evidence] even where those other crimes are unrelated to the capital crime. (See e.g., *People v. Price*, 1 Cal.4th at 479, relying on *People v. Karis*, 46 Cal.3d at 641 and discussion above.) Nonetheless, the victim impact testimony in this case exceeded even the expansive boundaries set by this Court in *Karis*, *Price* and their progeny.

Here, the trial court allowed not only testimony regarding the victim of the unrelated crime (committed seven years prior to the commission of

the capital crime) but also testimony from that victim's son as proxy for his father. The son testified as to the impact and speculative impact of the injury on his father and his mother (not a victim), reporting that his father seemed to lose his drive after the assault; that his father tried to back to work; but that both his mother and father were afraid even though someone else was working with his father; and that his father therefore retired completely. He even suggested that his father's injuries had caused his dementia and recent cancer (although he conceded that the doctor hadn't said that).

Perhaps the most salient point is that the "victim impact" evidence from the Arizona incident was not caused by appellant at all: Another one of the five young men involved in this assault hit Alvin on the head with a rock, causing his injuries. There was no indication whatsoever that appellant had done so. (64 RT 6903.)

None of the cases allowing victim impact evidence on unrelated crimes has so radically expanded the scope of such testimony to permit testimony by proxy as to injuries and speculative injuries not caused by the defendant.

E. The Erroneously Admitted Victim Impact Evidence From Unrelated Crimes Prejudiced Appellant.

Because the erroneously admitted victim impact evidence violated federal constitutional law, review for prejudice is under *Chapman v.*

California (1967) 386 U.S. 18, 24, requiring reversal unless the prosecution can show, beyond a reasonable doubt, that the error was harmless. A showing of harmlessness cannot be made in this case, as the indicia of prejudice are many. Moreover, this Court must consider the cumulative prejudicial impact of the various penalty phase errors. (*People v. Hill*, 17 Cal.4th at 844 [a series of trial errors may rise by accretion to reversible error]; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

First, as set out in the previous argument,[96] the unfair presentation of evidence of appellant's tattoos and skinhead beliefs turned the sentencing phase into a proceeding on appellant's supposed hatred of minorities and his supposed monstrous racist beliefs.

Secondly, the penalty phase trial must be described as a "difficult" one to decide: the first penalty phase trial ended in a hung jury after six days of deliberations; the second penalty phase jury also deliberated for almost six days before reaching the death verdict. (See e.g., *People v. Martinez* (1984) 36 Cal.3d 816, 822-823 [finding error reversible where one and a half days of deliberations after a three-day trial showed that the "fragile structure of the prosecution case clearly troubled the jury"]; *People v. Fuentes* (1986) 183 Cal.App.3d 444, 456 [error deemed prejudicial

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[96] See Arg. VIII, pages 147-173, above.

because the case was a "difficult" one for the jury as evidenced by the long deliberations]; *People v. Day* (1992) 2 Cal.App.4th 405, 420, overruled on other grounds in *People v. Humphrey* (1996) 13 Cal.4th 1073, 1085 [prejudice shown by length of deliberations plus request for reread of evidence and instructions].)

Finally, victim impact evidence, by its very poignancy, poses an inherent danger, encouraging jurors to decide in favor of death rather than life on the basis of their emotions rather than reason. (*Baze v. Rees* (2008) 553 U.S. 35, 84-85 [Stevens, J., conc.]; *Kelly v. California*, 555 U.S. at 1023 [Stevens, J., dissent from denial of petition for writ of certiorari]; see *United States v. Johnson* (N.D. Iowa 2005) 362 F.Supp.2d 1043, 1107 [describing the "unsurpassed emotional power of victim impact testimony on a jury"].)

For all these reasons, this Court must reverse appellant's sentence of death.

X. THE TRIAL COURT ERRED BY PERMITTING IRRELEVANT AND SPECULATIVE EVIDENCE REGARDING THE FACTOR (B) THUS RENDERING APPELLANT'S DEATH SENTENCE UNRELIABLE IN VIOLATION OF THE EIGHTH AMENDMENT

A. Introduction.

Appellant maintains that no victim impact testimony on the unrelated and seven-year-old prior offense from Arizona should have been admitted at trial. (Arg. IX, above.) However, even if this Court were to

find that victim impact testimony on offenses unrelated and unconnected to the capital offense is generally admissible – even though it cannot be in any way described as a "circumstance of the crime" and despite the limits on such testimony by the United States Supreme Court -- the trial court erred here by allowing improper, irrelevant and speculative opinion victim-impact testimony, as shown below. As a result, appellant's sentence of death must be vacated as unreliable in violation of the Eighth Amendment.

B. Summary of Improper Testimony Regarding the Arizona Assault.

Probation officer Frank Musumeci testified over foundation and leading objections that his report on the Arizona incident described appellant as a "callous and uncaring individual." (69RT 6939-40.) Defense counsel objected to the irrelevant opinion testimony from Arizona detective Stephen Wolf that the assault was "a brutal offense." (64RT 6905.)

Wolf also testified that the victim, Lee Alvin, was a "really nice person" and that it was "really sad that somebody would hit an elderly person with a rock for a small amount of money." (64RT 6903.)

Stephen Alvin also testified in place of his father Lee Alvin,[97] who was the victim in the Arizona case. At the time of the assault Stephen was living an hour and a half away from his father. Stephen testified that his mother called him to report the assault, that his mother was "a nervous

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[97] At the time of trial, the victim Lee Alvin was 85 years old, and suffered from dementia. (37RT 3256-58.)

wreck," that his father lost his drive after this incident and sat around doing nothing and now suffers from dementia. He said that growths (like "mountains") repeatedly appeared on the scar on his father's head. Stephen testified that he had just learned the previous day that the growths were cancerous, and that even though the doctor did not say that cancer was caused by the injury, the doctor "probably didn't even know about the injury in 1992) and the growths were "coming from the same spot" or scar where he was hit on the head. (64RT 6914-22.)

C. The Arizona Testimony Was Irrelevant Opinion Testimony And Speculative Testimony Rendering Appellant's Sentence Of Death Unreliable.

Only relevant evidence is admissible and the trial court has no discretion to admit irrelevant evidence. (*People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Evidence Code section 210 defines relevant evidence as that which tends "in reason to prove or disprove any disputed fact that is of consequence to the determination of the action."

1. Improper lay opinion testimony.

Evidence that Musumeci described appellant in his probation report as "callous and uncaring" was irrelevant to the penalty phase determination. The facts of the Arizona incident were admitted as factor (b) evidence, but Musumeci had no percipient knowledge of that incident. Musumeci's opinion as to appellant's comportment, demeanor, or state of mind during

an interview by a probation officer did not tend to prove any fact of consequence.

Similarly, Detective Wolf's testimony that he considered the offense a "brutal" one, and that he thought it was sad that the nice Lee Alvin had been hit in the head for $30 did not tend to prove any fact of consequence. The facts of the Arizona incident were admissible as factor (b) evidence and Wolf's opinion on the offense and his own emotional reaction to it proved nothing. The robbery and assault were certainly "sad" as all such crimes are, and brutal as well, but appellant did not hit Alvin on the head with a rock. (64RT 6903.)

This Court has held that opinion testimony by law enforcement officers or defense investigators, when not testifying as experts, is inadmissible, because it is the fact finder and not the witnesses who draw the ultimate inferences from the evidence. (*People v. Sergill* (1982) 138 Cal.App.3d 34, 39-40 [holding that police officers' opinion that the child victim was telling the truth was inadmissible as irrelevant]; *People v. Melton* (1988) 44 Cal.3d 713, 744 [citing *Sergill* and holding that it was error to permit a defense investigator to testify to his opinion as to the credibility of a witness he interviewed]; see also *People v. Smith* (1989) 214 Cal.App.3d 904, 914 [sheriff's opinion as to victim's physical condition and mental state was not necessary to elucidate his testimony and tended to invade the province of the jury].)

2. Inadmissible speculative testimony.

Stephen Alvin's testimony that his father lost his drive after this incident and that cancerous growths possibly resulted from the gash on his father's head was speculative at best. Evidence is irrelevant and inadmissible if it "leads only to speculative inferences." (*People v. Stitely* (2005) 35 Cal.4th 514, 549; *People v. Morrison* (2004) 34 Cal.4th 698, 711 [accord].) As such, it was inadmissible in aggravation at penalty phase.

D. The Improperly Admitted Evidence Prejudiced Appellant at the Penalty Phase.

The prejudicial impact of this evidence is reviewable under *Chapman v. California*, 386 U.S. at 24, requiring reversal unless the prosecution can show beyond a reasonable doubt that the error was harmless. In addition, the prejudice from these evidentiary errors must be viewed in conjunction with the other penalty phase errors.

This Court must consider the cumulative prejudicial impact of this error with the penalty phase errors addressed above. (*People v. Hill*, 17 Cal.4th at 844 [a series of trial errors may rise by accretion to reversible error]; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].) The admission of this evidence was prejudicial for all the reasons stated above in Arg. VII, pages 139-146, Arg. VIII, pp. 160-163, and Arg. IX, pp. 172-173, adopted and incorporated by reference here.

The testimony of Musumeci and Detective Wolf was particularly prejudicial because it improperly told the jury – through the "official" voices of a probation officer and a detective -- that appellant was remorseless and brutal and callous; and that he was therefore bad from the start, even before he went to prison. As such, the evidence went to the heart of the mitigation evidence presented by the defense, i.e., that appellant had acted in panic at the Five Star robbery and that in prison (as before and after) he had just gone along with others, and was not a hardened criminal or the shot caller. The prosecutor was able to use the improper aggravating testimony to poke holes in both these mitigation themes.[98]

The prosecutor began her closing argument by stating that "seven years ha[d]n't dulled the pain of the brutal horror" of the crimes which made "seasoned police officers cr[y] on the stand," and showed appellant's "callous disregard for anyone's humanity." (72RT 7900.)[99] The prosecutor emphasized that Detective Wolf considered the assault on Lee Alvin

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98 See e.g., 72RT 7989; 8005; 8015; 8032; 73RT 8052; 8057-58 [defense argument setting out themes of mitigation supported by the evidence].

99 There was no evidence at the penalty phase that any seasoned police officer cried on the stand, much less that more than one police officer so conducted him or herself on the witness stand) cried on the stand. Nor is there any indication that such conduct took place. Detective Hill had cried (or nearly cried) at the guilt phase in the first trial, but she did not testify at the second trial. To the extent the prosecutor argued based on her memory of the first trial, the argument shows the prejudicial impact of mandating a second penalty trial. (See Arg. VII, page 145, above.)

"particularly brutal," and that appellant was "particularly cavalier" about it. (72RT 7969-70.)

When erroneously admitted prosecution evidence strikes at the heart of the defense case, it is viewed as prejudicial. (See e.g. *People v. Lindsey*, 205 Cal.App.3d at 117 and *People v. Vargas*, 9 Cal.3d at 481 [both holding that error striking directly at the heart of the defense is reversible error].)

Similarly, prosecutorial reliance in argument on inadmissible testimony is a powerful indicator of prejudice. (*People v. Minifie* (1996) 13 Cal.4th1055, 1071 [prosecutorial argument exploiting error "tips the scale in favor of finding prejudice"]; see also *Brown v. Borg* (9th Cir. 1991) 951 F.2d 1011, 1017 [prosecutor's argument can enhance immensely the impact of inadmissible evidence]; *People v. Younger* (2000) 84 Cal.App.4th 1360, 1385 [prosecutor's reliance in argument on erroneous jury instruction exacerbated the prejudicial impact].)

XI. THE EXCLUSION OF THIRD PARTY CULPABILITY EVIDENCE DEPRIVED APPELLANT OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO PRESENT A DEFENSE, TO A FAIR TRIAL, AND TO A RELIABLE PENALTY DETERMINATION, AND PREJUDICED APPELLANT AT THE PENALTY PHASE

As set forth above, at guilt phase the trial court prohibited the defense from introducing third-party culpability evidence relating to Jack Reynolds. (Argument V, above, pages 122-126.)

The defense proffered and attempted to introduce the following evidence: (1) Reynolds' prior convictions for robberies similar to the one at issue here as relevant to the possibility of an "inside job," (2) Reynolds had told his brother he might be coming into some money and had promised his mother he would send her to the Cayman Islands; (3) at the time of his death, Reynolds had only $6 in his account, and a number of pawn tickets; (4) Reynolds had racist attitudes, and a skinhead tattoo similar to one appellant had; (5) Reynolds had told the employees to prepare and not fuss if there was a robbery; and Reynolds had talked to Torkelson that night outside the trailer. The trial court excluded the evidence. (13RT 805-09; 15RT 920-23; 27RT 2040-41.)

Prior to the second penalty phase trial, the trial court stated that all the rulings made at the guilt phase remained intact. (RT 4095-96.) Thus, at the penalty phase, the prosecution was able to introduce evidence regarding appellant's racist and other tattoos, including a rune and a Celtic cross (interpreted by expert testimony as "inherently racist"), and his skinhead allegiance and beliefs, but, as at the guilt phase, the defense was precluded from introducing the proffered evidence summarized above. The proffered evidence would have diminished somewhat the impact of the crime and the aggravating evidence because the third party culpability evidence could be deemed mitigating under Penal Code section 190.3, subdivision (e) [whether or not the victim was a participant in the homicidal conduct].)

Appellant adopts and incorporates by reference the discussion above, Argument V, pages 122-126, in arguing that the trial court erred and deprived appellant of his federal constitutional rights to present a defense, to due process and to a fair trial, and that this Court must consider the cumulative prejudicial impact of this error in conjunction with other errors.

The exclusion of the third party culpability evidence, specifically the evidence of Reynolds' Norse tattoos and skinhead beliefs, was particularly prejudicial at penalty phase, where the prosecution focused both the evidence and argument on appellant's tattoos and skinhead beliefs. Had the jury been exposed to the excluded evidence appellant's body art and skinhead allegiance would necessarily have been seen in a more normal and human way and not as proof that appellant was a Hitler-loving "monster" as portrayed by the prosecution.

Even if this error is not deemed reversible, standing alone, the prejudicial impact must be considered in conjunction with the other trial errors, as set forth in more detail immediately below, in Argument XII, pp. 183-185. (*People v. Hill,* 17 Cal.4th at 844; *Taylor v. Kentucky* (1978) 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

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XII. THE CUMULATIVE PREJUDICIAL IMPACT OF THE PENALTY PHASE ERRORS VIOLATED APPELLANT'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS, A FAIR TRIAL BY AN IMPARTIAL JURY, AND A RELIABLE AND INDIVIDUALIZED SENTENCING DETERMINATION

Woodson v. North Carolina (1976) 428 U.S. 280 held that because the death penalty is qualitatively different from imprisonment, there is a corresponding difference in the need for reliability that death is the appropriate punishment in a specific case. (See also *Monge v. California* (1998) 524 U.S. 721, 732 [because death penalty is unique in its severity and finality, there is an "acute need for reliability in capital proceedings"].)

The multiple errors in the penalty phase of appellant's trial, beginning with the statutorily mandated but unconstitutional second penalty trial, and ending with a wide range of evidentiary error, resulted in a death sentence which is constitutionally unreliable in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the federal constitution. Not only did the synergistic effect of the errors amount to a prejudicial violation of appellant's due process and fair trial rights under *Taylor v. Kentucky*, 436 U.S. at 387, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial] but the errors also rendered the death verdict unconstitutionally unreliable under *Woodson* and *Monge*.

The second penalty trial was unconstitutional from the outset under the Eighth Amendment: California is only one of two of the 33 death

penalty jurisdictions that permits a retrial after the first penalty phase jury cannot unanimously reach a verdict of death, a strong indication that a penalty retrial is out of step with the Eighth Amendment's requirement that sentencing conform to the evolving standards of decency that mark the progress of a maturing society.

The second trial was replete with errors that overemphasized the aggravating evidence, supercharging the penalty phase with speculative and improper victim impact evidence of unrelated crimes and testimony by proxy. The trial court also improperly excluded potential mitigating evidence of third party culpability, thus lessening the evidence on the mitigation side of the scale.

Finally, appellant's sentencing proceeding was wrongly converted into a trial on the monstrous beliefs of Adolph Hitler and appellant's racist tattoos, despite their irrelevance. Despicable as such beliefs may be, they were not a valid basis for a sentence of death. (Arg. VIII, pp. 147-163.) Yet the prosecutor's closing argument featured prominently references to appellant as a skinhead, appellant's attendance at Aryan Nation meetings, white supremacy beliefs that whites are the chosen people and that everyone else is the devil, appellant's racist beliefs at a very young age, his continued white supremacy beliefs, his strong embrace of white supremacy ideology, appellant's use of racist symbols in his letters, reference to himself as Hitler's child, raising his child in a racist household, his

possession of a Nazi flag, his espousing of hateful views in his body tattoos as a "walking billboard of hate," spending money on racist tattoos, his offensive attitudes and beliefs as proof of "who he is" and "what he does." (73RT 7923, 7928, 7948-63.)

Finally, the jury deliberations show the unreliability of the ultimate sentence of death. The first jury failed to reach a verdict after six days of deliberations. And the second jury still had difficulty in reaching a unanimous decision as to the moral appropriateness of a death sentence in this case, likely due to evidence that appellant had been influenced by older, more experienced criminals, but had nonetheless rehabilitated himself in they years after the crime, by educating himself, working hard, and being the kind of father he never had. Had it not been for the errors addressed at above, it is highly likely that the second jury would also have failed to reach a verdict of death. Under these circumstances, the death sentence imposed on appellant is unconstitutionally unreliable.

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

In *People v. Schmeck* (2005) 37 Cal.3d 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that in dealing with these attacks in prior cases, it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." (*Id.* at 304.) Appellant Young has no wish to unnecessarily lengthen this brief. Accordingly, pursuant to *Schmeck* and in accordance with this Court's own practice in decisions filed since then,[100] appellant identifies the following systemic and previously

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[100] See, e.g., *People v. Taylor* (2010) 48 Cal.4th 574, 143-44 and *People v. McWhorter* (2009) 47 Cal.4th 318, 377-379. See also, e.g., *People v. Collins* (2010) 49 Cal.4th 175, 259-61; *People v. Thompson* (2010) 49 Cal.4th 79; *People v. D'Arcy* (2010) 48 Cal.4th 257, 307-309; *People v. Mills* (2010) 48 Cal.4th 158, 213-215; *People v. Ervine* (2009) 47 Cal.4th 745, 810-811; *People v. Carrington*

rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requests the Court to reconsider its decisions rejecting them:

1. Factor (a): Section 190.3, subdivision (a), permitting a jury to sentence a defendant to death based on the "circumstances of the crime," is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death, is vague and standardless, and violates appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. The jury in this case was instructed in accord with this provision. (8CT 1965.) In addition, the jury was not required to be unanimous as to which "circumstances of the crime" amounting to an aggravating circumstance had been established, nor was the jury required to find that such an aggravating circumstance had been established beyond a reasonable doubt, thus violating *Ring v. Arizona*, 536 U.S. 584 and its progeny[101] and appellant's Sixth Amendment right to a jury trial on the "aggravating

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(2009) 47 Cal.4th 145, 198-199; *People v. Martinez* (2010) 47 Cal.4th 911, 967-968.

[101] *Ring v. Arizona* (2002) 536 U.S. 584, *Blakely v. Washington* (2004) 542 U.S. 296, *United States v. Booker* (2005) 543 U.S. 220, *Cunningham v. California* (2007) 549 U.S. 270.

circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at. 609.) This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Mills*, 48 Cal.4th at 213-14; *People v. Martinez*, 47 Cal.4th at 967; *People v. Ervine*, 47 Cal.4th at 810; *People v. McWhorter*, 47 Cal.4th at 378; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; *People v. Schmeck*, 37 Cal.4th at 304-05.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

2. Factor (b): During the penalty phase, the jury was instructed it could consider criminal acts that involved the express or implied use of violence. (8CT 1965.) The jury was instructed that it had to agree unanimously as to factor (c) evidence of appellant's prior convictions (8CT 1990) but the jurors were not instructed that they could not rely on factor (b) evidence unless they unanimously agreed beyond a reasonable doubt that the conduct had occurred. In light of the Supreme Court decision in *Ring v. Arizona*, 536 U.S. 584 and its progeny,[102] the trial court's failure violated appellant's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at 609.)

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[102] See cases cited above in previous footnote.

In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a reliable, non-arbitrary penalty phase determination and to freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th 259-61; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Martinez*, 47 Cal.4th at 967-68; *People v. Lewis* (2006) 39 Cal.4th 970, 1068.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

In addition, allowing a jury that knows the defendant has already been convicted of first degree murder to decide if the defendant has committed other criminal activity violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to an unbiased decision maker, to due process, to equal protection, to a reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decisions in this vein should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

3. Factor (i): The trial judge's instructions permitted the jury to rely on defendant's age in deciding if he would live or die without

providing any guidance as to when this factor could come into play. (8CT 1965.) This aggravating factor was unconstitutionally vague in violation of due process and the Eighth Amendment right to a reliable, non-arbitrary penalty determination and requires a new penalty phase. This Court has repeatedly rejected this argument. (See, e.g., *People v. Mills*, 48 Cal.4th at 213; *People v. Ray* (1996) 13 Cal.4th 313, 358.) These decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

4. Inapplicable, vague, limited and burdenless factors: At the penalty phase, the trial court instructed the jury in accord with standard instruction CALJIC 8.85. (8CT 1965-66.) This instruction was constitutionally flawed in the following ways: (1) it failed to delete inapplicable sentencing factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) it limited factors (d) and (g) by adjectives such as "extreme" or "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. These errors, taken singly or in combination, violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable and non-arbitrary determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Thompson*, 49 Cal.4th at

143-44; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 214; *People v. Martinez*, 47 Cal.4th at 968; *People v. Schmeck*, 37 Cal.4th at 304-305; *People v. Ray*, 13 Cal.4th at 358-359.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

5. Failure to narrow: California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment by failing to provide a meaningful and principled way to distinguish the few defendants who are sentenced to death from the vast majority who are not. This Court has repeatedly rejected this argument. (See, e.g., *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213 ; *People v. Martinez*, 47 Cal.4th at 967; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

6. Burden of proof and persuasion: Under California law, a defendant convicted of first-degree special-circumstance murder cannot receive a death sentence unless a penalty-phase jury subsequently (1) finds that aggravating circumstances exist, (2) finds that the aggravating circumstances outweigh the mitigating circumstances, and (3) finds that death is the appropriate sentence. The jury in this case was not told that

these three decisions had to be made beyond a reasonable doubt, an omission that violated the Supreme Court decisions in *Ring v. Arizona*, 536 U.S. 584 and its progeny. Nor was the jury given any burden of proof or persuasion at all. These were errors that violated appellant's rights under the Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to a jury trial, to equal protection, to a reliable and non-arbitrary determination of the appropriateness of the death penalty, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Taylor*, 48 Cal.4th at 259-61; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213; *People v. Martinez*, 47 Cal.4th at 967; *People v. Ervine*, 47 Cal.4th at 810-811; *People v. McWhorter*, 47 Cal.4th at 379; *People v. Schmeck*, 37 Cal.4th at 304.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

7. Written findings: The California death penalty scheme fails to require written findings by the jury as to the aggravating and mitigating factors found and relied on, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these

arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Thompson*, 49 Cal.4th at 143-44; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213; *People v. Martinez*, 47 Cal.4th at 967.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

8. Mandatory life sentence: The instructions fail to inform the jury that if it determines mitigation outweighs aggravation, it must return a sentence of life without parole. This omission results in a violation of appellant's Fifth, Sixth, Eighth, and Fourteenth Amendment rights to due process of law, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. McWhorter*, 47 Cal.4th at 379; *People v. Carrington*, 47 Cal.4th at 199.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

9. Vague standard for decision-making: The instruction that jurors may impose a death sentence only if the aggravating factors are "so substantial" in co.mparison to the mitigating circumstances that death is warranted (11CT 2474) creates an unconstitutionally vague standard, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendment rights to

due process, equal protection, a reliable, non-arbitrary determination of the appropriateness of a death sentence, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (*People v. Carrington*, 47 Cal.4th at 199; *People v. Catlin* (2001) 26 Cal.4th 81, 174; *People v. Mendoza*, 24 Cal.4th at 190.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

12. Intercase proportionality review: The California death penalty scheme fails to require intercase proportionality review, in violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of the fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th 259-61; *People v. Thompson*, 49 Cal.4th at 143-44; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308-09; *People v. Mills*, 48 Cal.4th at 214; *People v. Martinez*, 47 Cal.4th at 968.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

13. Disparate sentence review: The California death penalty scheme fails to afford capital defendants with the same kind of disparate sentence review as is afforded felons under the determinate sentence law, in

violation of Fifth, Sixth, Eighth and Fourteenth Amendment rights to due process, to equal protection, to reliable determinations of the appropriateness of the death penalty and of he fact that aggravation outweighed mitigation, and freedom from cruel and unusual punishment. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Mills*, 48 Cal.4th at 214; *People v. Martinez*, 47 Cal.4th at 968; *People v. Ervine*, 47 Cal.4th at 811.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned provisions of the federal Constitution.

14. International law: The California death penalty scheme, by virtue of its procedural deficiencies and its use of capital punishment as a regular punishment for substantial numbers of crimes, violates international norms of human decency and international law — including the International Covenant of Civil and Political Rights — and thereby violates the Eighth Amendment and the Supremacy Clause as well, and consequently appellant's death sentence must be reversed. This Court has repeatedly rejected these arguments. (See, e.g., *People v. Collins*, 49 Cal.4th at 259-61; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. D'Arcy*, 48 Cal.4th at 308; *People v. Mills*, 48 Cal.4th at 213; *People v. Martinez*, 47 Cal.4th at 968; *People v. Carrington*, 47 Cal.4th at 198-199; *People v. Schmeck*, 37 Cal.4th at 305.) The Court's decisions should be reconsidered because they are inconsistent with the aforementioned

provisions of federal law and the Constitution.

15. Cruel and unusual punishment: The death penalty violates the Eighth Amendment's proscription against cruel and unusual punishment. This Court has repeatedly rejected this argument. (See, e.g., *People v. Thompson*, 49 Cal.4th at 143-44; *People v. Taylor*, 48 Cal.4th at 661-63; *People v. McWhorter*, 47 Cal.4th at 379.) Those decisions should be reconsidered because they are inconsistent with the aforementioned provision of the federal Constitution.

16. Cumulative deficiencies: Finally, the Eighth and Fourteenth Amendments are violated when one considers the preceding defects in combination and appraises their cumulative impact on the functioning of California's capital sentencing scheme. As the United States Supreme Court has stated, "[t]he constitutionality of a State's death penalty system turns on review of that system in context." (*Kansas v. Marsh* (2006) 548 U.S. 163, 179, fn. 6; see also *Pulley v. Harris* (1984) 465 U.S. 37, 51 [while comparative proportionality review is not an essential component of every constitutional capital sentencing scheme, a capital sentencing scheme may be so lacking in other checks on arbitrariness that it would not pass constitutional muster without such review].) Viewed as a whole, California's sentencing scheme is so broad in its definitions of who is eligible for death and so lacking in procedural safeguards that it fails to provide a meaningful or reliable basis for selecting the relatively few

offenders subjected to capital punishment. To the extent respondent hereafter contends that any of these issues is not properly preserved, on the grounds that, despite *Schmeck* and the other cases cited herein, appellant has not presented them in sufficient detail, appellant will seek leave to file a supplemental brief more fully discussing these issues.

XIII. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

The death-qualification procedure used in California to select juries in capital cases is unconstitutional. As will be demonstrated below, the death-qualification process produces juries which are both more likely to convict and more likely to vote for death and also disproportionately remove women, members of racial minorities and religious people from juries. Therefore, the use of the death-qualification procedure in California violates the rights of a capital defendant to equal protection and due process as well as the right to a reliable death penalty adjudication, in derogation of the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and article I of the California Constitution, sections 7,15,16 and 17.

As the United States Supreme Court has explained: "A 'death qualified' jury is one from which prospective jurors have been excluded for cause in light of their inability to set aside their views about the death penalty that would prevent or substantially impair the performance of their

duties as jurors in accordance with their instructions and oath." (*Buchanan v. Kentucky* (1987) 483 U.S. 402, 408, fn. 6 [internal citations and quotations omitted).) If a juror's ability to perform his or her duties is substantially impaired under this standard, he or she is subject to dismissal for cause. (*People v. Ashmus* (1991) 54 Cal. 3d 932, 961-962 citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 and *Adams v. Texas* (1980) 448 U.S. 38, 45.) This Court has held that the only question that a trial court needs to resolve during the death-qualification process is "whether any prospective juror has such conscientious or religious scruples about capital punishment, in the abstract, that his views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." (*People v. Mattson* (1990) 50 Cal. 3d 826, 845.)

A. Current Empirical Studies Prove That the Death Qualification Process is Unconstitutional.

In *Hovey v. Superior Court* (1980) 28 Cal.3d 1, and *People v. Fields* (1983) 35 Cal.3d 329, this Court began to examine the vast body of research concerning the problems caused by death-qualification procedure, but that California's death-qualification jury selection process did not violate the Sixth Amendment right to an impartial guilt phase jury. (See also *Lockhart v. McCree* (1986) 476 U.S. 162, 165, 167 [accord].)

However, the concerns about statistical evidence stated in *Hovey* and *Fields* have since been resolved, and new evidence establishes that the factual basis on which *Lockhart* rests is no longer valid, and that this decision was based on faulty science and improper logic. The questions raised in these cases must be reevaluated in light of the new evidence.

1. The statistical research since *Hovey*.

Hovey generally accepted the vast research condemning the death-qualification process, although it found one flaw in the scientific data then available: The studies presented in that case did not take into account the fact that California also excluded automatic death penalty jurors via "life-qualification." (*Hovey*, 28 Cal.3d at 18-19.) As set forth immediately below, this problem has been solved, and this Court should now acknowledge that fact.

After *Hovey*, a study was conducted that specifically addressed the "*Hovey* problem." (Kadane, Juries Hearing Death Penalty Cases: Statistical Analysis of a Legal Procedure (1984) 78 J. American Statistical Assn. 544.) The article reviewed two studies presented in *Hovey*, the 1984 Fitzgerald and Ellsworth study and the 1984 Cowan, Thompson, and Ellsworth study. (Id. at 545-546.) The conclusion was that excluding the "always or never" group, i.e., the automatic death and automatic life jurors, results in a "distinct and substantial anti-defense bias" at the guilt phase. (*Id.* at 551.) Professor Kadane conducted additional research using data

unavailable at the time *Hovey* was decided. (See Kadane, After Hovey: A Note on Taking Account of the Automatic Death Penalty Jurors (1984) 8 Law & Human Behavior 115 [hereafter "Kadane, After Hovey"].) This study proved that "the procedure of death qualification biases the jury pool against the defense." (*Id.* at 119.) More recent studies have reached the same result.[103]

A more recent study updated the past research on death qualification based on numerous changes in society and the law, including the increase in support for the death penalty and the Supreme Court's decision in *Morgan v. Illinois* (1992) 504 U.S. 719, which required "life qualification," or the removal of the automatic death jurors. (See Haney, et al., "Modern" Death Qualification: New Data on Its Biasing Effects (1994) 18 Law & Human Behavior 619, 619-622 [hereafter "Haney"].) The Haney study was "likely the most detailed statewide survey on Californians' death penalty attitudes ever done." (*Id.* at 623, 625.) It found that "[d]eath-qualified juries remain significantly different from those that sit in any other kind of criminal case." (*Id.* at 631.)

These studies are the type of research that this Court sought in the

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[103] See, e.g., Seltzer et al., The Effect of Death Qualification on the Propensity of Jurors to Convict: The Maryland Example (1986) 29 How. LJ. 571, 604 [hereafter "Seltzer et al."]; see also Luginbuhl & Middendorf, Death Penalty Beliefs and Jurors' Responses to Aggravating and Mitigating Circumstances in Capital Trials (1988) 12 Law & Human Behavior 263 [hereafter Luginbuhl & Middendorf].

Hovey opinion, and they establish that death qualification of jurors serving in capital cases, even when "life qualification" also occurs, violates the Sixth and Fourteenth Amendments and article I, sections 7, 15, 16 and 17 of the California Constitution.

2. The factual basis of *Lockhart* is no longer sound.

Lockhart has been repeatedly criticized for its analysis of both the data and the law related to death qualification. (See, e.g., Smith, Due Process Education for the Jury: Overcoming the Bias of Death Qualified Juries (1989) 18 Sw. U. L. Rev. 493, 528 [hereafter "Smith"] [the analyses in *Lockhart* were "characterized by unstated premises, fallacious argumentation and assumptions that are unexplained or undefended"].)[104] Because the "constitutional facts" upon which *Lockhart* was based are no longer correct, the Supreme Court's holding should not be considered controlling under the federal Constitution. (*United States v. Carolene*

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[104] See also Thompson, Death Qualification After Wainwright v. Witt and Lockhart v. McCree (1989) 13 Law & Human Behavior 185, 202 [hereafter "Thompson"][*Lockhart* is "poorly reasoned and unconvincing both in its analysis of the social science evidence and its analysis of the legal issue of jury impartiality"]; Byrne, *Lockhart v. McCree*: Conviction-Proneness and the Constitutionality of Death-Qualified Juries (1986) 36 Cath. U. L. Rev. 287, 318 [hereafter "Byrne"] [*Lockhart* was a "fragmented judicial analysis," representing an "uncommon situation where the Court allows financial considerations to outweigh an individual's fundamental constitutional right to an impartial and representative jury"]; Moar, Death Qualified Juries in Capital Cases: The Supreme Court's Decision in *Lockhart v. McCree* (1988) 19 Colum. Hum. Rts. L. Rev. 369, 374 [hereafter "Moar"] [detailing criticism of the Court's analysis of the scientific data].

Products (1938) 304 U.S. 144, 153.) This Court needs to review the new data and reevaluate this issue.

Moreover, *Lockhart* does not control the issues raised under the California Constitution. (*Raven v. Deukmejian* (1990) 52 Ca1.3d 336, 352-354.) This Court should continue the path it began in *Hovey* and find the death qualification process unconstitutional under the California Constitution.

a. Misinterpretation of the scientific data.

Despite that the studies presented in *Lockhart* were carried out in a "manner appropriate and acceptable to social or behavioral scientists," the United States Supreme Court categorically dismissed them. (Smith, 18 Sw. U. L. Rev. at p. 537.) When the Supreme Court found a supposed flaw in a study, or a group of studies, it dismissed the study or studies "from further consideration, never considering that alternative hypotheses left open by shortcomings in studies of one type might be ruled out by studies of another type." (Thompson, 13 Law & Human Behavior at 195.) The Court dismissed any study that it deemed less than definitive. (*Ibid.*) Professor Thompson also observed: "The Court's adamant refusal to acknowledge the strength of the evidence before it casts grave doubts upon its ultimate holding in Lockhart." (*Ibid.*) The Supreme Court "erred in its rejection of the empirical evidence."

In *Lockhart*, the Supreme Court was presented with over

fifteen years of scholarly research on death-qualification procedures, using a "wide variety of stimuli, subjects, methodologies, and statistical analyses." (Moar, at pp. 386-387.) From both a scientific and a legal perspective, "[g]iven the seriousness of the constitutional issues involved [] and the extent and unanimity of the empirical evidence, it is hard to justify [the Court's] superficial analysis and rejection of the social science research." (*Id.* at 387.) *Lockhart* "ignored the evidence which indicates that a death-qualified jury, composed of individuals with pro-prosecution attitudes, is more likely to decide against criminal defendants than a typical jury which sits in all noncapital cases." (Byrne, at p. 315.) In deciding the issue now presented here, the Court should not rely upon the analysis of the statistics found in *Lockhart*.

b. Incorrect legal observations.

Witherspoon v. Illinois (1968) 391 U.S. 510 had all but accepted that, once the "fragmentary" scientific data on the effect of death qualification on the guilt phase was solidified, the Court would act to prevent impartial guilt phase juries. "It seemed only inadequate proof of 'death-qualified' juror bias caused the Court to uphold Witherspoon's guilty verdict." (Smith, at 518.) This Court should not follow this faulty lead, but should instead continue on its own path, as laid out by *Hovey*, both in construing and applying the federal and state Constitutions properly. "The Court's holding in *Lockhart* infers [sic] that the Constitution does not

guarantee the capital defendant an 'impartial jury' in the true meaning of the phrase, but merely a jury that is capable of imposing the death penalty if requested to do so by the prosecution." (Peters, Constitutional Law: Does "Death Qualification" Spell Death for the Capital Defendant's Constitutional Right to an Impartial Jury? (1987) 26 Washburn LJ. 382, 395.) This is not the meaning of impartiality, under either the federal or the state Constitutions, discussed in *Hovey*, nor is it the proper one.

c. The scientific evidence.

Empirical studies of actual jurors from actual capital cases show that many capital jurors who had been death-qualified under *Witt*, and "who had decided a real capital defendant's fate, approached their task believing that the death penalty is the only appropriate penalty for many of the kinds of murder commonly tried as capital offenses." (Bowers, W. & Foglia, W., Still Singularly Agonizing: The Law's Failure to Purge Arbitrariness from Capital Sentencing (2003) 39 Crim. Law. Bull. 51, 62 [hereafter "Bowers & Foglia"].)

In 1990, a group of researchers, under the leadership of Professor William J. Bowers, and funded by the Law and Social Sciences Program of the National Science Foundation, formed the Capital Jury Project ("CJP"). One of its purposes was to generate a comprehensive and detailed understanding of how capital jurors actually make their life or death decisions. (See Bowers, W., The Capital Jury Project: Rationale, Design,

and Preview of Early Findings, (1995) 70 Ind. L. J. 1043.)

The work of the CJP has addressed many of the specific problems noted in *Lockhart*. First, it studied 1201 actual jurors who participated in 354 actual cases. Second, the CJP studied how their decisions were influenced by their peers during jury deliberations. Third, as a result of studying actual jurors, this research data is not "contaminated" by the influence of the so-called nullifiers [automatic life jurors] because they were all excused during the death-qualification process at voir dire. (Rozelle, "The Principled Executioner: Capital Juries' Bias and the Benefits of True Bifurcation" (Fall 2006) 38 Ariz. St. L. J. 769, 784.) The CJP study confirms what the earlier studies described in *Lockhart* showed: the death-qualification process results in juries more prone to convict and to choose the death penalty; that it produced skewed juries, particularly in the following ways: (1) there are more automatic death penalty jurors; (2) many of these jurors don't understand the nature of mitigation evidence; and (3) such jurors tend to decide prematurely both to convict and to choose the death sentence. (*Id.* at 785, 787-93.)

B. Data Regarding the Impact of Death Qualification on Jurors' Race, Gender, and Religion.

Lockhart did not address whether death qualification had a negative impact on the racial, gender, and religious composition of juries. This Court acknowledged in *Fields* that this issue is of constitutional dimension and

required more research. Such research is now available, and it compels a finding that the death-qualification process has an adverse effect on the inclusion of important classes of people in capital juries.

Numerous studies have shown that "proportionately more blacks than whites and more women than men are against the death penalty." (Moar, at p. 386.) Death qualification "tends to eliminate proportionately more blacks than whites and more women than men from capital juries," adversely affecting two distinctive groups under a fair cross-section analysis. (*Id.* at 388; see also Seltzer et al. at p. 604 [death qualification results in juries that under-represent blacks]; Luginbuhl & Middendorf at p. 269 [there is a significant correlation between attitudes about the death penalty and the gender, race, age, and educational backgrounds of jurors].)

C. Prosecutorial Misuse of Death Qualification.

Research has shown that a "prosecutor can increase the chances of getting a conviction by putting the defendant's life at issue." (Thompson, at p. 199.) Some prosecutors have acknowledged that death qualification skews the jury and that they use this unconstitutional practice to their advantage in obtaining conviction-prone juries. (See Garvey, The Overproduction of Death (2000) 100 Colum. L. Rev. 2030, 2097 & fns.163 and 164 [hereafter "Garvey"].)[105]

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[105] See also Rosenburg, Deadliest D.A. (1995) N.Y. Times Magazine (July 16, 1995) p. 42 [quoting "various former and current Pennsylvania prosecutors

Lockhart declined to consider the prosecutorial motives underlying death qualification because the petitioner had not argued that death qualification was instituted as a means "for the State to arbitrarily skew the composition of capital-case juries." (476 U.S. at 176.) But the *Lockhart* dissent predicted that "[t]he State's mere announcement that it intends to seek the death penalty if the defendant is found guilty of a capital offense will, under today's decision, give the prosecution license to empanel a jury especially likely to return that very verdict." (476 U.S. at 185 [dis. opn of Marshall, J., Brennan, J., & Stevens, J.].)

The prosecutor's use of death qualification in this case violated appellant's Sixth, Eighth and Fourteenth Amendment rights and his rights under article I, sections 7, 15, 16, and 17 of the California Constitution.

D. Death Qualification in California Violates the Eighth Amendment.

In California, the death-qualification process skews juries by making them more conviction-prone and more likely to vote for a death sentence. Non-capital defendants do not face such skewed juries. This result is unacceptable under the Sixth, Eighth and Fourteenth

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explaining the Philadelphia District Attorney's practice of seeking the death penalty in nearly all murder cases" as self-consciously designed to give prosecutors a permanent thumb on the scale enabling them to "'use everything you can' to win" because everyone who's ever prosecuted a murder case wants a death-qualified jury, because of the "'perception... that minorities tend to say much more often that they are opposed to the death penalty,'" which means that a lot of Latinos and blacks will be stricken from the jury by death qualification questions.

Amendments of the United States Constitution and article I, sections 7,15, 16 and 17 of the California Constitution.

The Eighth Amendment requires "heightened reliability" in capital cases because "death is different." The penalty of death is qualitatively different from a sentence of imprisonment, however long. (*Woodson v. North Carolina* (1976) 428 U.S. 280, 305.) Since death qualification results in a jury more likely to choose a death sentence, it cannot survive the "heightened reliability" requirement mandated by the Eighth Amendment. The Supreme Court has recognized the same principle when it comes to guilt determinations. In California, instead of the "utmost care" and "heightened reliability," capital defendants face juries which are not allowed in any other type of case: capital defendants are tried by juries at both the guilt and penalty phases that are far less "impartial" than juries provided to defendants in any other kind of criminal case. Accordingly, the death-qualification process violates the "heightened reliability" requirement of the Eighth Amendment because it is utterly "cruel and unusual" to put a human being on trial for his life while also forcing him to face a jury that is prone to convict and condemn him to die because many if not all of the jurors who would have been open to the defense evidence had been excluded. Since appellant faced such a death-qualified jury, his convictions, the special circumstance finding against him, and his death penalty must be reversed.

E. The Death-Qualification Process is Unconstitutional.

Even if this Court does not condemn death qualification in principle, the process of death qualification in California courts is nevertheless unconstitutional. The Supreme Court did not reach this issue in *Lockhart*. In *Hovey*, this Court reviewed the evidence on this issue and generally accepted it, although the decision only addressed some of the problems presented by the evidence. In *Fields*, this Court improperly allowed more specific death-qualification voir dire, which exacerbated the problems of the process.

"The voir dire phase of the trial represents the 'jurors' first introduction to the substantive factual and legal issues in a case.' The influence of the voir dire process may persist through the whole course of the trial proceedings." (*Powers v. Ohio* (1991) 499 U.S. 400, 412, quoting *Gomez v. United States* (1989) 490 U.S. 858, 874.) As detailed in *Hovey* and in recent studies, death-qualification voir dire persuades jurors to adopt pro-conviction and pro-death views. The result is that potential jurors who do not share such pro-prosecution attitudes on guilt and penalty are removed from the panel.

The death qualification in this case influenced the deliberative process and the mind set of the jurors concerning their responsibilities and duties. The use of death-qualification voir dire in California violates the Sixth, Eighth and Fourteenth Amendments and article I, sections 7,15,16

and 17 of the California Constitution. Any verdict reached by a jury chosen in this manner cannot stand since the use of a jury whose views are skewed and biased constitutes a structural error.

F. Death Qualification Violates the Right to a Jury Trial.

Taylor v. Louisiana (1975) 419 U.S. 522, 530-531 identified three purposes underlying the Sixth Amendment right to a jury trial, and death qualification defeats all three. First, "the purpose of a jury is to guard against the exercise of arbitrary power--to make available the common sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge." (*Ibid.*) Death qualification makes the "common sense judgment of the community" unavailable. The evidence now shows that a death-qualified jury fails to represent the judgment of the excluded community members. Death qualification also removes the constitutionally required "hedge against the overzealous or mistaken prosecutor" or "biased response of a judge." (*Ibid.*) Evidence shows that prosecutors intentionally use the death qualification process to remove potential jurors so that there is no "hedge" to prevent their overzealousness. (See, e.g., Garvey, at 2097 and fn. 163.)

The second purpose of the jury trial is to preserve public confidence. "Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also

critical to public confidence in the fairness of the criminal justice system. (*Ibid.*) Death qualification fails to preserve confidence in the system and discourages community participation.[106]

The third purpose is to implement the belief that "sharing in the administration of justice is a phase of civic responsibility." (*Taylor v. Louisiana*, 419 U.S. at 532.) The exclusion of a segment of the community from jury duty sends a message that the administration of justice is not a responsibility shared equally by all citizens.

Finally, because the death-qualification process undermines the purposes of the Sixth Amendment right to a jury trial, excluding individuals with views against the death penalty from petit juries also violates the fair cross-section requirement and the Equal Protection Clause. "We think it obvious that the concept of "distinctiveness" must be linked to the [three] purposes oft he fair cross-section requirement." (*Lockhart*, 476 U.S. at 175.) For these reasons, death qualification violates the Sixth and Fourteenth Amendments of the United States Constitution and article I, sections 7,15,16 and 17 of the California Constitution.

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[106] See, e.g., Moller, Death-Qualified Juries Are the 'Conscience of the Community'? L.A. Daily Journal, (May 31, 1988) p. 4, Col. 3 [noting the "Orwellian doublespeak" of referring to a death-qualified jury as the "conscience of the community"];"(Smith, at p. 499 ["the irony of trusting the life or death decision to that segment of the population least likely to show mercy is apparent"]; Liptak, Facing a Jury of (Some of) One's Peers, New York Times (July 20, 2003), Section 4.

G. The Prosecutor's Use of Death Qualification via Peremptory Challenges was Unconstitutional.

In the instant case, the prosecutor's use of peremptory challenges to systematically exclude jurors with reservations about capital punishment denied appellant his constitutional rights. After all the jurors who declared they could not impose a death sentence were excused, various prospective jurors remained who had reservations about the death penalty, but who were not excludable for cause under *Witherspoon* and *Witt*. These prospective jurors stated that they could vote for the death penalty in an appropriate case. (*Gray v. Mississippi* (1987) 481 U.S. 648, 667-668.)

However, when these jurors were called to the jury box, the prosecutor systematically used a peremptory challenge to exclude those who were hesitant or conflicted about imposition of the death penalty. For example, after the trial court denied the prosecutor's cause challenges to Prospective Jurors 48 and 49 (55RT 5315), the prosecutor used peremptory challenges to strike them from the jury. (Supplemental 58CT 12257.) Prospective Juror 48 stated in her questionnaire that she did not want the responsibility of sentencing someone to death and did not want to be a juror because she would have a hard time if the jurors decided to impose the death penalty. (35CT 8122.) In voir dire she affirmed that although it would be difficult to impose a death sentence, she could do it. (55RT 5272.) Prospective Juror 49 stated in voir dire that she "could follow the

law" although it would be "very difficult."[107] (54RT 5255.) In her questionnaire she also said she didn't want the responsibility of sentencing someone to death; that she didn't want to sit on the jury because it might involve voting for the death penalty; and that imposing a LWOP sentence would be an easier decision for her. (35CT 8145.)

As the above examples demonstrate, the prosecutor's actions in this case denied appellant his federal and state constitutional rights to due process, equal protection, an impartial jury, a jury drawn from a fair cross-section of the community and a reliable determination of guilt and sentence under the Fifth, Sixth, Eighth and Fourteenth Amendments of the U.S. Constitution and related provisions of article I, sections 7,15,16 and 17 of the California Constitution.

The peremptory exclusion of these jurors prejudiced appellant's rights at the guilt phase for the same reasons as did the "death qualification" of the jury. Unlike death qualification done by for-cause challenges, which excludes from the jury only those whom the trial judge determines would not be able to follow their oath at the penalty phase, the elimination of these jurors through peremptory challenge involves the exclusion of persons whose ability to follow their oath and instructions at the penalty phase is

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[107] Although both prospective jurors answered in the affirmative when asked by the prosecutor if they would have difficulty "looking the defendant in the eye" and telling him he was sentenced to death, the trial court deemed this question improper and ordered that the question not be posed. (55RT 5315.)

unaffected by their reservations about capital punishment. Even assuming their exclusion was harmless at the guilt phase, reversal of the death judgment is required nonetheless. (See, e.g., *Gregg v. Georgia*, 428 U.S. at 188; *Lockett v. Ohio* (I988) 438 U.S. 586, 604.) The prosecution "stacked the deck" in favor of death by exercising its peremptory challenges to remove these jurors. The exclusion of these jurors resulted in a "jury uncommonly willing to condemn a man to die." (*Witherspoon v. Illinois*, 391 U.S. at 521, 523.)

The prosecutor shares responsibility with the trial judge to preserve a defendant's right to a representative jury and should exercise peremptory challenges only for legitimate purposes. Since the State is forbidden from excusing a class of jurors for cause based on their death penalty skepticism, those views are not a proper basis for a peremptory challenge. The State has no legitimate interest in the removal of jurors who can follow their oaths, but who may also be skeptical about the death penalty. A jury stripped of the significant community viewpoint that these prospective jurors provide is not ideally suited to the purpose and functioning of a jury in a criminal trial. (*Ballew v. Georgia* (1978) 435 U.S. 223, 239-242.) Even if these jurors do not constitute a cognizable class for purposes of analysis of the Sixth Amendment's representative cross-section of the community issue (*Lockhart*, 476 U.S. at 174-77), they constitute a distinct group for purposes of ensuring both the reliability of a capital

sentencing decision and the need for the jury to reflect the various views of the wider community. (*Witherspoon*, 391 U.S. at 519.)

In *Gray v. Mississippi*, the Supreme Court held the wrongful exclusion for cause of a prospective juror who was a death penalty skeptic constituted reversible error. The plurality opinion emphasized the potential prejudice to a capital defendant when death penalty skeptics are systematically excluded from a jury by peremptory challenges. (481 U.S. at 667-68.) The systematic, peremptory exclusion of death penalty skeptics in appellant's case requires reversal of the penalty verdict.

H. Errors in Death Qualifying the Penalty Jury Requires Reversal of the Guilt Verdicts as Well.

Witherspoon v. Illinois identified three separate problems regarding death qualification. First, death qualification can be so extreme as to make the jury biased at the penalty phase. Second, death qualification that is so extreme may also make the jury biased at the guilt phase. Third, even death qualification that is not so extreme biases the jury at the guilt phase. (391 U.S. 510.)

The first issue is the one that formed the basis for the limits on death qualification in *Witherspoon*. The second and third issues were left open for further studies. However, it appears that courts have erroneously compounded these issues. (See, e.g., *Hovey*, 28 Cal.3d at 11-12

[summarizing *Witherspoon* and discussing the two issues as if they were identical]; see also *People v. Fields*, 35 Cal.3d at 344.)

This melding of issues is incorrect. The second issue is whether death qualification that did not meet the proper standard for removal of penalty phase jurors was improper at the guilt phase. (*Witherspoon*, 391 U.S. at 516-18.) *Witherspoon* held that because the evidence on this second issue was not yet developed, it only would reverse the penalty phase. (*Id.* at 516-18, 522, fn. 21.) The third issue is whether, assuming the State properly death-qualified the jury for purposes of the penalty phase, it was proper for such death qualification to also exclude potential jurors from the guilt phase. (*Id.* at 521, fn. 19.) This was the issue involving the "guilt phase includables" discussed in *Lockhart* and *Hovey*.

This Court has routinely asserted that *Witherspoon* error as to the penalty phase jury requires the reversal of the penalty but not the guilt verdicts. (See, e.g., *People v. Ashmus*, 54 Cal.3d at 962.) The United States Supreme Court has not addressed this issue. This Court should alter its position on this point and find that error resulting from the death qualification of the jury also requires reversal of any convictions resulting from the guilt phase.

Since the evidence shows that a death-qualified jury is conviction prone and different from a typical jury, this Court should reconsider the conclusion that *Witherspoon* error requires only penalty reversal. The

State's only conceivable legitimate interest in death qualification is at the penalty phase. If it committed error in achieving this interest, then it has no interest in death-qualifying the guilt phase jury. Since the prosecution did death-qualify the jury in this case, appellant improperly faced a biased guilt phase jury. Moreover, an error resulting in a biased jury cannot be harmless. When this Court finds error as to the penalty phase jury's death qualification, it must also reverse appellant's guilt phase convictions.

I. Conclusion.

The death-qualification process in California is irrational and unconstitutional. It prevents citizens from performing as jurors in capital cases based on their "moral and normative" beliefs despite the fact that the law specifically requires capital jurors to make "moral and normative" decisions. These citizens' voices are eliminated from the data that the courts rely on to determine whether a particular punishment offends evolving standards of decency under the Eighth Amendment. To make matters worse, California allows some case-specific death qualification; one of the effects of this process is to remove jurors who would be highly favorable to specific mitigation evidence in violation of the Eighth Amendment.

The death-qualification procedure in California also violates the equal protection and due process clauses of the Fourteenth Amendment. To their detriment, capital defendants receive vastly different juries at the guilt

phase in comparison with other defendants. In addition, since death qualification results in juries which are more likely to convict and to choose the death sentence, capital defendants' guilt and penalty determinations are not made with the heightened reliability required by the Eighth Amendment.

A vast amount of scientific data demonstrates that death-qualified juries are far more conviction-prone and death-prone than any other juries. The data shows that the death-qualification process disproportionately removes minorities, women, and religious people from sitting on capital juries in violation of the Sixth and Fourteenth Amendments. Moreover, as was true in this case, prosecutors regularly use the death-qualification process to achieve these results. The very process of death qualification skews capital juries to such a degree that they can no longer be said to be impartial and fully representative of the community.

All of these errors were present in the instant case. From beginning to end, death qualification violated appellant's rights. In this case, the process accomplished was what was expressly prohibited by the Supreme Court:

> "In its quest for a jury capable of imposing the death penalty, the State produced a jury uncommonly willing to condemn a man to die. It is, of course, settled that a State may not entrust the determination of whether a man is innocent or guilty to a tribunal 'organized to convict.' It requires but a short step from that principle to hold, as we do today, that a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a

verdict of death." (*Lockhart v. McCree*, 476 U.S. at 179, quoting *Witherspoon*, 391 U.S. at 520-521 [footnotes and internal citations omitted].)

Thus, death qualification in general and as applied in this particular case violated appellant's Fifth, Sixth, Eighth and Fourteenth Amendment rights under the United States Constitution and article I, sections 7, 15, 16 and 17 of the California Constitution. Since this error is comparable to other constitutional errors in the jury selection, it requires reversal of defendant's convictions and death sentence without inquiry into prejudice. (See, e.g., *Davis v. Georgia* (1976) 429 U.S. 122, 123 [improper challenges for cause]; *People v. Stewart* (2004) 33 Ca1.4th 425, 454; *Turner v. Murray* (1986) 476 U.S. 28, 37 [failure to question prospective jurors about race in a capital case involving interracial violence].) Appellant's convictions and death sentence accordingly must be reversed.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and sentence of death and remand for a fair trial; or in the alternative vacate his sentence of death and impose a sentence of life without possibility of parole.

DATED: October 19, 2012

Respectfully submitted,

KATHY MORENO
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Jeffrey Scott Young

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Jeffrey Scott Young, certify that this Appellant's Opening Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Word word-processing program on which it was produced, the number of words contained herein is 47,146 and the font is Times New Roman 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this 19th day of October, 2012, in Berkeley, CA.

KATHY R. MORENO[108]

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S OPENING BRIEF by depositing in the United States mail on October ___, 2012, a true and full copy thereof, to the following:

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Executed this ___day of October, 2012, in Berkeley, CA under penalty of perjury.

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