SUPREME COURT COPY

# In the Supreme Court of the State of California

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| **THE PEOPLE OF THE STATE OF CALIFORNIA,**<br>*Plaintiff & Respondent,*<br>**v.**<br>**JEFFREY SCOTT YOUNG,**<br>*Defendant & Appellant.* | **CAPITAL CASE**<br>Case No. S148462 |

SUPREME COURT
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Deputy

San Diego County Superior Court Case No. SCD173300
The Honorable JOHN M. THOMPSON, Judge

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DEATH PENALTY

## TABLE OF CONTENTS


**Page**

Statement of the Case ..... 1

Statement of Facts ..... 2

A. Guilt phase ..... 2

B. Penalty phase ..... 15

1. Prosecution's case in aggravation ..... 15

a. Circumstances of the crime ..... 15

(1) Young's active role in the robbery-murders ..... 15

(2) The nature of the crime ..... 17

(3) The impact of the crime on others ..... 18

(a) Family ..... 18

i) Perez ..... 18

ii) Reynolds ..... 19

(b) Victims, witnesses & others impacted by the crime ..... 21

b. Prior crimes & violent criminal activity ..... 25

(1) Attempted bank theft ..... 25

(2) Assault with deadly weapon on fellow inmate ..... 26

(3) Aggravated assault on elderly victim ..... 29

2. Defense case in mitigation ..... 30

3. People's rebuttal ..... 36

4. Defense sur-rebuttal ..... 38

## TABLE OF CONTENTS
## (continued)

**Page**


Argument ..... 39

I. The admission of Young's statement "you heard it all" after he was read his *Miranda* rights did not violate Young's Fifth or Fourteenth Amendment rights ..... 39

A. Young waived his right to remain silent and voluntarily told Detective McDonald, "you heard it all ...." ..... 43

B. The waiver was not coerced ..... 44

C. *Honeycutt* does not apply because the pre-advisement conversation was brief and recorded, and Detective McDonald neither disparaged the victims nor tried to ingratiate himself ..... 48

D. Evidence Code section 352 does not require exclusion of the admission ..... 50

E. Any error was harmless because the evidence against Young was overwhelming and no reasonable juror would have believed that his admissions to Getscher were mere posturing ..... 51

II. The trial court properly admitted only two of Young's numerous tattoos, the fact that he put red laces in his boots, and minimal evidence of his association with skinheads because an eyewitness relied on the tattoos to identify Young, the red laces were tantamount to an admission of guilt, and the evidence of association explained the significance of the laces and Young's close relationship with the other robbers ..... 53

A. The trial court ruled the evidence admissible ..... 54

B. The people elicited only minimal testimony about skinheads to show the nexus between Torkelson, Raynoha, and Young; defense counsel elicited evidence about the red laces ..... 55

## TABLE OF CONTENTS
## (continued)

**Page**


C. The trial court was within its discretion to admit the evidence ..... 58

1. The court properly admitted the two tattoos upon which Paula Daleo Relied to identify Young ..... 58

2. The trial court was within its discretion to allow the prosecutor to introduce evidence of the meaning of the red laces after defense counsel elicited testimony that they were merely a fashion statement ..... 62

3. The trial court admitted only minimal evidence of Young's association with skinheads to shows he knew what the red laces meant, and to show that he closely associated with the other robbers ..... 64

D. Admission of this evidence was harmless in light of the overwhelming evidence of Young's guilt ..... 65

III. The prosecutor's remark that she was certain the victims felt fear did not constitute prejudicial prosecutorial misconduct ..... 65

IV. The trial court reasonably used a minimal, hidden restraint as a security measure because Young repeatedly made and concealed deadly weapons and nearly killed a man while in custody ..... 70

V. The trial court acted within its discretion in excluding speculative third-party guilt evidence ..... 74

A. The court was within the bounds of reason to exclude evidence of Reynolds's prior convictions as irrelevant and as improper character evidence ..... 74

## TABLE OF CONTENTS
## (continued)

**Page**


B. The trial court acted within its discretion to exclude Reynolds's prior convictions because they were a quarter of a century old and connected to the current robbery-murders only by speculation and conjecture ..... 77

VI. The nonexistent or minimal error in this case cannot be aggregated ..... 78

VII. There is no constitutional infirmity in a second penalty trial when the first jury is unable to reach a verdict ..... 79

A. This Court has held that retrial of the penalty phase does not violate the Eighth Amendment ..... 80

B. The prosecutor's remark in closing argument of the second penalty trial that the crime had caused an investigator to become emotional was harmless error ..... 82

VIII. The trial court did not violate Young's First Amendment rights by admitting evidence that Young believed he deserved a badge of honor for murdering Ms. Perez, and that Young endorsed and committed violence against non-white people ..... 84

A. Young opened the door to evidence of his violent racist beliefs and conduct ..... 84

B. The evidence of violent racism did not abridge Young's First Amendment rights because it was offered in rebuttal and was far more than a mere statement of an abstract belief ..... 88

C. The evidence was admissible to rebut the defense witnesses' testimony that Young was a kind, non-violent, and bookish fellow who played no role in the attack on Harger, and that skinhead groups were mere social clubs ..... 89

D. The evidence was harmless ..... 92

**TABLE OF CONTENTS**
**(continued)**

**Page**


IX. The trial court properly admitted evidence of the impact of Young's past crimes on the victims of those crimes ..... 93

A. The court properly admitted the evidence because the effect of a capital defendant's prior violent crimes on his victims is admissible in the penalty phase of the trial ..... 93

B. Any error in admitting the evidence was harmless ..... 97

X. The trial court properly excluded tenuous and speculative evidence of third-party culpability at the penalty phase because it did not raise a reasonable doubt about Young's guilt ..... 98

XI. Young received a fair trial and may not obtain relief due to alleged cumulative error ..... 100

XII. California's death penalty statute is constitutionally sound ..... 100

A. Penal Code section 190.3, subdivision (a) is not vague or overbroad ..... 101

B. There is no requirement the jury find that the aggravating factors outweigh the mitigating factors beyond a reasonable doubt, nor that it unanimously agree upon specific aggravating circumstances ..... 101

C. Factor (i) (permitting jury to consider defendant's age) is not impermissibly vague ..... 104

D. CALJIC No. 8.85 is constitutionally sound ..... 105

E. California's death penalty statute is not unsound for failure to narrow the class of persons eligible for the death penalty ..... 106

F. The trial court properly did not instruct the jury on burden of proof respecting aggravating and mitigating factors ..... 106

## TABLE OF CONTENTS
## (continued)

**Page**


G. Written findings are not required ..... 107

H. The court had no obligation to instruct the jury on a "presumption of life" ..... 107

I. CALJIC No. 8.88 does not set an unconstitutionally vague standard ..... 107

J. Neither intercase proportionality review nor "disparate sentence" review is constitutionally required ..... 108

K. California's death penalty law does not violate international law ..... 108

L. No cumulative error ..... 109

XIII. California's process for qualifying jurors for death penalty cases is constitutional ..... 109

Conclusion ..... 114

## TABLE OF AUTHORITIES

**Page**

**CASES**

*Apprendi v. New Jersey*
(2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435] ..... 102, 103

*Berghuis v. Thompkins*
(2010) 560 U.S. 370 [130 S.Ct. 2250, 176 L.Ed.2d 1098] ..... 48

*Blakely v. Washington*
(2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403] ..... 102, 103

*Booth v. Maryland*
(1987) 482 U.S. 496 [107 S.Ct. 2529, 96 L.Ed.2d 440] ..... 95, 96

*Cantu v. State*
(Tex.Ct.App.1997) 939 S.W.2d 627 ..... 96

*Chapman v. California*
(1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] ..... 51, 92, 97

*Cunningham v. California*
(2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] ..... 102

*Darden v. Wainwright*
(1986) 477 U.S. 168 [106 S.Ct. 2464, 91 L.Ed.2d 144] ..... 66, 69

*Dawson v. Delaware*
(1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309] ... 59 *et passim*

*Donnelly v. DeChristoforo*
(1974) 416 U.S. 637 [94 S.Ct. 1868, 40 L.Ed.2d 431] ..... 67

*Frazier v. Cupp*
(1969) 394 U.S. 731 [89 S.Ct. 1420, 22 L.Ed.2d 684] ..... 45

*Holmes v. South Carolina*
(2006) 547 U.S. 319 [126 S.Ct. 1727, 164 L.Ed.2d 503] ..... 78

*Hovey v. Superior Court*
(1980) 28 Cal.3d 1 ..... 110

*Lockhart v. McCree*
(1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137] ..... 112

*Maryland v. Shatzer*
(2010) 559 U.S. 98 [130 S.Ct. 1213, 175 L.Ed.2d 1045] ..... 43

*Miranda v. Arizona*
(1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] ..... 39 *et passim*

*Payne v. Tennessee*
(1991) 501 U.S. 808 [111 S.Ct. 2597, 115 L.Ed.2d 720] ..... 87, 89, 96

*People v. Abilez*
(2007) 41 Cal.4th 472 ..... 106, 107

*People v. Akins*
(2005) 128 Cal.App.4th 1376 ..... 73

*People v. Alfaro*
(2007) 41 Cal.4th 1277 ..... 109

*People v. Alvarez*
(1996) 14 Cal.4th 155 ..... 66, 81, 92

*People v. Anderson*
(2001) 25 Cal.4th 543 ..... 72

*People v. Aranda*
(2012) 55 Cal.4th 342 ..... 92

*People v. Ashmus*
(1991) 54 Cal.3d 932 ..... 113

*People v. Barton*
(1995) 12 Cal.4th 186 ..... 74

*People v. Beeler*
(1995) 9 Cal.4th 953 ..... 79, 100

*People v. Bell*
(2007) 40 Cal.4th 582 ..... 95

*People v. Benson*
(1990) 52 Cal.3d 754 ..... 95, 96

*People v. Bittaker*
(1989) 48 Cal.3d 1046 ..... 84

*People v. Bivert*
(2011) 52 Cal.4th 96 ..... 58 *et passim*

*People v. Box*
(2000) 23 Cal.4th 1153 ..... 100

*People v. Boyette*
(2002) 29 Cal.4th 381 ..... 53, 91

*People v. Brady*
(2010) 50 Cal.4th 547 ..... 98

*People v. Brown*
(1988) 46 Cal.3d 432 ..... 84

*People v. Brown*
(2004) 33 Cal.4th 382 ..... 102

*People v. Burney*
(2009) 47 Cal.4th 203 ..... 103, 105

*People v. Carpenter*
(1997) 15 Cal.4th 312 ..... 106

*People v. Carrington*
(2009) 47 Cal.4th 145 ..... 107, 108, 109

*People v. Catlin*
(2001) 26 Cal.4th 81 ..... 108

*People v. Clark*
(1993) 5 Cal.4th 950 ..... 44

*People v. Collins*
(2010) 49 Cal.4th 175 ..... 108, 109

*People v. Contreras*
(2009) 177 Cal.App.4th 1296 ..... 73

*People v. Cook*
(2007) 40 Cal.4th 1334 ..... 103

*People v. Cornwell*
(2005) 37 Cal.4th 50 ..... 106, 107, 108

*People v. Crew*
(2003) 31 Cal.4th 822 ..... 69

*People v. Crittenden*
(1994) 9 Cal.4th 83 ..... 58

*People v. Cudjo*
(1993) 6 Cal.4th 585 ..... 61

*People v. Cunningham*
(2001) 25 Cal.4th 926 ..... 100, 103

*People v. Daniels*
(1991) 52 Cal.3d 815 ..... 82

*People v. Davenport*
(1995) 11 Cal.4th 1171 ..... 73

*People v. Davis*
(2009) 46 Cal.4th 539 ..... 94, 96

*People v. Dunlap*
(Colo. 1999) 975 P.2d 723 ..... 96

*People v. Dykes*
(2009) 46 Cal.4th 731 ..... 82, 97, 103, 105

*People v. Earp*
(1999) 20 Cal.4th 826 ..... 66

*People v. Edwards*
(2013) 57 Cal.4th 658 ..... 77

*People v. Elliot*
(2005) 37 Cal.4th 453 ..... 106, 107, 108, 109

*People v. Fuiava*
(2012) 53 Cal.4th 622 ..... 59, 68

*People v. Garceau*
(1993) 6 Cal.4th 140 ..... 59, 94

*People v. Giminez*
(1975) 14 Cal.3d 68 ..... 90

*People v. Gonzales*
(2012) 54 Cal.4th 1234 ..... 78

*People v. Green*
(1995) 34 Cal.App.4th 165 ..... 62

*People v. Griffin*
(2004) 33 Cal.4th 536 ..... 103

*People v. Guerra*
(2006) 37 Cal.4th 1067 ..... 46

*People v. Guiuan*
(1998) 18 Cal.4th 558 ..... 68

*People v. Gutierrez*
(2009) 45 Cal.4th 789 ..... 59, 70, 75, 76

*People v. Hall*
(1986) 41 Cal.3d 826 ..... 77, 98

*People v. Harris*
(2005) 37 Cal.4th 310 ..... 64, 65

*People v. Harris*
(2013) 57 Cal.4th 804 ..... 106

*People v. Hawkins*
(1995) 10 Cal.4th 920 ..... 70

*People v. Hawthorne*
(1992) 4 Cal.4th 43 ..... 104

*People v. Hawthorne*
(2009) 46 Cal.4th 67 ..... 90

*People v. Hayes*
(1990) 52 Cal.3d 577 ..... 105

*People v. Hill*
(1998) 17 Cal.4th 800 ..... 78

*People v. Honeycutt*
(1977) 20 Cal.3d 150 ..... 44, 48, 49

*People v. Hope*
(Ill. 1998) 702 N.E.2d 1282 ..... 96

*People v. Hovarter*
(2008) 44 Cal.4th 983 ..... 60

*People v. Howard*
(1988) 44 Cal.3d 375 ..... 49

*People v. Howard*
(2010) 51 Cal.4th 15 ..... 112, 113

*People v. Jenkins*
(2000) 22 Cal.4th 900 ..... 101

*People v. Johnson*
(1992) 3 Cal.4th 1183 ..... 82, 97

*People v. Jones*
(1998) 17 Cal.4th 279 ..... 43, 44

*People v. Jones*
(2003) 29 Cal.4th 1229 ..... 108

*People v. Jones*
(2013) 57 Cal.4th 899 ..... 107, 108

*People v. Karis*
(1988) 46 Cal.3d 612 ..... 51, 95, 96

*People v. Kimble*
(1988) 44 Cal.3d 480 ..... 51

*People v. Kipp*
(2001) 26 Cal.4th 1100 ..... 69, 107

*People v. Lasko*
(2000) 23 Cal.4th 101 ..... 70

*People v. Ledesma*
(2006) 39 Cal.4th 641 ..... 66

*People v. Lenart*
(2004) 32 Cal.4th 1107 ..... 105, 106

P*eople v. Lewis & Oliver*
(2006) 39 Cal.4th 970 ..... 70, 72

*People v. Lewis*
(1990) 50 Cal.3d 262 ..... 66

*People v. Lewis*
(2001) 26 Cal.4th 334 ..... 77, 98

*People v. Lindberg*
(2008) 45 Cal.4th 1 ..... 60, 62

*People v. Linton*
(2013) 56 Cal.4th 1146 ..... 98, 99

*People v. Mai*
(2013) 57 Cal.4th 986 ..... 101

*People v. Martinez*
(2003) 31 Cal.4th 673 ..... 79

*People v. Martinez*
(2009) 47 Cal.4th 399 ..... 103

*People v. Martinez*
(2010) 47 Cal.4th 911 ..... 47, 48, 100

*People v. Maury*
(2003) 30 Cal.4th 342 ..... 101

*People v. McDowell*
(2012) 54 Cal.4th 395 ..... 107

*People v. McWhorter*
(2009) 47 Cal.4th 318 ..... 107

*People v. Medina*
(1990) 51 Cal.3d 870 ..... 104

*People v. Medina*
(1995) 11 Cal.4th 694 ..... 60, 61, 70, 73

*People v. Memro*
(1995) 11 Cal.4th 786 ..... 45

*People v. Mendoza*
(2000) 24 Cal.4th 130 ..... 108

*People v. Mickey*
(1991) 54 Cal.3d 612 ..... 91

*People v. Mills*
(2010) 48 Cal.4th 158 ..... 101 *et passim*

*People v. Mungia*
(2008) 44 Cal.4th 1101 ..... 109

*People v. Myles*
(2012) 53 Cal.4th 1181 ..... 104

*People v. Neal*
(2003) 31 Cal.4th 63 ..... 51

*People v. Nelson*
(2011) 51 Cal.4th 198 ..... 67

*People v. Nelson*
(2012) 53 Cal.4th 367 ..... 43

*People v. Ochoa*
(1998) 19 Cal.4th 353 ..... 66

*People v. Ochoa*
(2001) 26 Cal.4th 398 ..... 62, 63, 90

*People v. Parson*
(2008) 44 Cal.4th 332 ..... 66, 105

*People v. Pearson*
(2013) 56 Cal.4th 393 ..... 69, 79

*People v. Perry*
(2006) 38 Cal.4th 302 ..... 107

*People v. Price*
(1991) 1 Cal.4th 324 ..... 94

*People v. Prieto*
(2003) 30 Cal.4th 226 ..... 62, 103

*People v. Prince*
(2007) 40 Cal.4th 1179 ..... 103

*People v. Quang Minh Tran*
(2011) 51 Cal.4th 1040 ..... 50

*People v. Quartermain*
(1997) 16 Cal.4th 600 ..... 63, 89

*People v. Ramos*
(2004) 34 Cal.4th 494 ..... 101

*People v. Ray*
(1996) 13 Cal.4th 313 ..... 45

*People v. Riggs*
(2009) 44 Cal.4th 248 ..... 68, 107

*People v. Robinson*
(2005) 37 Cal.4th 592 ..... 99

*People v. Rodrigues*
(1994) 8 Cal.4th 1060 ..... 90

*People v. Rodriguez*
(1999) 20 Cal.4th 1 ..... 61

*People v. Rogers*
(2013) 57 Cal.4th 296 ..... 109

*People v. Roldan*
(2005) 35 Cal.4th 646 ..... 59

*People v. Sauceda-Contreras*
(2012) 55 Cal.4th 203 ..... 45

*People v. Scott*
(2011) 52 Cal.4th 452 ..... 47, 48, 49

*People v. Seijas*
(2005) 36 Cal.4th 291 ..... 62

*People v. Slaughter*
(2002) 27 Cal.4th 1187 ..... 105

*People v. Smith*
(2005) 35 Cal.4th 334 ..... 108, 109

*People v. Smith*
(2007) 40 Cal.4th 483 ..... 45

*People v. Smithey*
(1999) 20 Cal.4th 936 ..... 104

*People v. Steele*
(2002) 27 Cal.4th 1230 ..... 112

*People v. Stevens*
(2007) 41 Cal.4th 182 ..... 103

*People v. Stitely*
(2005) 35 Cal.4th 514 ..... 48, 98

*People v. Taylor*
(2010) 48 Cal.4th 574 ..... 79, 80, 81, 107

*People v. Tenner*
(1993) 6 Cal.4th 559 ..... 81

*People v. Thomas*
(2012) 54 Cal.4th 908. ..... 97

*People v. Thompson*
(2010) 49 Cal.4th 79 ..... 105, 108

*People v. Thornton*
(2007) 41 Cal.4th 391 ..... 80

*People v. Tuggles*
(2009) 179 Cal.App.4th 339 ..... 90

*People v. Tuilaepa*
(1992) 4 Cal.4th 569 ..... 72

*People v. Tully*
(2012) 54 Cal.4th 952 ..... 66 *et passim*

*People v. Valdez*
(2004) 32 Cal.4th 73 ..... 79

*People v. Valdez*
(2012) 55 Cal.4th 82 ..... 59

*People v. Waidla*
(2000) 22 Cal.4th 690 ..... 50, 91

*People v. Wallace*
(2008) 44 Cal.4th 1032 ..... 72

*People v. Ward*
(2005) 36 Cal.4th 186 ..... 103

*People v. Weaver*
(2001) 26 Cal.4th 876 ..... 43

*People v. Whisenhunt*
(2008) 44 Cal.4th 174 ..... 103

*People v. Whitson*
(1998) 17 Cal.4th 229 ..... 44

*People v. Wickersham*
(1982) 32 Cal.3d 307 ..... 73

*People v. Williams*
(2010) 49 Cal.4th 405 ..... 43, 45

*People v. Williams*
(2013) 56 Cal.4th 165 ..... 104, 105

*People v. Wright*
(1985) 39 Cal.3d 576 ..... 75

*People v. Yeoman*
(2003) 31 Cal.4th 93 ..... 94, 113

*People v. Young*
(2005) 34 Cal.4th 1149 ..... 69, 90

*Price v. Superior Court*
(2001) 25 Cal.4th 1046 ..... 78, 96

*Richardson v. United States*
(1984) 468 U.S. 317 [104 S.Ct. 3081, 82 L.Ed.2d 242] ..... 82

*Ring v. Arizona*
(2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556] ..... 102

*Sattazahn v. Pennsylvania*
(2003) 537 U.S. 101 [123 S.Ct. 732, 154 L.Ed.2d 588] ..... 81

*Schneckloth v. Bustamonte*
(1973) 412 U.S. 218 [93 S.Ct. 2041, 36 L.Ed.2d 854] ..... 45

*Sherman v. State*
(Nev. 1998) 965 P.2d 903 ..... 96

*State v. Nesbit*
(Tenn. 1998) 978 S.W.2d 872 ..... 96

*Stone v. Superior Court*
(1982) 31 Cal.3d 503 ..... 82

*Trop v. Dulles*
(1958) 356 U.S. 86 [78 S.Ct. 590, 2 L.Ed.2d 630] ..... 80

*Tuilaepa v. California*
(1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] ..... 104

*Wisconsin v. Mitchell*
(1993) 508 U.S. 476 [113 S.Ct. 2194, 124 L.Ed.2d 436] ..... 60, 62, 88

*Witherspoon v. Illinois*
(1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776] ..... 113

**STATUTES**

Evidence Code
§ 210 ..... 59
§ 352 ..... 40 *et passim*
§ 1101 ..... 75
§ 1102 ..... 90
§ 1103 ..... 75, 76

Penal Code
§ 187 ..... 1
§ 190.2 ..... 1
§ 190.3 ..... 82 *et passim*
§ 211 ..... 1
§ 215 ..... 1
§ 664 ..... 1
§ 12022.5 ..... 1
§ 12022.53 ..... 1

**CONSTITUTIONAL PROVISIONS**

California Constitution
Article I ..... 109, 110, 111, 112

United States Constitution
I Amendment ..... 4 *et passim*
V Amendment ..... 39 *et passim*
VI Amendment ..... 78 *et passim*
VIII Amendment ..... 79 *et passim*
XIV Amendment ..... 39 *et passim*

**OTHER AUTHORITIES**

7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 327, p. 371 ..... 73

CALJIC No. 1.04 ..... 73

CALJIC No. 2.50.2 ..... 43

CALJIC No. 8.84.1 ..... 97

CALJIC No. 8.85 ..... 105

CALJIC No. 8.88 ..... 97, 107

## STATEMENT OF THE CASE

On September 16, 2005, the District Attorney of San Diego County filed an information charging appellant Jeffrey Scott Young in Counts 1 and 2 with the July 18, 1999 murders (Pen. Code, § 187, subd. (a)) of Teresa Perez and Jack Reynolds. (V CT 1166-1168.) Two special circumstances were alleged as to each murder: it was committed during a robbery (Pen. Code, §§ 190.2, subd. (a)(17); 211), and Young committed multiple murders (Pen. Code, § 190.2, subd. (a)(3)). (V CT 1166-1168.) Young was additionally charged in Count 3 with the attempted murder (Pen. Code, §§ 187, subd. (a), 664) of Daniel Maman, and in Count 4 with carjacking Jim Gagarin (Pen. Code, § 215, subd. (a)). (V CT 1169.)

The information also alleged as to all counts that Young personally used a firearm within the meaning of Penal Code sections 12022.5, subdivision (a), and 12022.53, subdivision (b). (V CT 1166-1169.) It further alleged with respect to the murders and the attempted murder that Young personally and intentionally discharged a firearm (Pen. Code, § 12022.53, subd. (c)). (V CT 1166-1169.) Finally, it alleged with respect to the murders that the firearm discharge caused death (Pen. Code, § 12022.53, subd. (d)). (V CT 1166-1168.)

Jury selection began on September 16, 2005. (V CT 1171; XX RT 1021.) The jury was sworn on September 26, 2005. (XII CT 2720; XXIII RT 1500.) Deliberations began on October 19, 2005. (XII CT 2742-2743; XXXII RT 2965.)

The next day, the jury returned a verdict, finding Young guilty of all charges, and finding all allegations and special circumstances true. (XXII CT 2750-2760; XXIII RT 2985-2990.)

The penalty phase began on October 25, 2005. (XII CT 2763; XXXII RT 3071.) Deliberations began on November 1, 2005. (XII CT 2775; XLI RT 4006-4008; XLIII RT 4022.) On November 10, 2005, the

court declared a mistrial after the jury declared itself unable to reach a unanimous decision. (XII CT 2790; XLV RT 4071-4077.)

A new jury was sworn in on June 15, 2006 (XII CT 2809; LV RT 5436); retrial of the penalty phase began on June 19, 2006 (XII CT 2810; XVI RT 5445); and deliberations began on July 14, 2006 (XII CT 2848; LXXIII RT 8088). On July 25, 2006, the jury determined the appropriate penalty is death. (LXXIII RT 8093-8094.)

On November 28, 2006, the San Diego County Superior Court sentenced Young to death for the special circumstance murders of Teresa Perez and Jack Reynolds. (XII CT 2861-2865; 8121.) The court also sentenced Young to the middle term of seven years for the attempted murder of Daniel Maman, plus 20 years for personally and intentionally discharging the firearm; and one year and eight months (one-third the middle term) for the carjacking, plus three years and four months for personal use of the firearm; all terms to be served consecutively to one another and to the terms imposed for the murders. (XII CT 2863-2865; LXXIII RT 8121-8122.) The court stayed the terms on all other allegations. (XII CT 2863-2865; LXXIII RT 8121-8125.)

## STATEMENT OF FACTS

### A. Guilt Phase

Around 12:30 a.m. on July 18, 1999, Kendrick Bowman was working the graveyard shift in the toll booth at the Five Star Park, Shuttle and Fly ("Five Star") parking lot at the intersection of Sassafras Street and Pacific Highway, not far from the San Diego Airport. (XXIV RT 1567-1569, 1670.) He had just relieved his co-worker Teresa Perez, and she had emptied her cash drawer of all but a small amount of change and carried its contents toward a nearby trailer that served as a temporary office while the

parking lot was under construction. (XXIV RT 1571-1573, 1581-1582; XXV RT 1793.)

Shortly after coming on duty, Bowman encountered James Torkelson, until recently a security guard for the parking garage. (XXIV RT 1584-1586.) Bowman was surprised to see Torkelson because he thought the man had been fired; moreover, Torkelson was early, which was not typical. (XXIV RT 1584-1586.)[1] The two men exchanged small talk, and then Torkelson headed for a remote side of the structure, which, again, Bowman found odd since that was not where the security guard usually began his rounds. (XXIV RT 1587-1588.)

Torkelson had no sooner rounded the corner and gone out of Bowman's sight than someone came up behind Bowman and said, "Hey, you." (XXIV RT 1590.) When Bowman turned around, a man was pointing a gun at him. (XXIV RT 1590-1593.) He was a white man in his early- to mid-twenties with a fair complexion and short, reddish-blonde hair. (XXIV RT 1595.) He wore a white shirt and nylon stockings over his head, and he ordered Bowman to get down on the ground. (XXIV RT 1592.)

Bowman began pressing the button of his hand-held radio to send a covert distress signal to the security guard. (XXIV RT 1578, 1593.) When Torkelson failed to respond, Bowman asked the gunman, "Where do you want me?" (XXIV RT 1594.) The man said, "Lay on the ground. Get inside the booth and lay on the ground face-down." (XXIV RT 1594.) Bowman did as he was told. (XXIV RT 1594.) The gunman stepped down

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[1] Torkelson had indeed been fired and was not scheduled to work that night at all. (XXVII RT 2183, 2186-2189, 2213.) Moreover, shortly before encountering Bowman, Torkelson had gotten rid of the other security guards by telling them he was there to relieve them. (XXVII RT 2158-2161, 2167-2168, 2170, 2190, 2205.)

on Bowman's back with his boot and emptied the cash drawer, expressing disappointment at its meager contents. (XXIV RT 1596, 1634.)

The gunman did not leave, and Bowman thought the man was going to shoot or hit him in the head with the gun. (XXIV RT 1597, 1610.) He was scared. (XXIV RT 1596.) Bowman said, "You have the cash, everything. Why don't you just leave?" (XXIV RT 1596.) The man said, "I can't leave. I'm waiting for my ride." (XXIV RT 1597.) Bowman took this to mean the gunman had accomplices. (XXIV RT 1597-1598.) He was frightened. (XXXIV RT 1597-1598.)

Bowman heard the door to the bathroom near the trailer open, and the gunman yelled at someone to go into the trailer. (XXIV RT 1573-1574, 1598.) Bowman assumed the gunman was yelling at Teresa Perez because she had been in the office trailer shortly before and appeared to have gone into the adjoining restroom. (XXIV RT 1598.) A few moments later, Bowman heard gunfire: first one shot, then two more after a brief pause. (XXIV RT 1598-1600.) The man guarding Bowman ran away toward Pacific Highway. (XXIV RT 1599-1601.) When Bowman stood up, he saw the man clearly, as well as two other men clad in dark clothing and wearing stockings over their faces running in the same direction. (XXIV RT 1599-1602, 1610.) At that point, Torkelson materialized, and Bowman called 9-1-1. (XXIV RT 1599, 1600, 1602-1603.)

Jim Gagarin was at Park and Ride, a parking lot across Pacific Highway from the Five Star lot. (XXIV RT 1570, 1678.) He had retrieved his car around 12:30 a.m. and was stopped at Park and Ride's exit booth, which was manned by Michael Mackey. (XXIV RT 1678; XXV RT 1734-1736.) Gagarin had just stepped out of his car when a series of muffled pops came from the direction of the Five Star lot. (XXIV RT 1678-1680, 1683; XXV RT 1734-1736.) Gagarin was alarmed, but Mackey dismissed it as firecrackers. (XXIV RT 1679; XXV RT 1738-1739.)

Almost immediately, however, a number of "very, very loud" reports issued from the Five Star lot. (XXIV RT 1683; XXV RT 1738-1740.) Both Gagarin and Mackey saw a dark van leave the lot. (XXIV RT 1680-1681; XXV RT 1738-1739.) Seconds later three men ran toward them from the direction of the Five Star trailer. (XXIV RT 1680, 1683-1684; XXV RT 1743.) A passing driver noticed that two of the men were running together, and a third appeared to be trying to catch up to them. (XXV RT 1779-1780.)

One man ran past the booth and kept going. (XXIV RT 1689.) He was a white man of average height, and he had a firearm in his right hand. (XXIV RT 1692.) The other two, farther behind, fired shots at something and then ran up to the booth. (XXIV RT 1683-1684.) They were both white men in dark pants or coveralls, wearing dark watch caps and nylons over their faces, and one was notably shorter and stockier than the other. (XXIV RT 1693, 1695, 1705; XXV RT 1746, 1755-1756.) He had a gun in his hand. (XXIV RT 1694-1695.) He pointed it at Mackey and demanded, "Give me the car." (XXIV RT 1695; XXV RT 1746.) Although the man wore a stocking over his face, the stocking did not distort his features, which were "very discernible." (XXIV RT 1696, 1724.) Mackey later identified Young at the preliminary hearing as the shorter gunman, with 75% certainty. (XXIV RT 1722.)

The taller man had a gun, too; it was silver-colored, and he aimed it at Gagarin. (XXIV RT 1696; XXV RT 1746, 1767.) Both Gagarin and Mackey raised their hands in surrender. (XXIV RT 1696-1697; XXV RT 1743, 1767-1768) Gagarin, believing he was about to be executed, turned away from the gun and said, "Take it." (XXIV RT 1696; XXV RT 1743, 1748-1749, 1754-1755.)

The shorter man got into the driver's seat of Gagarin's car and opened up the passenger door for his accomplice. (XXIV RT 1698; XXV RT

1743-1744, 1746, 1749.) They closed the doors, revved the engine, and exited the lot, heading east on Sassafras Street, burning rubber. (XXIV RT 1669-1670; XXV RT 1744, 1750-1751.)

As the gunmen pulled out, the dark van Gagarin and Mackey had seen leaving the Five Star lot when they heard the gunshots pulled in. (XXIV RT 1680-1681, 1700-1701, 1768-1769.) The driver asked if they were all right and then told them that there had been shots fired at the Five Star lot, and that he thought the shots had been aimed at him. (XXIV RT 1680-1681; XXV RT 1769.) Mackey called 9-1-1, but police cars were already arriving while he was on the line with the emergency dispatcher. (XXIV RT 1701-1702; XXV RT 1752.)

The van driver was Daniel Maman, Ms. Perez's ride. (XXIV RT 1572, 1634-1636, 1640-1642.) He had arrived at the Five Star lot a few minutes earlier and pulled up near the trailer just as two men were coming out, one of whom, a mustached man of 5'7" wearing jeans, a white shirt, and a stocking over his head, and armed with a revolver, aimed the weapon at Maman and began firing. (XXIV RT 1644, 1647-1651, 1658, 1667-1668.) Consequently, Maman had driven away immediately. (XXIV RT 1650-1652.) After telling Mackey what happened, however, he returned to the Five Star lot because he saw police cars heading there, and told the officers what he had seen. (XXIV RT 1654-1656, 1703.)

By the time the police arrived at the Five Star lot, Bowman had already gone into the office trailer to check on Perez, having handed over the 9-1-1 call to Torkelson. (XXIV RT 1605.) He took only one step into the employee lounge area before he found Teresa Perez face-down on the ground in a growing pool of her own blood. (XXIV RT 1605.) Not far from her lay the body of Jack Reynolds, the office manager. (XXIV RT 1579, 1605.) Both victims appeared to have suffered multiple gunshot wounds to the back of the head. (XXIV RT 1605.) In the corner the safe,

to which only the managers knew the combination, stood open. (XXVII RT 2237.) Bowman touched nothing; he knew Perez and Reynolds were dead. (XXIV RT 1606; XXVI RT 1905, 1912.)

San Diego Police Department Officers Michael Shiraishi, Deborah Borders, and Chris Velovich arrived within minutes of Bowman's 9-1-1 call. (XXV RT 1818; (XXVI RT 1971.) They found Perez's and Reynolds's bodies on the ground, face-down with their arms above their heads, which were surrounded by blood and brain matter. (XXV RT 1822, 1827; XXVI RT 1910-1912, 1959, 1978-1979.) Officer Borders checked both victims for signs of life, but found none. (XXV RT 1821-1822, 1828.)

A homicide investigation team from the San Diego Police Department responded to the scene. (XXVI RT 1839-1843; XXIX RT 2538-2539.) They discovered that the telephone lines and computer power cord had been cut. (XXVI RT 1902-1904, 1919, 1979, 1982-1984.) Two bullet casings fired by the same Glock 9mm semiautomatic firearm ("Glock") were found on the ground, one near Perez's arms and another by Reynolds's head. (XXVI RT 1915, 1918, 1934.) Four fired bullets were recovered: two .38 caliber revolver rounds, one from outside the trailer that apparently had been fired from inside, leaving a bullet hole in the trailer wall, and one from the ground near Perez's body; and two rounds near Reynolds's body, fired by the Glock. (XXVI RT 1918-1919.) Finally, a live 9mm round was found under Perez's body. (XXVI RT 1916, 1918.) There was gunshot residue on Reynolds's clothing, indicating he had been shot at close range. (XXVI RT 1912-1914, 1999-2003.) Bullet holes in the carpet under the victims' heads indicated they had been shot while lying face-down. (XXVI RT 1921.)

There were no signs of a struggle. (XXVI RT 1932; XXVII RT 2069; XXVIII RT 2310.) The Five Star operations manager testified at trial that employees were trained to comply with robbers' demands and not resist.

(XXVII RT 2243.) The same instructions were set forth in the employee manual. (XXVII RT 2243.)

An autopsy confirmed the victims died from gunshot wounds to the back of the head. (XXVII RT 2064, 2070.) The nature of the wounds and the position of the bodies were consistent with their having been shot in the back of the head while lying face-down with their arms over their heads. (XXVII RT 2064, 2073-2074, 2076-2079, 2092; XXVIII RT 2320-2323.) Perez suffered two gunshot wounds caused by a .357 magnum or .38 caliber Rossi revolver; one bullet exited her forehead above her right eye; the other remained lodged in her skull. (XXVII RT 2033-2034; XXVII RT 2052, 2060; XXX RT 2682-2685, 2718-2720.) The revolver used to kill her was the same one that fired the shot through the trailer wall. (XXX RT 2741.) She was 31 years old when she died. (XXVII RT 2033.)

Reynolds was shot twice with a Glock 9mm, both bullets exiting out the right side of his face and head. (XXVII RT 2075, 2094-2095; XXX RT 2676-2678, 2706-2707.) Distinct star-shaped tearing around the entry wounds, as well as soot from the gun barrel blast found deep within the wounds themselves, indicated that the gunmen actually pressed the muzzle of their weapons against the victims' heads when they fired. (XXVII RT 2021-2027, 2056-2059, 2062-2063, 2065, 2084-2085, 2087; XXVIII RT 2324-2329; XXX RT 2714-2718, 2725-2726.)

Perez's car was found parked in one of the spaces in the structure. (XXVI RT 1886-1887.) There was a 9mm Glock cartridge on the ground outside the car. (XXVI RT 1885-1887, 1890.) One of the car's windows was shattered and a door was ajar. (XXVI RT 1885-1888, 1890.) A bullet was lodged in the driver's seat, indicating that the passenger window had been shot out, and the car key was upside down in the ignition. (XXVI RT 1885-1888, 1890-1891, 1928-1929.) A bank deposit bag containing $1,512 was recovered from the front passenger seat; a deposit slip in the bag

indicated a deposit of $2,547. (XXVI RT 1888, 1893, 1987; XXVII RT 2245-2246.) Also recovered from the cabin was a plastic bag containing a roll of duct tape. (XXVI RT 1892-1894, 1993.) DNA taken from a hair on the roll came from a man named Max Anderson. (XXVIII RT 2292, 2317; LXIV RT 6887-6888.)

Early the following day, July 19, 1999, Jim Gagarin's car was discovered less than a mile from the Five Star lot. (XXVI RT 1923-1925, 1929-1930; XXVII RT 2138, 2141-2143, 2148, 2152; XXX RT 2753.) There was a 9mm bullet casing on the ground outside the car, and a Glock brand 17-round capacity magazine containing twelve live 9mm cartridges lay on the front passenger seat. (XXVI RT 1925.) Ballistics showed that all of the 9mm casings from inside the trailer, as well as the casings recovered from the ground outside of both Perez's and Gagarin's car, came from the magazine in Gagarin's car. (XXX RT 2696-2700.)

On July 29, 1999, a 9mm Tangfolio Witness semiautomatic firearm ("Tangfolio") loaded with Luger rounds was found in a car driven by a man named David Rayhnoha. (XXX RT 2617-2622, 2628-2629.) The weapon matched casings found outside the Five Star trailer, but not those of the bullets that had killed Perez and Reynolds. (XXX RT 2669-2676, 2683-2684, 2693-2694.)

The case went cold. (XXIX RT 2539-2540.)

Three years later, on July 22, 2002, Detective Stephen McDonald, to whom the case had been re-assigned, contacted Paula Daleo, Torkelson's girlfriend at the time of the robbery-murders. (XXVIII RT 2395-2397; XXIX RT 2542.) Daleo admitted she knew more about the crimes than she had told the police when interviewed shortly after the crimes. (XXIX RT 2542.) Daleo told Detective McDonald the following:

The day before the murders, Torkelson, who was then living with Daleo, came home with four men: "Lil' Jeff" and David "Wolf" Raynoha,

and two others, one of whom was a tall man with long hair—notable because Torkelson, Lil' Jeff and Raynoha were skinheads and therefore wore their hair close-cropped. (XXVIII RT 2362-2364, 2367-2368, 2410-2411.) Daleo did not know "Lil' Jeff"s last name, but he and Torkelson hung out often, and he had two distinct tattoos: one on his arm that said "Nigger Thrasher" and another on his neck in the form of the hammer carried by the mythical Nordic god, Thor. (XXVIII RT 2339, 2341, 2343-2344, 2365, 2368-2369, 2396-2397; XXX RT 2746.) Within days of the killings, Torkelson left town with "Lil' Jeff" and a man named Jason Getscher. (XXVIII RT 2378-2379, 2381-2385.) At trial, Daleo identified Young as Lil' Jeff. (XXVIII RT 2338.)

In June of the following year, by which time Daleo had broken off her relationship with Torkelson, she attended a party at Young's home. (XXVIII RT 2366, 2388-2389.) There was general discussion, in which Young participated, that Torkelson had planned the robbery, which was then was carried out by Torkelson, Young and Raynoha. (XXVIII RT 2390-2393, 2395, 2438.) Someone said the murders were the result of Young being "trigger happy." (XXVIII RT 2392-2393.) Young denied the latter statement, but he did not otherwise deny involvement in the robbery and murders. (XXVIII RT 2392-2393.)

At trial, Daleo explained that she did not come forward with the information sooner because initially she still cared for Torkelson. (XXVIII RT 2378.) Also, he was an abusive and controlling man who frequently threatened her with physical harm, and she was afraid he would harm or kill her if she cooperated with the police. (XXVIII RT 2347-2348, 2377-2378, 2387, 2395.)

Based on Daleo's information, Detective McDonald interviewed Jason Getscher. (XXIX RT 2498, 2543-2545.) Getscher, a recidivist, was then serving a term in Arizona State Prison, having been convicted most

recently of forgery. (XXIX RT 2461-2462, 2497.) He admitted that he and Young had been friends since 1996 and that Young stayed with him shortly before and immediately after the murders. (XXIX RT 1463-1464.) Getscher explained that he and Young had met in prison (where he and Young also befriended fellow inmate Max Anderson), and that Getscher, being 10 years older and more experienced, tried to look out for Young in prison and keep him out of trouble once he got out. (XXIX RT 2464-2469.)

Getscher said Young introduced him to Raynoha and Torkelson shortly after he got out of prison in 1998, and the men stayed with Getscher immediately before the Five Star killings. (XXIX RT2465, 2468, 2470-2472, 2479-2480.) While at Gestcher's house, the men often discussed robbing a business at which Torkelson was a security guard. (XXIX RT 2476-2478.) They left his house shortly before the robbery. (XXIX RT 2479.)

When they came back a few days later, Torkelson watched Young closely and repeatedly warned him, "Don't say anything." (XXIX RT 2480.) Eventually, however, Young confessed to Getscher that he had shot someone. (XXIX RT 2480.) He showed Getscher a burn on his hand that he said resulted from trying to cover the gun barrel to hide the muzzle flash. (XXIX RT 2484.)

At some point after the murder, Getscher found Young putting red shoelaces in his boots. (XXIX RT 2483.) In the skinhead culture, red laces symbolized having shed "enemy" blood for the cause of white supremacy.[2] (XXIX RT 2482.) Getscher took the laces from Young and told him he had

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[2] On re-direct, Paula Daleo also testified that red laces sometimes meant "you have shed blood for the cause ...." (XXVIII RT 2449.)

not earned the laces because he killed an "innocent victim" rather than an enemy combatant. (XXIX RT 2483-2484.)

Getscher was afraid of being implicated in the robbery-murders. (XXIX RT 2498.) He agreed to call Young from prison and get him to talk about the Five Star robbery-murders while Detective McDonald recorded the conversation. (XXIX RT 2498-2499, 2502-2504, 2556-2557.) As a result of his cooperation, the state of Arizona reduced Getscher's sentence by half. (XXIX RT 2499, 2546-2547, 2552-2553.)

The first substantive conversation was on October 28, 2002. (VI CT 1274-1275; XXIX RT 2550.) Getscher called Young at home and referred to the "stupid little stunt" and "escapade" that Young and two men named "James and Max" had pulled two to three years earlier. (VI CT 1281, 1285.) Young did not deny involvement. (VI CT 1281, 1285.)

In the second conversation,[3] on November 26, 2002, Getscher said he was planning a bank heist with an easy target and a two-million-dollar take. (VI CT 1314-1315; XXIX RT 2550-2552.) He said he was putting together a "crew" of three men and was willing to cut Young in on a job that would net him "at least a quarter million," but only on the condition that Young told him "what happened before," so that Getscher could be sure "it ain't happenin' again." (VI CT 1314-1315, 1317.) Getscher also said that whoever "did it" on that last job would not be participating in the bank job. (VI CT 1317.)

Young named the participants in the parking lot robbery as "James," James's cousin "Max" and Young himself. (VI CT 1320.) He said James planned the job, but poorly. (VI CT 1316.) Young himself was nervous

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[3] The second conversation technically consisted of two separate conversations on the same day, one shortly after the other. (VI RT 1314.) Respondent calls them collectively the second conversation for ease of reference.

and affected by "adrenalin." (VI CT 1317.) Then he said, "It's basically just between me bein' new at that stuff, my nerves goin' and adrenaline. I'm not well planned." (VI CT 1317.)

Getscher said, "I remember you comin' back and freakin' out that you shot somebody[.]" (VI CT 1317.) Young responded, "Uh-huh." (VI CT 1317.) Getscher asked Young if he remembered Getscher's admonition of "long ... ago" that money was not worth killing over. (VI CT 1317.) Young said he did. (VI CT 1317.)

Young then described how he and the other robbers "covered up" to prevent identification, but forgot to bring the materials to tie up the victims. (VI CT 1318.) Young said, "I was thinkin' they're gonna get away, fuck, I don't want to go down." (VI CT 1321.) He said things began to get out of hand, and then "it happened." (VI CT 1318.) Getscher asked, "... [W]ell, who started it?" (VI CT 1318.) Young said, "I started it. I was ... the first one ...." (VI CT 1318.)

Getscher reminded Young that he had contacted him to determine his suitability for a "last final job." (VI CT 1318-1319.) Young responded that he was simply telling Getscher what happened. (VI CT 1319.) He repeated, "I, I was the first one that fired." (VI CT 1319.) He said he was "not really" scared, but he was not thinking straight and his "adrenalin was going." Also, he was worried the victims would "be able to get up, and you know ...." (VI RT 1319, 1332.) He explained that he experienced not as much fear as an intense high, like "[g]ettin' some kick-ass dope and slamming it." (VI CT 1334.)

Getscher said he was worried about trigger-happy accomplices on the bank robbery he was planning. (VI CT 1337.) He asked Young if it was Max who shot the woman during the robbery. (VI CT 1337.) Young said, "Nah, that was me." (VI CT 1337.) Getscher said, "That's wrong bro."

(VI CT 1337.) Then he laughed and told Young not to let it happen again. (VI CT 1337.) Young assured Getscher he would not. (VI CT 1337.)

Getscher asked, "... [W]hat in your head made you pull the trigger?" (VI CT 1320.) Young answered, "... [E]verything was just going wrong ... [and] the next thing I know I did it. I don't know. It kind of just happened." (VI CT 1321.) Max fired his weapon after Young fired his. (VI CT 1321.) Young also fired at someone near a car and some men at a "box thing" in the parking lot as he left the trailer because he thought one of the men had seen him. (VI CT 1333.)

Young remarked that "from the time [they] hit the point of no return, everything started ... falling apart." (VI CT 1320.) The robbers were supposed to flee together in one car but the key broke off in the ignition and then everyone "basically started just to scatter." (VI CT 1320.) Young characterized the robbery as a "cluster fuck." (VI CT 1321.)

Getscher asked Young if he understood why Getscher had told him at the time that he "didn't earn [his] laces" from that robbery. (VI CT 1321.) Young said he understood. (VI CT 1321.) He then assured Getscher that although he had overreacted during the robbery because of "adrenalin," within a few days he was "like, cool" and no longer bothered by the event; "Shit happens," he said. (VI CT 1323.)

Young noted that he made very little from the robbery because "most of the stuff got left behind." (VI CT 1324, 1329.) He explained that they failed to zip up the bag containing the money. (VI CT 1329.) Getscher called Young an idiot. (VI CT 1329-1330.)

After the recorded calls, Young was arrested. (XXX RT 2756.) When Detective McDonald played the recorded calls for Young, Young remarked, "You heard it all[.]" (XXX RT 2756.)

Young has a tattoo on his arm that reads, "Nigger Thrasher." (XXX RT 2746-2749.) His neck is tattooed with Thor's hammer.

(XXX RT 2746-2749.) Young is 5'6" or 5'7", weighs 160 pounds, and has brown hair. (XXIX RT 1560.) Max Anderson is 6'2", weighs 175 pounds, and has brown hair. (XXIX RT 1562.) Raynoha is 6', weighs 175 pounds, and has red hair. (XXIX RT 2561.)

## B. Penalty Phase

### 1. Prosecution's case in aggravation

#### a. Circumstances of the crime

##### (1) Young's active role in the robbery-murders

Jason Getscher testified that he and Young came to know each other during one of Getscher's many stints in prison as a result of their self-identification as "skinheads," a kind of "brotherhood" based on the belief in "white supremacy." (LXI RT 6423-6428.) They also became friends in prison with Max Anderson, although the latter was not a skinhead. (LXI RT 6427-6429.) After prison, Getscher and Young spent a lot of time with Anderson. (LXI RT 6436-6437.) They were all "good friends." (LXI RT 6438.)

In June or July 1999, Young introduced Getscher to Torkelson. (LXI RT 6431-6432.) Through Torkelson, Getscher learned of the existence of David "Wolf" Raynoha, whom Torkelson called his cousin. (LXI RT 6433.) Getscher agreed to Young's request to allow him and Torkelson to live at Getscher's house. (LXI RT 6440.) Young seemed to "really like[]" Torkelson. (LXI RT 6440.)

Torkelson found work as a security guard and began "casing" the job sites for a likely robbery, which he then discussed often with Young and Anderson. (LXI RT 6441, 6445.) At some point, Torkelson, Young, and Anderson began discussing a specific robbery. (LXI RT 6447-6449.)

Torkelson mentioned that he knew the security guards' routines. (LXI RT 6448.)

In Getscher's opinion, Anderson was "hotheaded," and Torkelson was an "idiot." (LXI RT 6449.) Getscher tried to dissuade Young from getting involved in the robbery because he feared it would go wrong with Torkelson and Anderson on board. (LXI RT 6449.) He told Young he could stay with Getscher for free until he got on his feet. (LXI RT 6449-6450.) Young would not be dissuaded, however; he wanted his own money and was "determined" to get it by means of the robbery. (LXI RT 6449-6450.)

Getscher also tried to convince Anderson to abandon the scheme by warning him that Torkelson could not be relied upon to plan a job properly. (LXI RT 6452.) Anderson did not take the advice; instead, he supplied the weapons for the job. (LXI RT 6452-6453.) He carried a Ruger 9mm, and he gave Young a .357 magnum revolver. (LXI RT 6452.) Anderson, Torkelson, and Young then left Getscher's house with their guns loaded. (LXI RT 6453.)

They came back shortly after the murders. (LXI RT 6454.) Young's hand was burned. (LXI RT 6454.) He told Getscher, "It all went wrong." (LXI RT 6454.)

Not long afterward, Getscher found Young trying to put brand-new red laces in his boots. (LXI RT 6454-6456, 6460.) Young told Getscher he had stopped to buy them on the way back to Getscher's house from San Diego. (LXI RT 6455-6456, 6459.) Red laces are a badge of honor in the skinhead culture, reserved for those who have "dr[awn]the blood of an enemy." (LXI RT 6455.) Getscher explained at the penalty trial,

> ... [T]he way that it's understood for the red laces, is like a time of war or a battle with this person. You don't run up, sneak up on somebody and shoot them. That's not how we're supposed to work. If ... for example, you kill somebody during a prison

> riot, it's an enemy; you earned them, like, face-to-face battle. Or if ... you're a skinhead on the street and some Mexican guy starts a fight with you because he's a gangbanger and he sees you're a skinhead ....

(LXI RT 6459.)

Getscher took the laces away and told Young he had not earned them because the laces were only for killing "nonwhite" "enemies." (LXI RT 6458.) Young responded, "Oh, I earned them. I earned them. It was a Mexican." (LXI RT 6461, 6577-6578.) He seemed proud of what he had done and wanted to notify other members of the skinhead movement of his accomplishment. (LXI RT 6462-6463, 6577-6578.)

### (2) The nature of the crime

Officer Deborah Borders testified that she still remembered the scene inside the trailer "vividly" eleven years after the fact. (LVII RT 5678-5679.) Both victims were found facedown in their own blood. (LVII RT 5680-5681.) The positioning of the bodies suggested a deliberate execution. (LVII RT 5679.) There was so much brain matter splattered outside Reynolds's head that Officer Borders did not even bother to check his pulse. (LVII RT 5682.) The murders were among the "coldest" she had witnessed in over a decade of policework. (LVII RT 5667, 5679.)

Officer Borders's partner, Michael Shiraishi, confirmed that the victims' bodies were facedown with their hands above their heads. (LVII RT 5696-5697.) The scene was grisly; as with Reynolds, Perez's brain was coming out of her head. (LVII RT 5697.) He described the murders as "horrific." (LVII RT 5696.)

Forensic Evidence Technician Denys Williams and Criminalist Tanya Dulaney also testified consistently to the position of the victims' bodies. (LVII RT 5745, 5787-5789; LVIII RT 5863, 5879.) Williams was

"sad[dened]" and "shock[ed]" by what he saw. (LVII RT 5785, 5787-5789.) Dulaney added that the victims appeared to have assumed their prone positions before they were shot repeatedly point-blank in the back of the head. (LVIII RT 5879-5880, 5885-5894, 5907-5908.) Both Williams and Dulaney noted that the robbers cut off the victims' means of summoning help. (LVII RT 5790-5791, 5882.)

### (3) The impact of the crime on others

#### (a) Family

##### i) Perez

Teresa Perez's mother testified, "[Teresa] was everything for me." (LXIV RT 6952.)

The family had gone to Sea World the day Teresa[4] was killed and did not get home until after midnight. (LXIV RT 6953.) It was upon returning from the amusement park that they received the news of Teresa's murder. (LXIV RT 6953.) The juxtaposition of the happy day and the terrible news—especially given the horrific nature of Teresa's death—made the blow especially hard. (LXIV RT 6953.)

The impact of Teresa's death on the family was "impossible to describe." (LXIV RT 6955.) It was "drastic, tremendous, impossible to believe." (LXIV RT 6955.) Mrs. Perez said, "I died along with her. I'm dead, but living. I don't have peace or tranquility. My life is over." (LXIV RT 6955.)

Teresa Perez's sisters and their children loved Teresa. (LXIV RT 6957-6958, 6977.) She was happy, generous, and caring. (LXIV RT 6957-

[4] Respondent refers to Teresa Perez as Teresa and Jack Reynolds as Jack to avoid confusion when discussing family members' testimony.

6958, 6970, 6977.) Everyone missed her terribly. (LXIV RT 6958, 6975-6976, 6977-6978.) When Teresa's sister, Elsa Perez, found out what happened, she became hysterical. (LXIV RT 6974.)

Joe Bravo, who married into the Perez family, described the family as "devastated" by the loss of Teresa (LXIV RT 6981.) Years after the murder, a deep and lingering sadness still prevented celebrations and gatherings in a family that once was lively and social. (LXIV RT 6981-6982, 6982-6983.) His wife had become given to sudden crying bouts. (LXIV RT 6983.) Even Bravo, a former Marine, had trouble coping with the "emotional impact" of Teresa's death. (LXIV RT 6983.)

**ii) Reynolds**

The impact of Jack's death on his children was severe. (LXIV RT 6998.) Jack's daughter, Christina, and son, Jason, who enjoyed a "special" relationship with their father, were 15 and 12, respectively, when he was murdered. (LXIV RT 6998, 7005.) Christina was despondent after her father's death, and at the funeral said that her father had been "her world," and that once he was gone, she just "didn't care anymore." (LXIV RT 6999.) From then on, she "just completely gave up. Self-destructed." (LXIV RT 7012.) She died in a car crash less than an hour after she turned 18. (LXIV RT 7012.)

Telling Jason about his father's death was "horrid" and "terrible." (LXIV RT 7012.) The boy has had mental problems and since the murder of his father "just cycles over and over and over again in and out of custody." (LXIV RT 7012.)

Jack's death also devastated other members of the close-knit family. His older brother, James, a 28-year Army veteran, explained that Jack was proud of and enthusiastic about his job as the manager of Five Star Parking, and that with it, he really seemed to be "pointing [him]self toward

something." (LXIV RT 6989.) Jack took the job seriously and told his older brother he intended to do it well. (LXIV RT 6989.)

Although the Reynolds siblings grew up in San Diego, everyone but Jack later moved away. Thus, after their father died, the family relied on Jack to look after their mother. (LXIV RT 6985, 6988.) Jack was also loving to his own children. (LXIV RT 6988.) He was good to James, too, and in the years shortly before his death taught James how to fish as a way to help James cope with his stressful job. (LXIV RT 6987.) Jack's desire to help people also motivated him to become active in his church. (LXIV RT 6989-6990.)

James's children "loved [Jack] to death." (LXIV RT 6992.) He played with them "like a child." (LXIV RT 6992.) They were very upset by his death. (LXIV RT 6992-6993.)

When James found out Jack has been shot and killed, he was "in shock." (LXIV RT 6991.) He felt responsible for his Jack's death because, as a highly trained soldier, he felt he should have been able to prevent it somehow. (LXIV RT 6993.) Over the course of time, he began to experience severe emotional distress. (LXIV RT 6993.) Finally, he underwent psychological counseling and was placed on medication. (LXIV RT 6993.) He improved but still missed his brother very much. (LXIV RT 6993-6994.) Delivering the news of Jack's death to their mother was "probably the toughest" thing he had ever done in his life. (LXIV RT 6991.)

Jack's sisters also testified to his loving, caring, and fun nature and to the closeness of the siblings' relationship and his important role in the family. (LXIV RT 6995-6996, 6998, 7003.) His death brought on "a sadness that just never goes away." (LXIV RT 6999.) His murder robbed them of their sense of joy and security. (LXIV RT 7000.)

Jack's eldest sister, Carol, explained how, upon their father's death, she and Jack made a pact that the two of them would look out for their mother. However, Carol had to move away due to her husband's job situation, so it fell to Jack to care for the mother, and he did so reliably. (LXIV RT 7008-7009.) This was exemplary of Jack's personality in general, as was his active involvement in the family church's outreach ministry to the homeless. (LXIV RT 7007-7008.) Carol was especially affected by Jack's death because her own son was dying at the time from Gulf War syndrome (he died three weeks after Jack). (LXIV RT 7005-7006.)

Jack's mother testified that she relied on Jack for companionship and physical assistance. (LXIV RT 7014-7017.) Jack brought her joy and comfort. (LXIV RT 7018-7020.) She was "simply devastated" by his death. (LXIV RT 7025.) After Jack's death, her health declined and she was forced to move to Texas. (LXIV RT 7024.) There is a "big hole in [her] life" now, and she thinks about Jack every day. (LXIV RT 7021.)

### (b) Victims, witnesses & others impacted by the crime

Kendrick Bowman described Perez as enthusiastic about her work and "nice, easy to get along with." (LVI RT 5512.) He said Reynolds was a good manager. (LVI RT 5513.) Bowman feared for his life and the life of his coworkers during the robbery, and he was "traumat[ized]" by what he witnessed. (LVI RT 5537, 5541, 5544, 5549.) The scene he saw in the trailer looked like an "execut[ion]," with blood still running from the victims' heads. (LVI RT 5547-5548.) He could not sleep for days after seeing the carnage, and the event still "interfered with [his] life ... a lot" by the time of trial. (LVI RT 5551.) He was absolutely certain that the red-haired man who robbed him was not among the gunmen who shot and

killed Perez and Reynolds because the man was still guarding Bowman when the shots were fired inside the trailer. (LVI RT 5540-5542, 5569-5571.)

Daniel Maman described Perez as "always happy." (LVI RT 5582.) He cared for her, and her death would affect him for the rest of his life. (LVI RT 5596.) He was certain that the man who fired at him was about 5'7" and armed with a revolver. (LVI RT 5588-5590.)

Mackey feared for his life when the "shorter, st[oc]kier" gunman—whom he identified at trial as Young—pointed the weapon in his face. (LVII RT 5645-5647, 5658.) Time seemed to slow down; the ordeal was "surreal" and "traumatic." (LVII RT 5647, 5651, 5654.) He relived the experience when he returned to work, and the fear of being robbed again always "loomed" over him. (LVII RT 5654, 5659.)

Michael Gagarin believed he was about to be shot in the head during the carjacking by the taller of the two carjackers. (LVII RT 5719-5720.) He was on a medication to thin his blood, and worried that he would bleed to death if wounded. (LVII RT 5719.) When the shorter gunman aimed his weapon at Mackey, Gagarin believed Mackey was about to die, and Gagarin was about to witness the execution. (LVII RT 5721.)

Gagarin explained that although he used humor occasionally during his 9-1-1 call, it was merely his way of trying to deal with a "really tough" situation. (LVII RT 5726.) In actuality, he did not feel humorous at all; he felt only relief at not having been shot, and anger that he was nearly murdered when he had a family to care for. (LVII RT 5728.) Also, he was deprived of essential heart medication that had been inside the car, and a police officer had to drive him to a pharmacy. (LVII RT 5729.)

The crimes have had a lasting impact on Gagarin's life. (LVII RT 5732.) He was no longer the "relaxed" person he used to be. (LVII RT 5732.) He had several procedures performed on his heart after the

carjacking, and he believes they were necessitated by the stress he suffered. (LVII RT 5732.) The procedures limited his ability to travel, on which his job depended. (LVII RT 5708-5709, 5732.)

The Five Star lot owner, Paul Chacon, had known Jack Reynolds since boyhood. (LIX RT 6011-6012, 6020-6021.) He considered Reynolds family. (LIX RT 6021.) Reynolds was personable and well-liked, and Chacon had confidence in his character. (LIX RT 6024.) Chacon was happy to have Reynolds working for his company. (LIX RT 6021-6022.)

Chacon described Perez as "very, very friendly" and "quick to smile." (LIX RT 6024.) Customers liked her and she was a valuable asset to the business. (LIX RT 6024, 6038.) Chacon's other manager agreed with these assessments. (LIX RT 6038.)

Chacon remembered well the night that Reynolds and Perez were murdered. (LIX RT 6024-6025.) He recalled the exact date because he was on an anniversary getaway with his wife when one of his employees called him in the dead of night and said, "Something wrong, very wrong happened at Park, Shuttle & Fly. You need to get there right away." (LIX RT 6025.)

Chacon still found it "very, very hard" to discuss the event nearly a decade after the fact. (LIX RT 6026-6027.) It was "very traumatic." (LIX RT 6026.) He felt a "tremendous responsibility" toward the families and paid for both Perez's and Reynolds' funeral services. (LIX RT 6027.)

The parking company's operations manager, Steve Simmons, was similarly affected by the tragedy. In his particular role in the company, he worked closely with the employees. He testified that Perez's and Reynold's death were "extremely difficult." (LIX RT 6053.) He said,

> As you can see, it's still very, very heavy. It's six, seven years ago, but it's without a doubt the most difficult situation I've ever been put through in my life. Very emotional. I knew both of

these people very well. I hired Teresa; I knew Jack; and it was devastating.

(LIX RT 6053.)

Other Five Star employees also testified to Reynolds's pleasant and forthright manner, as well as his reliability, to Perez's friendly and respectful demeanor, and to their horror upon learning of what had happened and their nervousness and fear upon returning to work at the parking lot. (LIX RT 6066-6069, 6072; LX RT 6180, 6190-6191, 6218, 6224, 6226; LXIV RT 6946-6950.) One such co-worker, Emma Prince, developed paranoia, and another, Dawn Zaczkiewicz, had to be put on medication and undergo counseling. (LIX RT 6236.) She had difficulty testifying about the matter. (LIX RT 6235-6238.) She recalled how Reynolds had shown her snapshots of his children and expressed his love for them. (LIX RT 6237-6238.)

Anna Arciniega was Perez's roommate. (LXIV RT 6941-6942.) The two were good friends. (LXIV RT 6942-6943.) Arciniega had come to this country on her own, and she looked on Perez as a sister, and even a mother. (LXIV RT 6942.) To Arciniega, Perez was "wonderful" and a "very special person" who "always looked for the positive." (LXIV RT 6944.) Losing Perez was like losing her only family. (LXIV RT 6944.)

Evangelina Alvarez also was close friends with Perez. (LXIV RT 6962-6963, 6965.) They went dancing together, attended church together, and shared many heartfelt talks. (LXIV RT 6962-6963, 6965.) The two worked together at a job with "difficult hours" until Alvarez got hired at Five Star Parking and convinced Perez to join her. (LXIV RT 6964.) When she heard the news of Perez's murder, Alvarez could not take it in. (LXIV RT 6966.) Later, seeing Teresa's corpse in a casket was "horrible." (LXIV RT 6966.) She felt guilt over Perez's death because she had helped

her to get the job at Five Star Parking. (LXIV RT 6967.) She missed Perez very much and regularly visited her gravesite. (LXIV RT 6967.)

### b. Prior crimes & violent criminal activity

#### (1) Attempted bank theft

Haleigh Roner was a bankteller in Mesa, Arizona, in July 1999 during the time that Young and Torkelson were living in nearby Tempe with Jason Getscher. (LXI RT 6401-6402, 6422-6423, 6426, 6432.) On July 12, 1999, a roughly 5'7,", stocky man with a "buzz" hair cut carrying identification in the last name of Young and matching that person's DMV photo tried to cash a check for $950 from a local business called The Scooter and ATV Shop. (LXI RT 6404-6405, 6408.) The man seemed nervous and his hands were shaking. (LXI RT 6412.)

Because the check was for over $500, Roner went to get permission from her supervisor to cash it. (LXI RT 6404-6405.) In fact, the supervisor was already in the process of investigating a similar check from the same business that has just been presented by another man in the bank. (LXI RT 6404-6406.) The signature on neither check matched the account holder's signature. (LXI RT 6406.) The supervisor contacted the account owner, who did not recall having written the checks. (LXI RT 6407.) The supervisor called the police. (LXI RT 6407.)

The two men appeared to be together. (LXI RT 6410.) They spoke to one another while at the counter. (LXI RT 6410.) Roner and the supervisor tried to delay them by pretending they were awaiting approval of the transactions, but the men left together with their checks. (LXI RT 6410-6412.) These events were recorded by the bank's video surveillance system, and still photographs taken from the video of the man named

Young were identified by Roner and shown to the jury. (LXI RT 6403, 6408-6409, 6413-6414, 6418.)

Jason Getscher testified that at some point in mid-July 1999, Max Anderson burglarized The Scooter and ATV Shop, which was just down the street from Getscher's house. (LXI RT 6442-6443.) He told Getscher that he stole an ATV and some checks. (LXI RT 6443.) Getscher believed Anderson gave the checks to Young and Torkelson. (LXI RT 6558.) Shown the still photos from the surveillance camera of the bank where Ms. Roner worked, Getscher identified Young and Torkelson. (LXI RT 6443-6444.)

### (2) Assault with deadly weapon on fellow inmate

During trial, Young was incarcerated at the George Bailey Detention Facility. Robert Harger was housed there at the same time. (LXII RT 6717, 6752-6753.) On Christmas Eve of 2004, Harger was awoken by a trusted jailhouse friend who told him that they had to attend a "white" meeting. (LXII RT 6720-6723.)

Harger was not a skinhead. (LXII RT 6722-6723.) The skinheads considered themselves superior to non-member Caucasian inmates, and they ran the Caucasian inmates in the jail. (LXII RT 6722-6723.) But since the meeting was a general "white" meeting, Harger was to attend. (LXII RT 6722-6723.)

Harger followed his friend to the designated cell, which was occupied by five Caucasian men, including Young, whom Harger recognized as the "shot caller" for the Caucasian inmates. (LXII RT 6724-6726, 6746-6747, 6749, 6753.) Young was one of only three men in the 67-man module required to wear special green clothing instead of the standard blue to indicate to staff that he represented a heightened risk (the other two were

a Mexican man and Harger's friend). (LXII RT 6725, 6747, 6749, 6753; LXIII RT 6847-6848.)

After bringing Harger to the cell, Harger's friend announced that he had to go take a shower, and then left abruptly. (LXII RT 6724.) Harger's sense that something was wrong came too late; a fist exploded in his face, spinning him around and knocking him to his knees, whereupon the other men in the cell fell upon him, kicking and beating him while he curled into a fetal position. (LXII RT 6724-6728.) Young joined in the fray as soon as Harger fell to the ground. (LXII RT 6728-6729, 6750.)

Harger was kicked in the face and sides; he also felt blows "up and down [his] whole back." (LXII RT 6728.) As the inmates beat Harger, they called him a "rat piece of shit" and said they were going to kill him. (LXII RT 6729.) Harger believed they meant it, so he stood up and tried to fight back. (LXII RT 6729.)

Instead of beating him, the men suddenly ceased their attack and stared at him. (LXII RT 6729.) Harger was confused; he backed out of the cell and said, "What the hell is going on?" (LXII RT 6729-6730.) Then he looked down at his sides and saw "there was blood coming from [him] everywhere." (LXII RT 6729.) It was only then that he realized he had been stabbed. (LXII RT 6730.)

Harger made it to a nearby call box, where he summoned the help of a deputy. (LXII RT 6730.) He passed out on the ground as the deputy was trying to walk him to the medical facility. (LXII RT 6731-6732.) Harger had to be transported to the trauma unit of a nearby hospital by helicopter. (LXII RT 6732-6733.)

He had sustained 17 puncture wounds to the shoulder, back, sides, and an arm. (LXII RT 6733, 6739-6740.) His left lung collapsed, his spleen was punctured, and he suffered muscle damage. (LXII RT 6734.) He was hospitalized for several days. (LXII RT 6734-6736.) His condition was so

poor that even after he was discharged from the hospital, the state prison would not accept custody of him because he fainted while awaiting transport from the hospital. (LXII RT 6736.)

The assailants also broke off several of Harger's teeth. (LXII RT 6735.) One of the broken teeth later abscessed, requiring a subsequent hospitalization. (LXII RT 6737.)

Harger refused to assist in the law enforcement investigation of the attack for fear of being murdered in retaliation. (LXII RT 6738.) He only agreed to cooperate once he was released from custody a little over five months later. (LXII RT 6737.)

Harger believed Young and the other assailants meant to kill him, and he was scared. (LXII RT 6735.) Gainfully employed and married with a family by the time of trial, he said the incident changed his life. (LXII RT 6735, 6737.) He continued to suffer from recurrent ear infections and muscle spasms, and he was missing several teeth. (LXII RT 6737.)

Three months before the attack on Harger, a hand-made metal stabbing implement ("shank") fashioned from a pair of glasses was found in Young's cell, hidden among some pencils. (LXII RT 6753-6756.) Immediately after the attack, two more substantial shanks were found just outside Young's cell, on and under a maintenance cabinet. (LXIII RT 6808-6810, 6814-6828.) One was made from a one-pound solid steel bar that had been stolen from the mess hall food carts one week earlier; the other from a fiberglass broom handle. (LXIII 6814-6828.) Another of the roughly foot-long metal shanks was found inside of a sock wedged between the ceiling and the top of a maintenance cabinet next to the cell immediately below Young's. (LXIII RT 6815-6821.)

Two days later, a secondary search of Young's cell revealed yet another such steel shank, this time wrapped in an apparently-blood-stained towel and wedged into a sink cavity. (LXIII RT 6858-6865, 6868, 6871-

6872.) Young admitted the shank was his. (LXIII RT 6873.) He claimed he used it for self-protection. (LXIII RT 6874.)

**(3) Aggravated assault on elderly victim**

Detective Stephen Wolf of the Lake Havasu, Arizona, Police Department testified about an assault Young and his friends committed on a Black man named Lee Alvin in 1992. (LXIV RT 6894-6905.) At that time, Lake Havasu was a sleepy town on the California/Arizona border. (LXIV RT 6895-6898.) Only one or two establishments stayed open 24 hours, and Mr. Alvin's convenience store was one of them. (LXIV RT 6897-6898.) Detective Wolf knew Mr. Alvin personally, and found him to be a "really, really nice person." (LXIV RT 6898.)

One night, on September 9, 1992, while working the graveyard shift, Detective Wolf received a radio call of a robbery in progress at Mr. Alvin's store. (LXIV RT 6898.) Detective Wolf knew there was a dark alley next to the store that the robbers might use to escape. (LXIV RT 6899.) He rushed to the spot and caught one of them. (LXIV RT 6899-6900.) The robber said he had accomplices. (LXIV RT 6900.)

Detective Wolf went to Mr. Alvin's store, where he found the "elderly gentleman" (he was 70 or 71 at the time) holding a bloody towel to his head while paramedics treated him. (LXIV RT 6898, 6900-6901, 6916.) Mr. Alvin told the detective that he had been ambushed by three young men as he came out of a storeroom, and one of the men struck him on the head with a rock. (LXIV RT 6901.) It seemed to Detective Wolf a "brutal" crime. (LXIV RT 6905.)

Further investigation revealed that Young was one of the accomplices. (LXIV RT 6902.) Detective Wolf was there when Young was brought into the police station a few hours after the robbery. (LXIV RT 6902, 6908.) The detective remembered Young and his demeanor particularly because

Young had a distinct tattoo: the word "thrasher." (LXIV RT 6903.) Young appeared "cavalier" about what he had done. (LXIV RT 6902.) He showed no remorse. (LXIV RT 6902.)

Likewise, when Young was interviewed by the probation department, he was "indifferent." (LXIV RT 6927.) He characterized the robbery as nothing more than a "job." (LXIV RT 6927.) He specifically said that he felt no remorse and asked to be sentenced to prison and not to be placed on probation with all of its terms and conditions because he did not want a probation officer "looking over [his] shoulder." (LXIV RT 6929-6930.) The probation officer assessed Young as "callous and uncaring." (LXIV RT 6939-6940.)

Mr. Alvin's son, Stephen Alvin, testified that when he saw his father shortly after the robbery, his father had a two-inch "gash" on his head that had been sutured. (LXIV RT 6917.) In the weeks and months after the robbery, his father declined; whereas previously he had been active and social, he became fearful, sedentary, and withdrawn. (LXIV RT 6918-6920, 6923.) Stephen's mother, Mr. Alvin's wife, suffered greatly by essentially losing her life's companion. (LXIV RT 6920.) Later, Mr. Alvin developed cancer at the site of the scar that formed over the head wound. (LXIV RT 6920.)

### 2. Defense case in mitigation

Young's various family members testified that Young's father separated from his mother when the boy was only two. Thereafter, Young had little contact with the father's side of the family. (LXV RT 7039-7041; LXVI RT 7126-7128, 7154, 7169-7171.) Young struggled as a boy and had a learning disability. (LXVI RT 7155-7156, 7205-7206-7207.) He was a follower. (LXVI 7133.)

When Young rejoined the family at the age of 12, he seemed to have a hard time fitting in. (LXV RT 7041; LXVI RT 7128, 7157-7158, 7172-7173.) Moreover, when he was nine years old, he may have been sexually molested by an older cousin who threatened to kill him if he revealed the abuse. (LXVI RT 7171-7172, 7208-7209.) Nonetheless, he stayed in regular contact with his grandmother and always asked for family news and photographs while he was incarcerated. (LXV RT 7041, 7046, 7049-7051.)

Young was a "good" and "kind" man loved by his nieces and nephews; he became an exceptionally loving and devoted father to his own son, Odin, as well as to his girlfriend's child by a previous union; and he learned a respectable trade after prison. (LXV RT 7043-7045, 7051; LXVI RT 7132, 7160-7161, 7222; LXVII RT 7350-7359, 7361-6363.) Young accepted responsibility for crimes he had committed in the past. (LXV RT 7048-7049.) He was "not a violent person." (LXVI RT 7224.) Moreover, regarding the crimes charged in this case, even if Young did not get the death penalty, he "was never going to leave prison." (LXV RT 7051; LXVI RT 7160.) His family was "confused" by his racist tattoos because he "was never really racist" to their knowledge. (LXVI RT 7179.)

Young's mother testified that his father began giving him alcohol as an infant. (LXVI RT 7196.) When Young was 14 or 16 months old, his father got him so drunk on wine that he could not walk properly. (LXVI RT 7199.) Later, appellant's father introduced appellant to drugs as an adolescent. (LXVI RT 7212.)

The father verbally and physically abused the mother, which is why she left him. (LXVI RT 7197.) Thereafter, the father only "rarely" visited and provided for Young. (LXVI RT 7199.) Young began getting into trouble and stealing from his mother in his teens. (LXVI RT 7214.) He was treated briefly for psychological problems. (LXVI RT 7216.) Later,

he was sent to a drug rehabilitation center but ran away and hitchhiked to his father, who turned him in to the police. (LXVI RT 7214-7215.)

Young's mother had multiple children by different fathers. (LXVI RT 7200-7201.) One of them, Marcus, was very close to Young. (LXVI RT 7201-7202, 7218.) Marcus was half Black. (LXVI RT 7201.) Young did not appear to have any problem with Marcus's ethnicity. (LXVI RT 7202.) The mother had never known Young to have any racist views until after he was incarcerated in Arizona state prison. (LXVI RT 7218-7219, 7247.) She acknowledged, however, that appellant and his girlfriend appeared to be raising their son around racist beliefs and paraphernalia. (LXVI RT 7246-7248.)

A family therapist testified that Young suffered from inconsistent discipline by an overburdened mother. (LXVIII RT 7420-7421.) He had low self-esteem because he had a "significant" learning disability with respect to reading and math. (LXVIII RT 7421, 7444.) He was bullied because he was short. (LXVIII RT 7421.) He is a "follower" who is "highly susceptible to the influence of others." (LXVIII RT 7444.)

The therapist also testified that when Young was molested by the cousin, his mother initially "tried to sweep it under the rug," although she eventually put him in counseling. (LXVIII RT 7422.) Sexual molestation is a "serious impediment" to development. (LXVIII RT 7423.) It caused Young to feel pain, confusion, and anger. (LXVIII RT 7423-7424.) He "acted out" his frustrations by doing things such as stealing Girl Scouts' money from his mother. (LXVIII RT 7431.)

The alcohol Young's father gave him starting in infancy also could have retarded his development and fostered his later problems with substance abuse. (LXVIII RT 7425.) The therapist believed Young suffered from depression and on one occasion cut his wrist. (LXVIII RT 7428.) He felt like an outsider in his family, which was one of the reasons

he became a skinhead and covered his body with racist tattoos: to achieve a sense of belonging. (LXVIII RT 7429, 7436.) Self-preservation in prison was the other, primary, reason. (LXVIII RT 7438.)

The therapist also testified about what it means to be a skinhead. She said skinhead doctrine includes not only "negative" aspects, but also "honor, respect, [and] loyalty." (LXVIII RT 7442.) She explained that it was a kind of "misguided" effort to protect the "poor little guy." (LXVIII RT 7442.)

The therapist characterized Young as a loving and responsible father to his son and stepchild. (LXVIII RT 7446.) She noted that he continues to parent them from jail. (LXVIII RT 7447.) She also acknowledged, however, that he had renewed his skinhead activity while in custody. (LXVIII RT 7448.) Nonetheless, she believed Young had "learn[ed] from his mistakes." (LXVIII RT 7448.)

The therapist was not a medical doctor, psychiatrist, or psychologist. (LXVIII RT 7460.) She only testifies for the defense in cases involving the death penalty. (LXVIII RT 7469-7470.) She admitted Young told her he had been physically violent on many occasions, and that he acted out of anger and revenge. (LXVIII RT 7483.) She also acknowledged having seen documents in which Young claimed skinhead membership since 1989. (LXVIII RT 7485.) And she acknowledged that Young was reported to have been the aggressor in violent encounters while in custody for this case, and that he committed "a number" of both major and minor violations while in prison in Arizona. (LXVIII RT 7493, 7498-7499.) Finally, she acknowledged test results showing Young had an average intelligence quotient. (LXVIII RT 7503.)

A woman who runs a foundation for children whose parents are incarcerated testified that even parents who are imprisoned for life can have a positive and meaningful relationship with their children. (LXVI RT

7077-7079, 7095.) A representative of the welders' union Young joined sometime after the murders testified that Young was a "nice guy" who appeared to get along peaceably on the job with people of different ethnicities, was a dependable worker, and never failed a job-related drug test. (LXVI RT 7100-7108.) A fellow welder who had never actually worked with Young but carpooled with him testified that Young was hard-working and "just a very nice person." (LXVI RT 7122, 7125.) She had never heard him make racist remarks; on the contrary, when a foreman made a racist remark, Young joined the others in denouncing the conduct. (LXVI RT 7122-7123.)

A convicted felon and fellow "neo-Nazi" skinhead who participated in the beating and stabbing of Harger also testified in Young's behalf. (LXVII RT 7272-7277, 7301.) Aaron Beek was in custody at the time of trial, serving sentences for multiple bank robberies, as well as for his part in the attack on Harger. (LXVII RT 7261, 7264-7271.) He had pled guilty to armed assault against Harger after prison officials confiscated a contraband inmate-to-inmate note ("kite") shortly after the Harger stabbing in which Beek said he stabbed a man 14 times. (LXVII RT 7264-7267.)

Beek testified that he was the only person who physically attacked Harger, that everyone else remained outside the cell, and that Young was not there at all. (LXVII RT 7271-7272, 7287-7288.) However, he also admitted authoring a letter in which he said he pled guilty to the assault to "take the charges off ... [his] comrade Jeff." (LXVII RT 7271, 7287.)

Beek also claimed to have authored another letter confiscated by jail officials, despite the fact that it bore Young's signature and was posted by Young in an envelope bearing Young's name. (LXVII RT 7261, 7277-7278, 7285.) The letter, written in the first person, bragged about being a member of the "American Front" and the "shot-caller" for the Caucasians in the jail, detailed Young's many racist tattoos, and professed Young's

love for Beek. (LXVII RT 7279-7282.) On cross-examination, Beek downplayed the American Front as a barbecuing club for white people, denied that he and Young were best friends, and claimed he "miswrote" when he called Young the shot-caller. (LXVII RT 7279-7280, 7282.) Regarding the skinhead culture in general, Beek explained it was "just a way to bring people together[,]" many of whom were not racist. (LXVII RT 7297.) He admitted, however, that the "88" tattoo that both he and Young bore on prominent places on their bodies stood for "Heil Hitler." (LXVII RT 7301.)

Beek claimed Young was a quiet, bookish fellow while in custody. (LXVII RT 7298-7299.) But on cross-examination he acknowledged that Young was repeatedly placed in administrative segregation because he was causing problems in the jail. (LXVII RT 7283.) Beek wrote another kite shortly before he testified in this case in which he expressed his desire to "rush" the deputies in the courtroom and "jump" one of them on the way back to the jail. (LXVII RT 7289, 7291-7292.)

An officer who investigated the jailhouse attack on Harger also testified. He said Harger told him he was "affiliated" with an east San Diego county gang that included skinheads. (LXVII RT 7312-7313.) Also, although Harger identified Young with "no hesitation whatsoever" from photographs and in person as one of his attackers, and specifically as the man sitting on the toilet and washbasin in the cell where Harger was stabbed, he did not accurately describe Young's hair color and he thought Young's name was "Joe." (LXVII RT 7311, 7317-7320, 7324-7325.)

On cross-examination, the officer testified that Aaron Beek's testimony that he acted alone in attacking Harger did not match the evidence the officer collected. (LXVII RT 7321.) He also explained that the group with which Harger associated (the "Peckerwoods") was not a part of the Aryan Brotherhood or other prison gangs, and did not necessarily

subscribe to neo-Nazi beliefs, but was simply a group to which imprisoned Caucasian males "gravitate[d]" to find "safety in numbers." (LXVII RT 7321-7322.)

A deputy who worked at the jail testified that Young was repeatedly punched in the head by a tall Latino inmate on July 23, 2004, after Young ordered a "Hispanic" inmate to leave the part of the jail where Young was housed. (LXVII RT 7335, 7338-7345, 7348.) The deputy said inmates sometimes carry shanks for protection. (LXVII RT 7340.) Another deputy testified that Young did not respond when other inmates encouraged him to "take out a deputy" since, as a murderer facing either life in prison or the death penalty, he had "nothing to lose." (LXVII RT 7365-7368.)

### 3. People's rebuttal

The day after the stabbing of Harger, deputies investigating the attack noted above Young's cell door a Celtic rune and outside his cell a swastika, both of which appeared to have been drawn in blood. (LXVIII RT 7451-7453, 7458-7459, 7531, 7541.) Appellant admitted drawing the Celtic symbol but denied authorship of the swastika. (LXVIII RT 7544.)

Police officers who interacted with Young in 1999 noted that Young already had "white supremist" [sic] tattoos, including one of the phrase "nigger thrasher," a swastika, and the number 88. (LXIX RT 7567, 7585.) Later, in September 1999, another officer saw Young wearing red laces in his combat boots and red suspenders. (LXIX RT 7591-7592.)

Joanna Mendelson, the "Director of Investigative Research" for the regional branch of the Anti-Defamation League, testified about the violent and hateful nature of neo-Nazi skinhead doctrine and the consequent violent conduct of its adherents. Neo-Nazis believe that Adolph Hitler's racial purification plan, a platform of his Nationalsozialistische Deutsche Arbeiterpartei ("Nazi") political party, to cleanse the Caucasian race of

impurities by actively exterminating Jewish and non-white races "was a good start." (LXIX RT 7627.) Neo-Nazi skinheads tattoo themselves with Nazi names, images, and symbols to show their adherence to Hitler's beliefs. (LXIX RT 7627, 7649.)

Aryan Nations is a so-called "Christian identity" organization that incorporates elements of neo-Nazism. (LXIX RT 7629-7630.) Contrary to its self-classification, however, the group's philosophy differs markedly from orthodox Christianity: its adherents believe that Caucasian people are descended from God, Jewish people descend from the devil, and all people of color are "mud people," and nothing more than God's "mistakes." (LXIX RT 7630.) Similarly, many neo-Nazi groups use the Celtic cross as a symbol—a tradition started by the Ku Klux Klan—but not for its traditional meaning that Jesus Christ was sacrificed to redeem mankind, but as a statement of "white supremacy." (LXIX RT 7632-7633.)

Neo-Nazis also subscribe to a particular form of "Odinism" a subset of "Asatru," which holds that a person cannot commune with God or the gods unless he or she is of "a clean and pure blood line." (LXIX RT 7636.) In prison, neo-Nazis use "Odinism" as a means to hold meetings at which they organize "criminal activity and violence." (LXIX RT 7637.)

The swastika, such as those found on Young's body and outside his prison cell, is a neo-Nazi symbol that announces Young's belief in Hitler's race-purification plan of exterminating non-white people. (LXIX RT 7638, 7669.) Many of Young's tattoos are also neo-Nazi symbols with the same meaning: the Nazi "totenkopf," or deathhead, on his head, the eagle carrying the type of dual lightning bolts worn by Hitler's Schutzstaffel, or "SS," on his chest, and the soldier resembling Joseph Dietrich, a Nazi German Army general responsible for mass executions, on his waist. (LXIX RT 7631-7658.) The "88" on the back of his neck stands for "Heil Hitler"; the outline of boots on his back represents the steel-toed

Dr. Marten®-brand boots Neo-Nazi skinheads wear as a weapon and/or a violent act committed against a non-Caucasian person; the image of skinheads wielding bats and machetes symbolizes racist "violence and aggression"; a noose hanging from a tree represents lynching; and the crucified skinhead wearing red suspenders glorifies a skinhead who has harmed or "spilled the blood of" a Jew or "mud [person]." (LXIX RT 7631-7658.)

The "nigger thrasher" tattoo on Young's upper arm identifies Young as one who has committed or will commit violence upon an African-American. (LXIX RT 7653-7654.) Young's other tattoos represent his belief in white supremacy: the letter "SWP" for "supreme white power"; "Weiss Macht," which roughly translates to white power; "14 words" (i.e., "secure the existence of our people and a future for white children"); the Celtic cross; the Celtic Elhaz rune, the same used by Nazis to represent their efforts to propagate Caucasian children; the god Thor ; "blood and honor," the eagle carrying the letter "S," and "Farewell, Ian" honor a martyr of the white supremacist movement. (LXIX RT 7631-7658.)

#### 4. Defense sur-rebuttal

A violent recidivist Mexican gang member most recently convicted of first degree murder who had been represented by Young's attorney and was housed in the same jail as Young testified he never saw Young "indicate[] any intent towards [racist] violence." (LXIX RT 7681-7682, 7684-7688.) He had seen Young interact with inmates of many different ethnicities, and did not see "any problems." (LXIX RT 7683-7684.) The gangster's brother, also a gang member and also represented by Young's attorney, similarly testified that Young appeared to get along peaceably with inmates of other races. (LXX RT 7735-7738.)

The gang member convicted of murder said inmates known to be violent are not permitted to mingle with the others. (LXIX RT 7683.) On cross-examination, however, he acknowledged that green clothing is worn by "high risk" inmates over whom the deputies have to be especially watchful. (LXIX RT 7683, 7688, 7690.)

A Sheriff's Department sergeant who investigated the near-fatal stabbing of inmate Harger testified that a jailhouse informant told him he "thought" the "shot-callers" for the Caucasian inmates were Aaron Beek and a man named Britain with whom the informant shared a cell. (LXXI RT 7821.) The informant also said he had seen Britain sharpening the shanks later recovered from the Harger stabbing. (LXXI RT 7818, 7820.) During the stabbing, Britain remained outside his jail cell looking "nervous and pumped up." (LXXI RT 7822.) After the stabbing, Beek came into the informant's cell and washed his hands. (LXXI RT 7823.) On cross-examination, the sergeant testified that inmates often give a false name when identifying a shot caller. (LXXI RT 7826.)

## ARGUMENT

### I. THE ADMISSION OF YOUNG'S STATEMENT "YOU HEARD IT ALL" AFTER HE WAS READ HIS *MIRANDA*[5] RIGHTS DID NOT VIOLATE YOUNG'S FIFTH OR FOURTEENTH AMENDMENT RIGHTS

In argument I, Young contends the trial court should have excluded the admission, "You heard it all," that he made to Detective McDonald after hearing a tape of his telephone conversations with Jason Getscher. (AOB 56-80.) Young claims he invoked his right to remain silent at the outset of the interview, so any subsequent interrogation was improper, and

[5] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694].

any incriminating responses involuntary and inadmissible. He also argues that to the extent he waived his *Miranda* rights just before making the admission, the waiver was involuntary because it was the result of improper police tactics. Finally, Young claims that the admission should have been excluded as irrelevant and unduly prejudicial under Evidence Code section 352. (AOB 77-78.) Young is wrong. He waived his right to remain silent and did not re-invoke it until after he made the admission. Moreover, the record discloses no evidence of coercion. And finally, even if the admission was improperly admitted, the error was harmless because there is no reasonable doubt the jury would have convicted him without it.

At the police station, Detective McDonald interviewed Young in the company of an investigator from the district attorney's office. After a few administrative questions, the detective told Young that James Torkelson was in custody and had provided information about a murder at the "Airport Park and Ride" in 1999. (V CT 1120-1121.) After Young admitted he knew Torkelson, Detective McDonald said both Torkelson and "[an]other guy" had offered to "give up information" in exchange for a reduced sentence. (V CT 1122.) But, Detective McDonald said, neither he nor the district attorney's office liked Torkelson and "we[re] not sure [they] wanted to deal with him." (V CT 1122.) The detective said the police "ha[d] other evidence too," including a tape, which Young could listen to if he so wanted. (V CT 1122.) He remarked, "So things are starting to fall apart on this whole operation you guys were ... involved in." (V CT 1122.)

Detective McDonald asked Young if he would like to give "[his] side of the story." (V CT 1122.) Young said, "After I get my rights." (V CT 1122.) The conversation then continued as follows:

> DETECTIVE: But only if this, yeah, I'm just letting you know if you can, I can read your rights.

YOUNG: .... [T]hat's, one step at a time.

DETECTIVE: Okay. Like to go that route?

YOUNG: It's getting kind of weird. Cause, yeah, I know about that. [Torkelson] told me about it, you know, cause he's working security there.

DETECTIVE: Okay.

YOUNG: Yeah, I'd like my rights.

DETECTIVE: Okay, let me uh

YOUNG: If you don't mind. I don't want to be, make like a dick or anything or make anything

DETECTIVE: No, but would you like to listen to a tape first?

YOUNG: Uh

DETECTIVE: I won't say nothing [sic]. I won't ask you any questions. Would you like to listen after?

YOUNG: Yeah.

DETECTIVE: Okay. And then after we're done, I'm not gonna ask you any questions. I'll play a tape and then, uh, after the tape, I'll advise you of your rights and we can go on.

YOUNG: Okay.

DETECTIVE: It's up to you....

(V CT 1122-1123.)

Detective McDonald attempted to play the tape, but the cassette player apparently malfunctioned, so he left to retrieve batteries. (V CT 1123.) When he came back, the player still did not work, so he left and came back again with more batteries. (V CT 1123.) At no time during these breaks did Young indicate that he did not wish to hear the tape. (V CT 1123.)

After they had listened to a portion of the tape, the detective asked Young, "Is that enough? Or you want to continue?" (V CT 1124.) Young replied, "Nah, I heard about enough." (V CT 1124.)

Detective McDonald then spoke about the importance of teaching one's children to take responsibility for their actions. (V CT 1124.) Young agreed he wanted his son Odin to be raised that way. (V CT 1124.) Detective McDonald remarked, "[E]ven if [you] make a mistake, you should face up to responsibilities." (V CT 1124.) He told Young that he and the district attorney's investigator had "spent a lot of time" investigating the case, and reminded him that "[a] lot of people ... want[ed] favors." (V CT 1124.)

Young derided Torkelson as his "bitch boy," and asked, "So you're sure those guys don't like [Torkelson]?" (V CT 1124.) When he began to discuss the menial services Torkelson performed for him, Detective McDonald reminded him, "Let me advise you of your rights and see if you'd like to continue on." (V CT 1124.) The detective then remarked that the tape basically contained "everything," but he would appreciate "some details" from Young, and that Young would be modeling good behavior for his son by being forthcoming. (V CT 1125.) Young's response was, "What am I looking at? Death?" (V CT 1125.)

Again, Detective McDonald told Young, "Let me, let me advise you of your rights[,] okay." (V CT 1125.) But before he could continue, Young interrupted him. (V CT 1125.) So, the detective said a third time, "Let me advise you of your rights and see what [sic], uh, we go from there." (V CT 1125.) Then he read Young his rights, each of which Young said he understood. (V CT 1125.) When he was done, he asked Young, "Do you want to tell us your side of the story on this?" (V CT 1125.) Young replied, "You heard it all, I can't really—" (V CT 1125.) The detective responded that there were still "a lot of holes." (V CT 1125.)

Young said, "I'll tell you what. I ain't gonna talk about it no more." (V CT 1125-1126.) After some brief back-and-forth, Young said, "I'm gonna have to ask for an attorney," at which point Detective McDonald said, "We're, we're done," and asked no further questions. (V CT 1127.)

The trial court rejected Young's argument that this interview constituted coercion, and found the admission to be knowing and voluntary. (XIX RT 1018.)

"An involuntary confession is inadmissible under the due process clauses of both the Fourteenth Amendment to the federal Constitution as well as article I, sections 7 and 15 of the California Constitution." (*People v. Weaver* (2001) 26 Cal.4th 876, 920.) When a defendant claims his confession was involuntary, the People need show otherwise only by a preponderance of the evidence. (*People v. Williams* (2010) 49 Cal.4th 405, 425; *People v. Jones* (1998) 17 Cal.4th 279, 296.) "'Preponderance of the evidence' means evidence that has more convincing force than that opposed to it." (CALJIC No. 2.50.2 [Definition of Preponderance of the Evidence].)

### A. Young Waived His Right to Remain Silent and Voluntarily Told Detective McDonald, "You heard it all ...."

A suspect has a right to remain silent and to have an attorney present during questioning, but he may waive those rights and give a statement. (*Maryland v. Shatzer* (2010) 559 U.S. 98, 103-104 [130 S.Ct. 1213, 1219, 175 L.Ed.2d 1045], citing *Miranda v. Arizona*, *supra*, 384 U.S. at p. 475.) So long as the waiver is knowing and of his own free will, his statements are voluntary and admissible. (*People v. Nelson* (2012) 53 Cal.4th 367, 374-375.) There is no talismanic phrase a suspect must utter to waive his rights; waiver may be implied when the suspect is informed of his

constitutional rights, acknowledges that he understands them, and proceeds to talk to the police anyway. (*People v. Whitson* (1998) 17 Cal.4th 229, 247-248, and cases cited therein.)

That Young was aware he had *Miranda* rights is evidenced by his own request that Detective McDonald read them to him. Moreover, when the detective read him his rights, Young said he understood each of them. (V CT 1125.) When asked thereafter if he wanted to "tell [his] side of the story," he volunteered, "You heard it all ...." (V CT 1125.) Later, when the detective began to press him for details, he said, "I ain't gonna talk about it no more," and then, "I'm gonna have to ask for an attorney." (V CT 1125-1127.) This is evidence that Young was aware of his right to remain silent and to have an attorney present, and chose nonetheless to admit that by means of the taped conversation with Jason Getscher, the detective had "heard it all." Given the total absence of any evidence to the contrary, the voluntariness of Young's statement is therefore established by a preponderance of the evidence.

### B. The Waiver Was Not Coerced

Young contends that his waiver was involuntary. (AOB 68-76.) He notes that Detective McDonald talked to him and played the tape for him before reading him his rights; citing *People v. Honeycutt* (1977) 20 Cal.3d 150, he claims these were coercive tactics that overcame his free will. (AOB 75-76.) Not so.

"A finding of coercive police activity is a prerequisite for a finding that a confession was involuntary under the due process clauses of the federal or state Constitution." (*People v. Clark* (1993) 5 Cal.4th 950, 988.) Police are prohibited from using "only those psychological ploys which, under all the circumstances, are so coercive that they tend to produce a statement that is both involuntary and unreliable.'" (*People v. Jones*,

*supra*, 17 Cal.4th at p. 298, quoting *People v. Ray* (1996) 13 Cal.4th 313, 340.) "The question is whether defendant's choice to confess was not 'essentially free' because his will was overborne." (*People v. Memro* (1995) 11 Cal.4th 786, 827, quoting *Schneckloth v. Bustamonte* (1973) 412 U.S. 218, 225 [93 S.Ct. 2041, 36 L.Ed.2d 854].) Deception by the police does not undermine the voluntariness of a defendant's statement unless the deception is of a type reasonably likely to procure an untrue statement. (*People v. Williams*, *supra*, 49 Cal.4th at p. 443.) Merely informing a defendant—even falsely—that a coconspirator has identified him is not improper or coercive. (See, e.g., *Frazier v. Cupp* (1969) 394 U.S. 731, 739 [89 S.Ct. 1420, 22 L.Ed.2d 684]; *People v. Smith* (2007) 40 Cal.4th 483, 505-506.) Again, the People need demonstrate the voluntariness of a *Miranda* waiver only by a preponderance of the evidence. (*People v. Sauceda-Contreras* (2012) 55 Cal.4th 203, 219.)

The only thing Detective McDonald did was to tell Young that an accomplice was prepared to provide information, and to play a tape of Young's admissions to Jason Getscher. Before playing the tape, he asked Young if he would like to hear it before being read his rights. (V CT 1123.) When Young responded noncommittally, the detective promised not to ask questions during the playing of the tape and then asked Young again, "Would you like to listen after?" (V CT 1123.) Young said, "Yeah." (V CT 1123.) Detective McDonald then told Young he was about to play the tape and that he would read Young his rights afterward, to which Young responded, "Okay." (V CT 1123.) Before playing the tape, the detective reiterated, "It's up to you." (V CT 1123.) Thereafter, there were two extended breaks in the conversation while the detective left to find batteries. (V CT 1123.) At any point during those lulls Young could have, but did not, say that he did not wish to listen to the tape. (V CT 1123.)

These facts are a far cry from "psychological ploys" designed to overbear Young's free will. There were no threats and no promises.[6] Detective McDonald did not order Young around; he asked Young what he wanted to do. He reminded Young that the choice was his. When Young said he wanted an attorney, the detective immediately ceased questioning him. In other words, the interview was calm and civil, and Young's rights

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[6] Young claims Detective McDonald told him he could go home after he heard the tape. (AOB 57-58.) The record does not support this claim. Young submitted to the trial court a purported transcript of his interview with Detective McDonald but provided no information on the document's provenance. (V CT 1088.) The purported transcript indicates that Detective McDonald told Young, "I'll play a tape and then after the tape uh, I'll advise you of your rights and you can go home." (V CT 1091.) Young claims this was a coercive false promise. (AOB 58.)

Young had been arrested for murder; no reasonable person would have expected to be released from custody under those circumstances, especially not an experienced recidivist like Young who had served multiple prison terms for violent crimes. To suggest that the detective would make such a transparently false promise is not reasonable, and the trial court did not credit the argument, as revealed by its decision to admit Young's statement as knowing and voluntary.

The people also submitted a transcript with their moving papers. (V CT 1119-1129.) The document was transcribed by a Maria Fallorina, and then both reviewed and corrected by an A. C. Hester, neither of whom appear to have had any other involvement in this case. (V CT 1119.) The People's transcript reflects that the detective actually said, "I'll play a tape and then after the tape uh, I'll advise you of your rights *and we can go on.*" (V CT 1123 [emphasis added].) Not only is this is the more reasonable reading, but the transcription is more reliable, having been transcribed and corrected by two different people, neither of whom were a party to the case. Further evidence that the People's version is the more accurate one is the absence of any surprise on Young's part when, after the tape was played, there was no mention of his "going home." (See V CT 1119-1129.) This Court reviews the trial court's findings as to the circumstances of the confession only for substantial evidence. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1093.) Where the facts conflict, the Court must accept the version favorable to the People. (*Ibid.*) Therefore, this Court must reject Young's characterization of the detective's statement.

were honored when he unequivocally invoked them. As Young himself said to McDonald, "You guys ... have been showing me respect all day ...." (V CT 1126.) Under the totality of the circumstances, therefore, there was no coercion, and Young's waiver of his right to remain silent was voluntary.

Young points out that Detective McDonald did not advise him of his *Miranda* rights at the outset of the interview and before playing the tape. He contends his subsequent *Miranda* waiver was therefore invalid. (AOB 62-77.) Young is correct in his assertion that the police should advise a suspect of his rights at the outset of a custodial interrogation. (*Miranda v. Arizona*, *supra*, 384 U.S. at pp. 467-468, 471, 479; *People v. Martinez* (2010) 47 Cal.4th 911, 947.) But he is wrong in his assertion that Detective McDonald's failure to do so in this case rendered his subsequent waiver involuntary. Even when police elicit initial statements in violation of *Miranda*, a subsequent voluntary confession made after proper advisement is not ordinarily tainted simply because it was procured after the violation. (*People v. Scott* (2011) 52 Cal.4th 452, 477.) Once a suspect has been informed of his *Miranda* rights, his waiver of those rights is valid and his statement admissible even where there has been a pre-confession *Miranda* violation, so long as there was no actual coercion or other circumstances calculated to overcome his free will. (*Ibid.*) The relevant inquiry remains whether the statement was voluntarily made under the totality of the circumstances.[7] As discussed above, Young's post-advisement statement, "You heard it all ...." was knowing and voluntary by this standard.

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[7] Young also contends that he invoked his right to remain silent at the outset of the interview, and that his admission, "You heard it all" was therefore extracted in violation of his constitutional rights. (AOB 60-65.) Not so. First, the invocation of the right to remain silent, like the invocation of the right to counsel, must be both unambiguous and

(continued...)

### C. *Honeycutt* Does Not Apply Because the Pre-advisement Conversation Was Brief and Recorded, and Detective McDonald Neither Disparaged the Victims Nor Tried to Ingratiate Himself

Young claims that his is no ordinary case, however, and that his post-advisement confession was tainted because Detective McDonald extracted his *Miranda* waiver by use of deceptive "softening up" techniques of which this Court disapproved in *People v. Honeycutt*, *supra*, 20 Cal.3d at page 150. In *Honeycutt*, the defendant was interviewed by an officer with whom he had a decade-long relationship, and with whom he was on a first-name basis. (*Id.* at p. 158.) That officer chatted with the defendant for half an hour off the record, during which time he talked about old times and friends, and simultaneously vilified the victim, all of which he frankly admitted was calculated to "soften[] up" the defendant and "get him to talk." (*Ibid.*) The officer did not advise the defendant of his rights until

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(...continued)
unequivocal. (*Berghuis v. Thompkins* (2010) 560 U.S. 370 [130 S.Ct. 2250, 2259, 176 L.Ed.2d 1098]; *People v. Martinez*, *supra*, 47 Cal.4th at pp. 947-948; *People v. Stitely* (2005) 35 Cal.4th 514, 535 ["It is not enough for a reasonable police officer to understand that the suspect might be invoking his right. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required ... to ask clarifying questions or to cease questioning altogether"].) Here, it is not clear Young was invoking his right to remain silent; on the contrary, Young told Detective McDonald he wanted to give his side of the story, but that he wanted to "get [his] rights first." (V CT 122.) This ambiguous response suggests that what he wanted was for the detective to read him his rights, which is precisely how the detective took the remark, because he responded, "I can read your rights," and then sought clarification: "Like to go that route?" (V CT 123.)

Second, even if Young invoked his rights, and the questioning that immediately followed was therefore in violation of *Miranda*, as stated above, Young subsequently voluntarily waived those rights before he told Detective McDonald, "You heard it all," and a subsequent voluntary confession made after proper advisement is admissible even where it follows a *Miranda* violation. (*People v. Scott*, *supra*, 52 Cal.4th at p. 477.)

they were in the presence of a reporter three hours later. (*Ibid.*) The *Honeycutt* court ruled the defendant's subsequent confession inadmissible as the involuntary product of coercive police tactics, namely, "a clever softening-up of a defendant through disparagement of the victim and ingratiating conversation ...." (*Id.* at p. 160.)

As this Court recently pointed out in *People v. Scott*, *supra*, 52 Cal.4th at pages 477-478, the "two salient features of *Honeycutt*," are that the officer (1) sought to ingratiate himself "by discussing 'unrelated past events and former acquaintances[,]'" and (2) disparaged the victim. Where those factors are absent, "[d]efendant's reliance on *Honeycutt* ... is misplaced." (*Scott*, *supra*, at p. 478.) Neither of those factors is present in this case. There is no evidence Detective McDonald had any prior relationship with Young, and they did not chat about old times or mutual acquaintances. The only mention of one of Young's associates was in the context of informing Young that Torkelson was ready to turn government's witness.[8] And the detective did not in any way disparage the murder victims. Finally, as in *Scott*, the pre-advisement discussion between Young and the detective was both relatively brief and recorded. (See *Scott*, *supra*, at p. 478.) Circumstances such as these provide no support for a claim of coercion, and *Honeycutt* does not apply. (*Ibid.*)

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[8] Young asserts Detective McDonald tried to "cozy[] up" to him by chatting about his son. (AOB 69, 76.) The record does not support this assertion. There is nothing coercive about pointing out a benefit that flows naturally from truthful and honest conduct. (*People v. Howard* (1988) 44 Cal.3d 375, 398.) The detective merely told Young that he would be setting a positive example for his son if he took responsibility for his actions, which was a natural consequence of an honest course of conduct. Accordingly, the detective's remarks were not coercive.

### D. Evidence Code Section 352 Does Not Require Exclusion of the Admission

Young also argues that his admission was "equivocal" and therefore irrelevant. Alternatively, he claims it was "unduly prejudicial." (AOB 77-78.) Therefore, he argues, the trial court was required to exclude it under Evidence Code section 352.

"Evidence Code section 352 requires the exclusion of evidence only when its probative value is substantially outweighed by its prejudicial effect. 'Evidence is substantially more prejudicial than probative ... only if, broadly stated, it poses an intolerable "risk to the fairness of the proceedings or the reliability of the outcome."'" (*People v. Quang Minh Tran* (2011) 51 Cal.4th 1040, 1047, quoting *People v. Waidla* (2000) 22 Cal.4th 690, 724.)

Here, after listening in Detective McDonald's company to a recording of his conversations with Getscher in which he admitted to participating in the robbery and shooting Perez to cover up the crime, Young told the detective, "You heard it all ...." (V CT 123.) This evidence was probative of Young's guilt of robbery and murder because it suggested that the tapes were an accurate account of what happened. Certainly the statement was "prejudicial" in the literal sense of the word because it was strong circumstantial evidence of Young's guilt. That "prejudice" does not warrant the exclusion of such probative evidence, however:

> The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence. "[All] evidence which tends to prove guilt is prejudicial or damaging to the defendant's case. The stronger the evidence, the more it is 'prejudicial.' The 'prejudice' referred to in Evidence Code section 352 applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual and which has very little effect on the

issues. In applying [Evidence Code] section 352, 'prejudicial' is not synonymous with 'damaging.'"

(*People v. Karis* (1988) 46 Cal.3d 612, 638.)

As for Young's assertion that the admission was vague or equivocal, that argument goes to its weight, not its admissibility; it is for the jury to decide whether a statement shows consciousness of guilt. (*People v. Kimble* (1988) 44 Cal.3d 480, 496, 498.) Accordingly, the statement was not made inadmissible by Evidence Code section 352.

### E. Any Error Was Harmless Because the Evidence Against Young Was Overwhelming and No Reasonable Juror Would Have Believed That His Admissions to Getscher Were Mere Posturing

Even had the trial court erred in admitting Young's four-word admission to Detective McDonald, the error would have been harmless because there is no reasonable doubt the jury would have convicted Young without the contested admission. (See *People v. Neal* (2003) 31 Cal.4th 63, 86 [erroneous admission of statement taken in violation of *Miranda* is reviewed under the *Chapman*[9] standard].) The evidence against Young was overwhelming. In the days before the robbery, Young, Torkelson and Max Anderson were overheard discussing robbing a business where Torkelson worked as a security guard. (XXIX RT 2476-2478.) Torkelson worked at the Five Star parking lot. (XXIV RT 1584-1586.) On the night of the robbery, a man matching Young's description ran from the Five Star parking lot where shots had just been fired and pointed a gun in Michael Mackey's face. (XXIV RT 1693, 1695-1696, 170, 172; XXV RT 1746, 1755-1756.) Mackey identified Young as that man with 75% certainty.

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[9] *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

(XXIV RT 1722.) A few days after the robbery, Young told Getscher he had shot someone and showed Getscher a burn on his hand from a handgun muzzle flash. (XXIX RT 2480, 2484.) Around the same time, Getscher saw Young putting red laces in his boots, which, in the skinhead culture to which Young belonged, meant that Young had shed the blood of a non-white person. (XXIX RT 2482-2483.) Later, in a series of surreptitiously-recorded telephone calls, Young acknowledged planning and committing the robbery with James Torkelson and Max Anderson and even admitted he was the one who shot the female parking lot employee so she would not "be able to get up." (VI CT 1281, 1285, 1317-1320, 1332, 1337.) He also admitted shooting at someone else in the parking lot because he feared the man had seen him. (VI CT 1333.) Young likened the whole experience to an intense high from powerful narcotics, and said that he was "like, cool" with everything that happened within a few days after the killings. (VI CT 1323, 1334.) Given this overwhelming evidence of deliberate and premeditated murder, there is no reasonable doubt the jury would have convicted him irrespective of the one-line remark he made to Detective McDonald.

Young's claim that he was robbed of the defense that his damning statements to Getscher were mere "posturing" (AOB 77-80) is, frankly, ludicrous. Besides telling Getscher that he murdered Perez so she could not identify him, and that he tried to shoot another man whom he believed to be a witness, Young told Getscher that he lost his cool because he became unnerved and was not thinking straight. (VI RT 1319, 1332.) He characterized himself as "not well planned," and the robbery itself as a disaster. (VI RT 1317, 1321.) He admitted that the robbers panicked and scattered, and that the robbery hardly netted anything because he and his accomplices failed even the simple step of zipping up the loot sack. (VI CT 1320-1321, 1324, 1329.) It is simply not plausible to suggest that these

admissions of utter incompetence were mere braggadocio calculated to earn Getscher's respect, and no reasonable juror would have taken them as such, especially after Getscher responded to the admissions by calling Young an "idiot." (See VI CT 1329-330.) Thus, even had the admission of Young's remark to the detective factored into his decision not to present a "posturing" defense, he suffered no harm because such a defense had no chance of success. (See *People v. Boyette* (2002) 29 Cal.4th 381, 463-464.)

## II. THE TRIAL COURT PROPERLY ADMITTED ONLY TWO OF YOUNG'S NUMEROUS TATTOOS, THE FACT THAT HE PUT RED LACES IN HIS BOOTS, AND MINIMAL EVIDENCE OF HIS ASSOCIATION WITH SKINHEADS BECAUSE AN EYEWITNESS RELIED ON THE TATTOOS TO IDENTIFY YOUNG, THE RED LACES WERE TANTAMOUNT TO AN ADMISSION OF GUILT, AND THE EVIDENCE OF ASSOCIATION EXPLAINED THE SIGNIFICANCE OF THE LACES AND YOUNG'S CLOSE RELATIONSHIP WITH THE OTHER ROBBERS

In argument II, Young contends the trial court abused its discretion in admitting evidence of two of his tattoos, the red laces that he put in his boots after the killings, and his knowledge of the significance of the latter act in the skinhead culture. (AOB 81-100.) He also asserts these evidentiary rulings violated his constitutional right to free speech and association. (AOB 100-105.) Young is wrong. The trial court was within the bounds of reason to admit evidence of two of Young's countless tattoos because a key witness relied upon them to identify him. It was also within the bounds of reason to admit evidence that Young put red laces in his boots shortly after the murders because in the skinhead culture, that act meant he had "drawn ... blood." (XXIX RT 2482.) And the court admitted only minimal evidence of Young's skinhead associations to explain the significance of the red laces and Young's close relationship to the other

robbers, and thereby establish an element of the crime, which did not impinge upon Young's First Amendment rights.

### A. The Trial Court Ruled the Evidence Admissible

Young moved *in limine* to exclude any reference to his tattoos and his "affiliation/membership with any white supremacy organization...." (I CT 151-154.) He argued the evidence was "irrelevant," and to the extent it was relevant, its probative value was outweighed by its "highly inflammatory impact." (I CT 153.) He also summarily asserted that it "would debilitate [his] fair trial rights." (I CT 153.) The People responded that certain of his tattoos were relevant to prove his identity as one of the killers; the red laces were relevant as an admission of guilt; and limited evidence of his skinhead beliefs was relevant to explain the admission. (I CT 268.)

At the hearing on the motion, the court stated it was inclined to exclude evidence of Young's white supremacist beliefs because they were irrelevant to the charged crimes. (IV RT 699-700.) The prosecutor responded that the People intended to offer evidence that Young put red laces in his boots immediately after the killings, an act tantamount to an admission of guilt for someone who "ascribes [sic] to [Young's] beliefs." (IV RT 705.) She pointed out that some evidence of Young's "white supremacy beliefs" would be necessary to explain the significance of the red laces. (IV RT 705.) The court remarked that its "gut reaction" was to exclude any such evidence because it appeared to present a "tremendous" problem under Evidence Code section 352. (IV RT 706.) The court also said, however, that it was willing to revisit the issue depending on "what the defense presents at trial." (IV RT 706.) Then it clarified that it was not actually ruling on the matter of the red laces, but would do so "closer to trial and as [both parties] develop[ed] [their] case[s] in chief ...." (IV RT 706.)

Regarding Young's tattoos, the court noted that Young had "a number" of them, and ruled them "not relevant unless they go to the issue of identification." (IV RT 701.) Turning specifically to the tattoos identified in the People's opposition, the Thor's hammer and the phrase "Nigger Thrasher," the court pointed out that Paula Daleo had identified Young by those precise tattoos. (IV RT 700.) While the latter tattoo was "offensive," that was "not enough" to outweigh its strong relevance to establish identity due to its uniqueness. (IV RT 700-701.)

Defense counsel complained that "other witnesses" could identify Young without the tattoos. (IV RT 702.) The court pointed out that the People were entitled to use the tattoos to strengthen Daleo's identification of Young as one of the men at the party in June 2000 who discussed his own involvement in the robbery-murders. (IV RT 702; XXVIII RT 2390-2393, 2395, 2438.) The court offered defense counsel the option of stipulating that Young had the tattoos. (IV RT 700.) Counsel did not accept this offer but suggested she might stipulate "that [Young] has certain tattoos which the witnesses [sic] have recognized, ... without specification of the tattoos and without showing them to the jury." (IV RT 703-704.) The court responded that the defense was welcome to suggest any stipulation to the People, and so long as the parties were in agreement, the court would entertain it. (IV RT 704.) However, the record does not show that defense counsel ever offered such a stipulation.

### B. The People Elicited Only Minimal Testimony About Skinheads to Show the Nexus Between Torkelson, Raynoha, and Young; Defense Counsel Elicited Evidence About the Red Laces

At trial, before Daleo had provided any skinhead testimony, the prosecutor asked the court for "clarification" of its ruling, and whether she could introduce evidence of Young and Torkelson's "connection through

the skinhead group." (XXVIII RT 2357.) The court said that while it would permit testimony that Daleo saw the men together at a generic "meeting," it "[did not] see the relevance of ... the skinhead culture ...." (XXVIII RT 2358.) Defense counsel responded, "[D]epends on what she goes into." (XXVIII RT 2358.) He noted that if Daleo were to mention the red laces, the defense would have to "deal[] with how she knows about that ...." (XXVIII RT 2358.) The prosecutor responded that she did not intend to elicit any testimony about the red laces, although that evidence "may become relevant later." (XXVIII RT 2358.)

The court remarked that the laces were "likely to become relevant in a number of ways." (XXVIII RT 2359.) It then said, "I believe we had already resolved [] that was going to come in." (XXVIII RT 2359.) The court also noted that Young's "alleged status as a skinhead ... may become pertinent" were Young to suggest that his statements to Getscher had been mere posturing. (XXVIII RT 2359.)

In a reversal of his previous position, defense counsel then moved for permission to elicit testimony about the red laces himself. (XXVIII RT 2359.) He felt that, as a matter of strategy given the court's ruling on the tattoos, it would be better to question Daleo on the subject to "find out exactly what her particular biases are, how she knew this particular group." (XXVIII RT 2359.) The court granted the motion. (XXVIII RT 2360.)

The prosecutor did not ask Daleo about the red laces. She also did not ask about skinhead beliefs until Daleo volunteered that she noticed the long hair of one of the men who came to her house with Young and Torkelson shortly before the murders because he "didn't look like a skinhead ...." (XXVIII RT 2367.) Thereafter, the testimony the prosecutor elicited on skinheads was limited to the following exchange:

> PROSECUTOR: How did you know that [Torkelson] was a skinhead?

DALEO: He had told me - stated he was.

PROSECUTOR: How did you know that [Young] was a skinhead?

DALEO: He stated he was.

...

PROSECUTOR: The group of people - let me ask you this: Did James Torkelson actually have a circle of friends that were skinheads?

DALEO: Yes.

PROSECUTOR: Did they associate together in certain ways to kind of practice their being skinheads?

DALEO: Yes.

PROSECUTOR: Tell us about that.

DALEO: [Torkelson] was involved in several groups that would talk about activism for the white power movement; rallying things together, sometimes political; getting involved to make a difference for the movement.

PROSECUTOR: Did you ever attend any of these meetings with [Torkelson]?

DALEO: Yes.

PROSECUTOR: Was [Young] present at the meetings?

DALEO: Yes.

PROSECUTOR: Was [Raynoha] present at the meetings?

DALEO: Yes.

PROSECUTOR: How often did those meetings take place?

DALEO: It varied. Sometimes every other weekend. Sometimes once a month. It varied.

(XXVIII RT 2368-2369.)

On cross-examination, however, defense counsel brought up the red laces over the prosecutor's objection. (XXVIII RT 2444.) He suggested to

Daleo that she had been wearing red laces herself the night of the party at which Young had admitted his involvement in the robbery-murders. (XXVIII RT 2446.) When Daleo denied this, he got her to admit that both she and other skinheads occasionally wore red laces for fashion and not to declare an act of violence. (XXVIII RT 2447.)

Accordingly, on re-direct, the prosecutor asked Daleo, "In and among the group of skinheads that [Young] was associated with, did red laces oftentimes have a specific meaning?" (XXVIII RT 2449.) Daleo responded that it could mean "hav[ing] shed blood for the cause[.]" (XXVIII RT 2449.) The prosecutor asked, "Was there such a thing known as earning your laces?" (XXVIII RT 2449.) Daleo explained that the practice varied from group to group, but "basically ... [it was] an initiation[]" that involved "spill[ing] the blood of an enemy." (XXVIII RT 2449.)

Later, the prosecutor also asked Jason Getscher what it meant among skinheads to "earn your laces." (XXIX RT 2482.) Getscher responded, "Red laces would indicate that you have drawn the blood of an enemy. I guess a proud standing in the skinhead culture." (XXIX RT 2482.) Getscher also said Young bought red laces to put in his boots on the way back from San Diego just after the robbery. (XXIX RT 2483-2484.)

### C. The Trial Court Was Within Its Discretion to Admit the Evidence

#### 1. The court properly admitted the two tattoos upon which Paula Daleo relied to identify Young

"'[E]xcept as otherwise provided by statute, all relevant evidence is admissible[.] (Evid. Code, § 351; see also Cal. Const., art. I, § 28, subd. (d).)" (*People v. Bivert* (2011) 52 Cal.4th 96, 116, quoting *People v. Crittenden* (1994) 9 Cal.4th 83, 132.) Relevant evidence is that which

tends to prove or disprove any disputed fact that could affect the outcome of the trial. (*Bivert, supra*, at p. 116, citing Evid. Code, § 210.) Identity is just such a material disputed fact. (*Bivert*, at pp. 116-117, citing *People v. Garceau* (1993) 6 Cal.4th 140, 177.)

Young placed all material issues in dispute by pleading not guilty. (*People v. Bivert, supra*, 52 Cal.4th at p. 117, citing *People v. Roldan* (2005) 35 Cal.4th 646, 705-706.) Evidence that Young had two unique tattoos that Paula Daleo identified to police as those borne by the man she knew only as "Lil' Jeff," who came to her house with Torkelson and Raynoha just before the crimes charged in this case took place, and who, at a party in June 2000 admitted that Torkelson planned the robbery that Young, Torkelson, and Raynoha then committed, was relevant in the guilt phase of the trial. This evidence tended to prove Young's identity as one of the men who participated in the robbery of Five Star Park and murder of Teresa Perez and Jack Reynolds.

Tattoos—even unsavory ones—are admissible to prove identity. (See, e.g., *People v. Valdez* (2012) 55 Cal.4th 82, 130-131.) "That this evidence also revealed [Young] to be a racist did not render it inadmissible." (*People v. Bivert, supra*, 52 Cal.4th at p. 117.) Young argues otherwise, citing *Dawson v. Delaware* (1992) 503 U.S. 159 [112 S.Ct. 1093, 117 L.Ed.2d 309].)[10] But in that case, the evidence of defendant's racist beliefs consisted of nothing but a stipulation that the

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[10] Young failed to object to any of the challenged evidence on the ground that it violated his First Amendment rights. Therefore, the claim is forfeit and this Court should not entertain it. (*People v. Fuiava* (2012) 53 Cal.4th 622, 689; *People v. Gutierrez* (2009) 45 Cal.4th 789, 809.) Should this Court choose to address it on the merits, respondent respectfully requests this Court state its forfeiture ruling on the record so the Court's holding will withstand collateral attack in a petition for writ of habeas corpus.

prison gang to which the defendant belonged was "white racist," and proved nothing but that he held those beliefs, which were protected by the First Amendment. (See *Dawson v. Delaware*, *supra*, 503 U.S. at pp. 162, 165-168; *Bivert*, *supra*, at p. 117.)

Here, on the other hand, the two tattoos the court admitted tended to prove more than Young's associations and abstract beliefs; they tended to prove that Young was the man who hung out with the other robbers shortly before the crimes, and who later talked about having participated in the robberies and murders. "[T]he Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations ... simply because [they] are protected by the First Amendment." (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 165.) As this Court has explained, "[T]he First Amendment does not prohibit evidentiary use of a defendant's protected expression to prove the elements of a crime." (*People v. Lindberg* (2008) 45 Cal.4th 1, 39, citing *Wisconsin v. Mitchell* (1993) 508 U.S. 476 [113 S.Ct. 2194, 124 L.Ed.2d 436].) Since Young's Thor's Hammer and "Nigger Thrasher" tattoos were relevant to disputed issues, they were not made inadmissible simply because they happened to be protected by the First Amendment for certain purposes. (See *People v. Bivert*, *supra*, 52 Cal.4th at p. 118.)

"[T]he weighing of probative, though possibly cumulative, evidence against its potentially prejudicial nature is a matter entrusted to the sound discretion of the trial court." (*People v. Medina* (1995) 11 Cal.4th 694, 749.) A court does not abuse its discretion—and this Court will not reverse a trial court's ruling—unless it is "arbitrary, capricious, or patently absurd." (*People v. Hovarter* (2008) 44 Cal.4th 983, 1004.) Here, the trial court expressly weighed the potential for improper prejudice from the offensive nature of the "Nigger Thrasher" tattoo against its strong relevance to establish identity, and found that its probative value carried the day.

(IV RT 700-701.) Such conscious reasoning cannot be called arbitrary or capricious. Therefore, the court acted within its discretion to admit the tattoos.[11]

Young complains that the trial court should have limited the tattoos the jury saw. (AOB 86-87, 90.) He appears to have overlooked the fact that the court did precisely that. Young's body was covered with tattoos, the vast majority of which were far more overtly racist in nature, and included the symbols and pictures of those who advocated genocide as a means of ridding the world of non-white people.[12] (LXIX RT 7631-7658.) The court admitted none of those tattoos in the guilt phase, expressly limiting its ruling to the two tattoos upon which Daleo relied to identify Young.

Young also complains that the court should have sanitized the tattoos. Again, he appears to have forgotten that the court offered him just that. The court suggested Young stipulate to the tattoos, and then expressed its willingness to entertain a stipulation that avoided reference to the language of the "Nigger Thrasher" tattoo, but defense counsel never pursued the

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[11] Nor did this proper exercise of discretion abridge Young's rights to due process or a fair trial (see AOB 92). Application of ordinary rules of evidence generally does not infringe on an accused constitutional rights. (*People v. Rodriguez* (1999) 20 Cal.4th 1, 10, fn. 2) Moreover, "the mere erroneous exercise of discretion under such 'normal' rules does not implicate the federal Constitution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

[12] Respondent takes exception to Young's claim that "[t]he tattoos in [*People v.*] *Medina* were nowhere near as prejudicial as the 'Nigger Thrasher' tattoo ...." (AOB 90, citing *People v. Medina*, *supra*, 11 Cal.4th 694.) The Medina defendant had a tattoo of a swastika, the symbol of a man and movement that advocated and practiced the mass murder of innocent men, women and children in the name of race-cleansing. Such a tattoo is as least as disturbing—if not more so—than the tattoos at issue here, yet the Medina court ruled it admissible in the penalty phase. (See *Medina*, *supra*, at pp. 749-750.)

point. Where the defendant has the opportunity to request sanitization of evidence, but fails to do so, he forfeits the complaint for appeal. (See *People v. Green* (1995) 34 Cal.App.4th 165, 182 fn. 9; *People v. Seijas* (2005) 36 Cal.4th 291, 301-302.)

### 2. The trial court was within its discretion to allow the prosecutor to introduce evidence of the meaning of the red laces after defense counsel elicited testimony that they were merely a fashion statement

The same reasoning that applies to the tattoos applies to the red laces. "[T]he First Amendment does not prohibit evidentiary use of a defendant's protected expression to prove the elements of a crime." (*People v. Lindberg*, *supra*, 45 Cal.4th at p. 39, citing *Wisconsin v. Mitchell*, *supra*, 508 U.S. at p. 489.) The red laces were an acknowledgment of guilt and therefore admissible, notwithstanding the fact that they brought into play Young's constitutionally protected beliefs in white supremacy.

The situation here is very similar to that in *People v. Ochoa* (2001) 26 Cal.4th 398, abrogated on another ground as noted in *People v. Prieto* (2003) 30 Cal.4th 226, 263 footnote 14. In *Ochoa*, the defendant was not charged with a gang-related crime, nor were there any gang allegations (*Ochoa*, *supra*, at pp. 415-416), yet the court admitted over defense objection a tattoo of the number "187" that defendant got shortly after the murders, as well as expert testimony that in the gang culture to which defendant belonged, the tattoo referred to the Penal Code section proscribing murder. (*Id.* at p. 437.) The trial court reasoned that the jury could conclude that the tattoo was "a badge of honor" and therefore an admission of guilt to the murders. (*Id.* at p. 437.) This Court held that the trial court "properly found the tattoo represented an admission of defendant's conduct and a manifestation of his consciousness of guilt."

(*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438.) Thus, the evidence was admissible under Evidence Code section 352 notwithstanding its potential emotional impact in a non-gang case. (*Ibid.*)

Similarly, here, although Young was not charged with a hate crime, Young bought and put red laces in his boots immediately after the murder of Perez, a Latina woman. Wearing red laces in his boots, in the skinhead subculture, could be a declaration of having shed the blood of a non-white person. As this Court has explained,

> Expressions of racial animus by a defendant towards ... the victim's race, like any other expression of enmity by an accused murderer towards the victim, is relevant evidence in a murder or murder conspiracy case. Among other things, it is evidence of the defendant's prior attitude toward the victim, a relevant factor in deciding whether the murder was deliberate and premeditated because it goes to the defendant's motive.

(*People v. Quartermain* (1997) 16 Cal.4th 600, 628.) As in *Ochoa*, the jury reasonably could conclude that Young considered the laces a badge of honor, and the fact that he wore them an admission of his participation in Perez's murder and a manifestation of his knowledge of his guilt. Accordingly, the trial court's decision to admit the evidence was not "arbitrary, capricious, or patently absurd," but a proper exercise of its discretion. (See *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438, citing, *inter alia*, Evid. Code § 352.)

It is worth nothing that it was not the People, but Young himself, who introduced this evidence. Only after defense counsel had suggested that red laces are mere fashion items among skinheads did the prosecutor on re-direct ask Daleo about the significance of the red laces in Young's subset of skinheads. She asked only two questions on this topic and did not go into any details about skinhead beliefs. Such precise and limited inquiry into a discrete area does not render a trial unfair. (See *People v. Bivert*, *supra*, 52 Cal.4th at p. 118.)

Nor did this evidence run afoul of *Dawson*. (*Dawson v. Delaware*, *supra*, 503 U.S. 159.) As with the tattoos, the red laces and their significance in the skinhead subculture tended to prove more than Young's "abstract beliefs"; they tended to establish his role as an active participant in the murder of Teresa Perez. Accordingly, the evidence was not inadmissible merely because Young is entitled under the First Amendment to believe that white people are superior. (See *People v. Bivert*, *supra*, 52 Cal.4th at p. 118, citing *Dawson v. Delaware*, *supra*, 503 U.S. at p. 165.)

### 3. The trial court admitted only minimal evidence of Young's association with skinheads to show he knew what the red laces meant, and to show that he closely associated with the other robbers

Young asserts that the evidence of his "white supremacy beliefs" was "so inflammatory" that it "smoothed over every deficiency in the prosecution's case" and deprived him of due process. (AOB 81, 105.) This assertion does not square with the record. The admission of inflammatory evidence violates due process only when it is so prejudicial that it renders the trial fundamentally unfair. (*People v. Bivert*, *supra*, 52 Cal.4th at p. 118, quoting *People v. Harris* (2005) 37 Cal.4th 310, 351.) The record shows that the sum total of the People's evidence of Young's participation in the skinhead subculture was a roughly ten-question exchange between the prosecutor and Daleo about whether Young, Torkelson, and Raynoha were "skinheads," and whether they saw each other regularly at meetings for that group; a few questions on re-direct about the meaning of red laces "[i]n and among the group of skinheads that [Young] was associated with"; and Getscher's explanation of the meaning of red laces to himself and other skinheads. (XXVIII RT 2368-2369, 2449; XXIX RT 2482-2484.) This evidence revealed Young's regular association with the other robbers,

Torkelson and Raynoha, and his awareness of the significance of the red laces as a badge of honor. It was brief and relatively mild in nature, was limited to one aspect of the skinhead tenets, and did not include "general White supremacist rhetoric." (See *Bivert*, *supra*, 52 Cal.4th at p. 118.) Although it may have been "disturbing" to the jury that skinheads take pride in "shedding the blood" of non-white people, the evidence "was not so inflammatory as to divert the jury's attention or invite an irrational response." (See *id.* at p. 118, citing *People v. Harris*, *supra*, 37 Cal.4th at p. 310.)

### D. Admission of This Evidence Was Harmless In Light of the Overwhelming Evidence of Young's Guilt

Even had the court erred in admitting this evidence, the error would be harmless under any standard. As set forth in Part I.E, *supra*, the evidence that Young deliberately shot and killed Teresa Perez to prevent her bearing witness to the robbery he and his friends planned and executed, was overwhelming. Young's assertion that but for the evidence that he was a skinhead who put red laces in his boots, the jury would have taken his admissions to Getscher for mere braggadocio is incredible; given the humiliating content of those statements, no reasonable juror would believe such an assertion. Accordingly, any error was harmless.

## III. THE PROSECUTOR'S REMARK THAT SHE WAS CERTAIN THE VICTIMS FELT FEAR DID NOT CONSTITUTE PREJUDICIAL PROSECUTORIAL MISCONDUCT

In argument III, Young contends the prosecutor committed misconduct by a single remark during her closing argument. (AOB 106-113.) Young is wrong. Viewed in context, the prosecutor's remark, "Teresa Perez and Jack Reynolds were ... I'm certain, very fearful[,]" was

meant merely to emphasize the obvious and inevitable conclusion any reasonable person would draw from the evidence. While the prosecutor should have avoided speaking in the first person, such a minor misstep does not rise to the level of misconduct.

This Court will uphold a trial court's ruling on alleged prosecutorial misconduct unless the lower court's ruling fell outside the bounds of reason. (*People v. Alvarez* (1996) 14 Cal.4th 155, 213; *People v. Ochoa* (1998) 19 Cal.4th 353, 408.) By federal standards, a prosecutor commits reversible misconduct only when she uses "'deceptive or reprehensible methods to persuade the jury ... [that] infect the trial with such unfairness as to make the resulting conviction a denial of due process.'"'" (*People v. Parson* (2008) 44 Cal.4th 332, 359, quoting *Darden v. Wainwright* (1986) 477 U.S. 168, 181 [106 S.Ct. 2464, 91 L.Ed.2d 144]; *People v. Tully* (2012) 54 Cal.4th 952, 1009-1010.) State law considers deceptive and reprehensible methods misconduct even when they do not result in a fundamentally unfair trial. (*Parson*, *supra*, at p. 359, quoting *People v. Earp* (1999) 20 Cal.4th 826, 858; *Tully*, *supra*, at p. 1010.) Under either standard, the trial court was within the bounds of reason in finding that the prosecutor did not commit misconduct here.

"[T]he prosecutor has a wide-ranging right to discuss the case in closing argument. [Sh]e has the right to fully state [her] views as to what the evidence shows and to urge whatever conclusions [s]he deems proper." (*People v. Lewis* (1990) 50 Cal.3d 262, 283; *People v. Ledesma* (2006) 39 Cal.4th 641, 726.) Here, the evidence showed that the victims were made to lie face-down on the ground and place their hands above their heads before their executioners shot each of them repeatedly in the head, splattering the room with blood and brain matter. (XXV RT 1822, 1827; XXVI RT 1910-1912, 1921, 1932, 1959, 1978-1979; XXVII RT 2069; XXVIII RT 2310.) Any human being placed in those circumstances would

be terrified. The prosecutor's remark to that effect was nothing more than a fair comment on the evidence.

"[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through a lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations." (*Donnelly v. DeChristoforo* (1974) 416 U.S. 637, 647 [94 S.Ct. 1868, 40 L.Ed.2d 431].) Thus, when defense counsel objected to the remark as "vouching," while the court noted that ideally "the word "I" [should not be used] in a closing argument, ever[,]" it nonetheless found that the prosecutor's use of the first-person pronoun "wasn't in terms of vouching." (XXXII RT 2906-2907.) Rather, her argument simply reflected "what she believed the [evidence showed]." (XXXII RT 2906.) Therefore, the court found no misconduct. (XXXII RT 2907.) There was nothing unreasonable about that finding, and this Court must uphold it.

Young insists, however, that the trial court should have read damaging meaning into the prosecutor's use of the first person because the prosecutor already had repeatedly committed misconduct by "play[ing] on [the jurors'] emotions throughout the trial." (AOB 110-112.) He cites as examples of this misconduct when the prosecutor asked Detective Hill if this was one of the more difficult crime scenes of her career, and when she asked some witnesses what they were thinking when they witnessed certain events and what the victims were like. (AOB 110-112.) Young failed to object to any of these questions as misconduct below.

A defendant must object to the offending conduct on the ground of prosecutorial misconduct; an objection on another ground does not preserve the issue for appeal because it deprives the People of an opportunity to respond, deprives the trial court of the opportunity to cure any harm, and deprives this Court of a developed record for review. (*People v. Nelson*

(2011) 51 Cal.4th 198, 223.) Here, Young merely objected to some of the prosecutor's questions as irrelevant, and did not object at all to the questions of Detective Hill. (XXVII RT 2224.) Moreover, Young did not request an admonition. A defendant generally "'"may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.]"' [Citation.]" (*People v. Fuiava* (2012) 53 Cal.4th 622, 679-680, quoting *People v. Riggs* (2009) 44 Cal.4th 248, 298.) Accordingly, appellant forfeited objection to these questions as misconduct, and this Court should not consider his argument. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1010, fn. 25 [failure to object to alleged repeated instances of prosecutorial misconduct on that ground forfeits the complaint]; *People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

At any rate, the questions to which Young objects did not rise to the level of misconduct. Those asked of Detective Hill came after that experienced law enforcement officer apparently became choked up while testifying about the murder scene. (XXVI RT 1910-1911.) The record shows that the detective spontaneously said, "I don't want to cry," and then asked for a moment to collect herself. (XXVI RT 1911.) The prosecutor briefly ceased examination. (XXVI RT 1911.) When she resumed questioning, she segued into it by asking the detective briefly about her reaction, and then moved immediately onto additional questions about the crime scene. (XXVI RT 1911.) There was nothing deceptive or reprehensible about this. It was a reasonable approach to the type of human response that sometimes occurs even in veteran law enforcement personnel when confronted with a crime scene of this kind. (XXVI RT 1911.)

Turning to questions about the victims' personalities or witnesses' thoughts: while this evidence may not have been necessary to the jury's

resolution of the issue of guilt, it was brief and limited in scope (see AOB 112, fns. 73 & 74), and utterly unlikely to hoodwink or inflame the jury into convicting an innocent man. (See *People v. Pearson* (2013) 56 Cal.4th 393, 441-442 ["prosecutor's fleeting appeal to the jury's sympathy for the victims" harmless].)

But even had the trial court erred in finding no misconduct, "'[a] defendant's conviction will not be reversed for prosecutorial misconduct, ... unless it is reasonably probable that a result more favorable to the defendant would have been reached without the misconduct.'" (*People v. Tully*, *supra*, 54 Cal.4th at p. 1010, quoting *People v. Crew* (2003) 31 Cal.4th 822, 839 [internal citations omitted].) Here, there is no reasonable probability the jury would have let Young off more lightly had the prosecutor not used the first-person pronoun when arguing the victims' terror because, as set forth in Part I.E *supra*, the evidence that Young murdered two innocent people in cold blood was overwhelming and there is no reasonable probability of a more favorable result merely had the prosecutor not used the word "I" when she argued that Perez and Reynolds suffered fear before being executed. Additionally, the mistake, if any, was fleeting and therefore was harmless. (*People v. Young* (2005) 34 Cal.4th 1149, 1189-1190, citing *People v. Kipp* (2001) 26 Cal.4th 1100, 1130 [prosecutor's comment was harmless because it was brief, not repeated, and did not contribute to other errors].) Furthermore, any error did not so infect the trial with unfairness as to make the resulting conviction a denial of due process. (*Darden v. Wainwright*, *supra*, 477 U.S. at p. 181.) Accordingly, even had this constituted misconduct, it would not be reversible error.

## IV. THE TRIAL COURT REASONABLY USED A MINIMAL, HIDDEN RESTRAINT AS A SECURITY MEASURE BECAUSE YOUNG REPEATEDLY MADE AND CONCEALED DEADLY WEAPONS AND NEARLY KILLED A MAN WHILE IN CUSTODY

In argument IV, Young contends the trial court violated his rights to due process, a fair trial, and a reliable sentence by "shackling" him in the courtroom. (AOB 113-121, citing U.S. Const., VI, VIII, XIV Amends.) Young is wrong. The trial court reasonably used the minimum restraint possible as a security measure against a defendant who was obstreperous and violent while in custody. (XIII RT 830.) Moreover, the court took steps to make the restraint invisible to the jurors, and there is no evidence the jurors saw it. Finally, the court admonished the jury that it was not to consider the restraint in any way.

"[A] criminal defendant may be subjected to physical restraints in the jury's presence upon 'a showing of a manifest need for such restraints.'" (P*eople v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1031.) The need for restraints may be shown by the defendant's violent record, violent or threatening behavior while in custody, or "'other nonconforming conduct.'" (*People v. Hawkins* (1995) 10 Cal.4th 920, 944, overruled on other grounds in *People v. Lasko* (2000) 23 Cal.4th 101, 110.) The manifest need "requirement is satisfied by evidence that the defendant has threatened jail deputies, possessed weapons in custody, [or] threatened or assaulted other inmates ...." (*People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1031.) The trial court need not hold an evidentiary hearing; the court may simply rely on any "factual information properly brought to its attention." (*People v. Medina*, *supra*, 11 Cal.4th at p. 731.) This Court reviews a trial court's decision to impose restraints only for manifest abuse of discretion. (*Id.* at 731.) An abuse of discretion means the court's decision was arbitrary, capricious, or patently absurd. (*People v. Gutierrez* (2009) 45 Cal.4th 789, 828.)

There was nothing absurd or arbitrary about the court's decision to restrain Young. While in jail awaiting trial in this matter, Young was caught with improvised stabbing weapons—several of which were made of steel and almost a foot long—on multiple occasions. (LXII RT 6753-6756, 6858-6865, 6868, 6871-6873.) He was one of only a handful of inmates required to wear special green clothing to indicate that he required closer supervision and that, per Sheriff's Department policy, he was to be accompanied by two deputies and placed in restraints at all times during any movement to or from jail. (LXII RT 6725, 6747, 6749, 6753; LXIII RT 6847-6848; LXVII RT 7369; LXVIII RT 7524; LXIX RT 7683, 7688, 7690; LXXI RT 7827.) He was so disruptive in the custodial setting that he was placed repeatedly in administrative segregation. (LXVII RT 7283.) He participated in—indeed, the evidence suggests he actually ordered—the brutal beating and near-fatal stabbing of a fellow inmate. (LXII RT 6724-6726, 6728-6730, 6733, 6735, 6739-6740, 6746-6747, 6749-6750, 6753.) All of this took place while he was under the supervision of Sheriff's deputies.

Thus, when the trial court denied Young's motion that Young be unrestrained notwithstanding the People's concession, the court explained that it "vehemently" disagreed with the notion that Young did not need to be restrained, and expressly found that Young "posed a security threat." (II CT 459-467, 475-476; XIII RT 830-831.) The court noted Young's "numerous problems while in custody" that involved threats and weapons. (XIII RT 831.) It pointed out that the only security personnel in the courtroom were the Sheriff's deputies, the very same law enforcement officers with whom Young and his then-co-defendant were "generally hav[ing] problems in custody." (XIII RT 831.) In other words, the court based its decision on the fact that Young possessed weapons in custody, threatened and assaulted other inmates, and did not obey the commands of

the deputies. (See XIII RT 833.) These were valid reasons for deciding to restrain Young. (See *People v. Lewis & Oliver*, *supra*, 39 Cal.4th at p. 1031.)

But even had the court acted irrationally in restraining a violent and frequently armed defendant, the error would be harmless. Unjustified shackling is harmless when there is no evidence the jury saw the restraints. (*People v. Tuilaepa* (1992) 4 Cal.4th 569, 583-584.) Likewise, error in the use of restraints is harmless if there is no evidence the shackles impaired or prejudiced the defendant's right to testify or participate in his or her defense. (*People v. Wallace* (2008) 44 Cal.4th 1032, 1051; *People v. Anderson* (2001) 25 Cal.4th 543, 596.) Here, the court noted that the only restraint on Young would be a leg restraint attached to the floor. (XIII RT 830.) Young's hands would be free, and he would also be able to sit, stand, and stretch without impediment. (XIII RT 830.) The counsel table was draped so as to obscure any view of the restraint, and the courtroom deputy had arranged the restraint to prevent any noise with movement. (XIII RT 830.) Young points to no evidence—and respondent can find none—that the jury saw the restraint, or that it in any way interfered with the defense.[13]

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[13] Young suggests the court's decision to use a leg restraint "coerced" him into waiving his presence for jury selection. (AOB 120-122.) Not so. Because of the large jury pool needed for a capital case, the non-substantive portion of jury selection—handing out questionnaires and excluding jurors for hardship—had to be conducted in the jury lounge instead of the courtroom. (XVII RT 981.) The court noted that because the lounge was a "hugely public area with numerous exits," and given Young's and then-co-defendant Raynoha's "problems ... in custody," the Sheriff's Department was likely to assign "tons of marshalls [sic]" to the lounge. (XVIII RT 981.) The court also noted that it would not be able to hide the leg restraint in the jury lounge. (XVIII RT 980-981.) The court was concerned this could create a negative impression in juror's minds. (XVIII RT 980-981.) Accordingly, the court told defense counsel she "might want to talk to" Young about waiving his presence at that limited

(continued...)

Young has the burden of showing error by an adequate record. (*People v. Contreras* (2009) 177 Cal.App.4th 1296, 1301; *People v. Akins* (2005) 128 Cal.App.4th 1376, 1385.) The reviewing court "cannot assume from a silent record that the jury viewed defendant's restraints." (*People v. Medina, supra*, 11 Cal.4th at p. 732.) Accordingly, even had the court erred in restraining Young, the error would be harmless.

Finally, even had a juror seen the restraint, the court instructed the jury that it was not to consider the restraint "for any purpose"; that it was not to speculate about the reasons for the restraint, and in fact that it was to "disregard the matter entirely." (VI CT 1416 [CALJIC No. 1.04 Defendant Physically Restrained—Cautionary Instruction].) This Court must presume the jurors followed that admonition. (*People v. Davenport* (1995) 11 Cal.4th 1171, 1210.)

Apparently anticipating this argument, Young asserts that the instruction itself was error because it informed the jury that he was shackled. (AOB 119.) The problem with this argument is that it was Young's counsel who requested the instruction. (XXXI RT 2775.) "Where an improper instruction was given at the request of the complaining party, ... he cannot complain of the invited error." (7 Witkin, Cal. Procedure (4th ed. 1997) Trial, § 327, p. 371; see *People v. Wickersham* (1982)

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(...continued)
portion of jury selection. (XVIII RT 981.) The court emphasized, however, that it would "adhere to [Young's] wishes" and furthermore would presume that Young would be present unless the court heard otherwise from Young personally. (XVIII RT 981-982.) Two weeks later, Young personally stated his desire to waive his presence at the proceedings conducted in the jury lounge. (XIX RT 1010-1011.) The court confirmed that Young would be present when actual jury selection began and the first 35 potential jurors were brought to the courtroom for voir dire. (XIX RT 1011.) There is nothing in the record to suggest Young absented himself from those proceedings.

32 Cal.3d 307, 330, disapproved on another ground in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.) The court stated it was not going to give the instruction because there was nothing to suggest the jurors were aware of the restraint. (XXXI RT 2775.) But one of Young's attorney's countered that Young had told him "some of the jurors" saw Young "when he was brought up one day." (XXXI RT 2775.) The court therefore agreed to give the instruction out of an "abundance of caution." (XXXI RT 2775.) Thus, the instruction was only given because Young requested it, and he cannot now fault the court for having done as he asked.

## V. THE TRIAL COURT ACTED WITHIN ITS DISCRETION IN EXCLUDING SPECULATIVE THIRD-PARTY GUILT EVIDENCE

In argument V, Young contends the trial court erred by excluding evidence of "third-party culpability," namely, that victim Jack Reynolds had been convicted of robbery some twenty-five years before the robbery-murders in this case, had a tattoo similar to one of Young's tattoos, and had promised his mother a trip that was beyond his means. (AOB 122-128.) Young asserts that such evidence was "relevant to the possibility" that Reynolds, who was shot execution-style while his hands were raised above his head in surrender, was a willing participant in the crimes in this case. (AOB 122-128.) Young is wrong. The evidence he offered was improper character evidence and entirely speculative, and the trial court acted within its discretion to exclude it.

### A. The Court Was Within the Bounds of Reason to Exclude Evidence of Reynolds's Prior Convictions as Irrelevant and as Improper Character Evidence

Young first says the trial court summarily denied his "request" to admit third-party culpability evidence early in the pre-trial proceedings.

(AOB 122, citing XIII RT 809.) Not so; he made no such request at the hearing he cites. That hearing on August 8, 2005, was on the People's motion to exclude evidence of Reynolds's roughly quarter-century-old convictions (1980, 1976, and 1974) as irrelevant and as improper character evidence, and purported racist beliefs on those grounds as well as on the ground that they were purely speculative. (III CT 553; XIII RT 804.)

Young orally opposed the motion on the grounds that the convictions were relevant to prove the crime was an "inside job" in which Reynolds participated. (XIII RT 805.) He cited Reynolds's Thor's hammer tattoo and purported racist beliefs, as well as his supposed statement to family members that he would soon have money as further proof of Reynolds's complicity. (XIII RT 805-807.) He then argued that the crimes Reynolds committed were "very similar" to the crimes in this case because they comprised "going in and holding down a husband and wife or man-and-woman team ...." (XIII RT 808.) The court rejected Young's argument and granted the People's motion.

Evidence of a victim's character—including past misdeeds—is inadmissible to prove his conduct on a specific occasion. (Evid. Code, § 1101, subd. (a); *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 827.) Evidence Code section 1103, subdivision (a)(1), provides an exception to Evidence Code section 1101, subdivision (a), when a defendant offers evidence regarding the character or trait of a victim "to prove conduct of the victim in conformity with the character or trait of character." (*Gutierrez*, *supra*, at p. 827.) Of course, the trial court may exclude otherwise admissible evidence pursuant to Evidence Code section 352 if admitting the evidence would have confused the issues at trial, unduly consumed time, or been more prejudicial than probative. (*Id.*, at p. 828; see *People v. Wright* (1985) 39 Cal.3d 576, 587-588.) A trial court's exercise of its discretion to exclude this type of evidence will not be disturbed on

appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (*Gutierrez*, *supra*, at p. 828.)

Accordingly, the trial court acted within its discretion in granting the People's motion to exclude evidence that Reynolds had been convicted of felonies several decades before he was murdered. (See *People v. Gutierrez*, *supra*, 45 Cal.4th at p. 828.) While it is true a victim's past violent behavior can be admitted for the special purpose of showing that he precipitated the violence when the defendant raises a claim of self defense (see Evid.Code, § 1103, subd. (a)), Young did not make that argument at the hearing. This is not surprising, since the trial court would surely have rejected it, given the total absence of evidence that Reynolds was the aggressor. On the contrary, the uncontested evidence showed that the unarmed Reynolds was executed while his hands were raised above his head in surrender and while he was face-down on the ground, and there was no evidence whatsoever of a struggle. (XXVI RT 1932; XXVII RT 2021-2027, 2056-2059, 2062-2065, 2069, 2073-2074, 2076-2079, 2084-2085, 2087, 2092; XXVIII RT 2310, 2320-2329; XXX RT 2714-2718, 2725-2726.) Therefore, even had Young argued for admissibility of Reynolds's prior convictions on a self-defense theory, the court would have rejected the argument. (*People v. Gutierrez*, *supra*, 45 Cal.4th at p. 828 [where no evidence is presented that the victim posed a threat to the defendant, court will exclude exclusion evidence of victim's propensity for violence].)

### B. The Trial Court Acted Within Its Discretion to Exclude Reynolds's Prior Convictions Because They Were a Quarter of a Century Old and Connected to the Current Robbery-Murders Only by Speculation and Conjecture

At a subsequent hearing later that month, Young asked the court to "ventilate" its ruling on the People's motion because whereas the motion also sought exclusion of any reference to Reynolds's supposed racist views, the court had simply stated, "Motion to exclude the victim's criminal record is granted" (see XIII RT 809). (XV RT 870.) Young wanted to know if the exclusion applied to any evidence that the robbery "was an inside job." (XV RT 918.) The court responded that it "fail[ed] to see that the defense ... made any reasonable proffer to suggest that this was an inside job ...." (XV RT 919.) It found that the mere facts Reynolds (a) had a tattoo of Thor's hammer, and (b) was poor but had promised to send his mother to a tropical paradise, did not "even come close to suggesting" that Reynolds was a guilty third party. (XV RT 919-920, 923.) The court reiterated this finding a few months later when Young again suggested eliciting character evidence on Reynolds, remarking that it "need[ed] way more" than Young had offered to justify such third-party culpability evidence. (XXVII RT 2046-2048.)

Third-party culpability evidence is admissible only if it is capable of raising a reasonable doubt as to the defendant's guilt. (*People v. Hall* (1986) 41 Cal.3d 826, 833; see *People v. Edwards* (2013) 57 Cal.4th 658, 729.) Evidence of a third party's mere motive or opportunity to commit the crime does not raise a reasonable doubt; the proponent must offer evidence that actually links the third person to the commission of the crime. (*Ibid.*) This Court reviews a trial court's exclusion of third-party culpability evidence only for an abuse of discretion. (*People v. Lewis* (2001) 26 Cal.4th 334, 372-373.)

Here, the material Young proffered to prove that Reynolds participated in his own robbery and murder fell far below the standard. All he offered was Reynolds's supposed racism and his promise to his mother of luxuries he could not afford. It is a stretch to call this evidence of motive; it would be a leap of faith to say it links Reynolds to the actual perpetration of the robbery in which he was shot execution-style. Certainly it is not the quality of evidence that could raise a reasonable doubt in the face of the overwhelming evidence of Young's guilt of participating in the murder of two people who offered no resistance. Accordingly, the trial court did not abuse its discretion in excluding it. And since the exclusion of weak and speculative third-party culpability evidence does not infringe on a defendant's constitutional rights (*People v. Gonzales* (2012) 54 Cal.4th 1234, 1261, citing *Holmes v. South Carolina* (2006) 547 U.S. 319, 326-327 [126 S.Ct. 1727, 164 L.Ed.2d 503]), neither did the trial court's ruling violate Young's rights under the Sixth and Fourteenth Amendments to the United States Constitution.

## VI. THE NONEXISTENT OR MINIMAL ERROR IN THIS CASE CANNOT BE AGGREGATED

In argument VI, Young contends that, cumulated, the various errors he asserts in the guilt phase had a "synergistic effect" that deprived him of a fair trial. (AOB 128-129.) He is wrong. "[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*People v. Hill* (1998) 17 Cal.4th 800, 844-845, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) This is not such a case. As set forth in Arguments I through V *supra*, there was no error, and even that which might be construed as error was harmless. In other words, "no serious errors occurred that, whether viewed individually or in

combination, could possibly have affected the jury's verdict." (*People v. Martinez* (2003) 31 Cal.4th 673, 704; *People v. Valdez* (2004) 32 Cal.4th 73, 128; see *People v. Beeler* (1995) 9 Cal.4th 953, 994, abrogated on other grounds by *People v. Pearson, supra*, 56 Cal.4th at p. 462 ["If none of the claimed errors were individual errors, they cannot constitute cumulative errors that somehow affected the ... verdict"].) Accordingly, this Court should reject the claim of cumulative error.

## VII. THERE IS NO CONSTITUTIONAL INFIRMITY IN A SECOND PENALTY TRIAL WHEN THE FIRST JURY IS UNABLE TO REACH A VERDICT

In argument VII, Young contends that California's statutory scheme governing capital cases violates the Sixth, Eighth, and Fourteenth Amendments because it requires a second jury to decide penalty if the first jury deadlocks on the question. (AOB 130-146.) He points out that of the thirty-three states with a death penalty, only seven permit penalty retrial and only two require it; the other twenty-four provide for life without the possibility of parole. (AOB 131-135.) Therefore, he argues, our state is "vastly at odds with the evolving standards of decency on this issue." (AOB 132.) As Young acknowledges, this Court rejected almost the precise issue in *People v. Taylor* (2010) 48 Cal.4th 574, 633-634.

Young also complains that the jury's decision to sentence him to death was "arbitrary and capricious," (AOB 138), that retrial of the penalty phase "sends a message to the community that the individual moral judgment of each juror is not trusted or valued" in violation of the Eight Amendment (AOB 137-138), and that the prosecutor erroneously referred in her second penalty-phase closing to evidence that testimony from the guilt phase that did not come out in the second penalty phase. Young offers

no record support for his first two assertions. Regarding the latter assertion, the prosecutor did err, but the error was harmless.

### A. This Court Has Held That Retrial of the Penalty Phase Does Not Violate the Eighth Amendment

Like Young, the defendant in *Taylor* cited "other jurisdictions that mandate a sentence of life without parole if the penalty jury deadlocks," and asserted it as proof that California is "'out of step with an emerging national consensus against allowing retrial ....'" (*People v. Taylor*, *supra*, 48 Cal.4th at p. 633.) This Court noted that it already had upheld the state's death penalty scheme against a challenge that it was among a "'minority of jurisdiction worldwide that impose capital punishment.'" (*Id.*, at pp. 634, quoting *People v. Thornton* (2007) 41 Cal.4th 391, 470.) It then held that the mere fact that California was among a small minority of states that provided for penalty phase retrial "does not, in and of itself, establish a violation of the Eighth Amendment or 'evolving standards of decency ....'" (*Taylor*, *supra*, at p. 634, quoting *Trop v. Dulles* (1958) 356 U.S. 86, 101 [78 S.Ct. 590, 2 L.Ed.2d 630].)

Young claims this Court got it wrong in *Taylor* because California is only one of two states that requires retrial. (AOB 130-135.) But nothing in California's capital sentencing statute has changed since the Court decided *Taylor*. Thus, unless Young means to suggest this Court was unaware of that aspect of the statute when it decided *Taylor*, his argument is unavailing.

At any rate, Young fails to explain how mandatory, as opposed to optional, retrial results in an outcome contrary to *Taylor*. This is not surprising, since it does not change the inquiry at all. As the *Taylor* court said, "Given that the double jeopardy clause permits retrial following juror deadlock [at the penalty phase], we fail to see how subjecting defendant to

retrial of the penalty phase ... could offend the constitutional proscription against cruel and unusual punishment." (*People v. Taylor*, *supra*, 48 Cal.4th at p. 634, citing *Sattazahn v. Pennsylvania* (2003) 537 U.S. 101, 108-110 [123 S.Ct. 732, 154 L.Ed.2d 588].)

Pointing to certain victim-impact testimony, Young also suggests that retrial gave the People an unfair advantage by "allowing for ... flourishes and amplifications" that did not exist in the first penalty trial. (AOB 139-144.) Young is wrong. As in all retrials, it cuts both ways; both sides get the chance to preview the other's evidence and hear the other's argument, and to adjust their presentation accordingly the second time.

Young also complains that the second trial unfairly allowed the prosecutor to ask Perez's sister if it had been hard on the family "to go through these trials." (AOB 145, citing LXIV RT 6977-6978.) First, it is reasonable to presume the prosecutor was referring to the guilt and penalty phase trial, not to the two penalty phase trials, and all reasonable inferences will be drawn in favor of the judgment. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 225; *People v. Tenner* (1993) 6 Cal.4th 559, 567.) Second, as the trial court held, reliving Perez's death through the course of multiple trials was victim suffering directly caused by Young's actions, and the jury was entitled to consider it. (LXV RT 7027-7028.) Third, the remarks were harmless for the reasons set forth below.

Turning to Young's claim that the jury's decision that he deserved to be sentenced to death was "arbitrary and capricious," nothing in the record supports this assertion. Retrials occur with some regularity in our judicial system. The mere fact that one jury reaches a decision where another was unable cannot possibly be said to prove the caprice of the second jury, and Young points to nothing in the record to support this bizarre assertion. Likewise his naked assertion that retrial signals to the community that jurors' individual moral judgment is not valued: there is nothing

whatsoever to support this claim. At any rate, the constitutional protection against double jeopardy applies only to successive prosecutions, and not a continued prosecution in a second trial after a jury is unable to reach a verdict. (*Richardson v. United States* (1984) 468 U.S. 317, 323-324 [104 S.Ct. 3081, 82 L.Ed.2d 242]; *Stone v. Superior Court* (1982) 31 Cal.3d 503, 516.)

### B. The Prosecutor's Remark in Closing Argument of the Second Penalty Trial That the Crime Had Caused an Investigator to Become Emotional Was Harmless Error

Young complains that the prosecutor argued in the second penalty trial that the murders were so brutal, they made "seasoned police officers cr[y] on the stand," and that whereas the officer in question (Detective Hill) became somewhat emotional during guilt-phase testimony, she did not testify at the second penalty trial. (AOB 145, citing LXXII RT 7900.) First, Young did not object to this argument below, and his failure to do so forfeited the complaint for appeal. (*People v. Tully*, *supra*, 54 Cal.4th at p. 1014; *People v. Johnson* (1992) 3 Cal.4th 1183, 1245; *People v. Daniels* (1991) 52 Cal.3d 815, 891.) Had he preserved the claim, he would be correct that this was error. But it was harmless.

Erroneous admission of victim-impact evidence is subject to harmless error analysis. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1246.) Here, there is no reasonable probability Young would have enjoyed a more favorable outcome absent the prosecutor's lone remark about the impact of the crime on an investigating officer. (See *People v. Dykes* (2009) 46 Cal.4th 731, 781.) Every statutory aggravating factor was established by overwhelming evidence. (See Pen. Code, 190.3, factors (a)-(c).)

First, the circumstances of the crime were horrific. (See Pen. Code, § 190.3, factor (a).) Young and his accomplices planned a robbery and

then, when Young thought the victims might be able to identify him, he executed an unarmed woman who had already complied with orders to lie facedown on the ground. Witnesses were shocked by the gruesomeness and senselessness of the crime. The murders of Teresa Perez and Jack Reynolds devastated their families, friends, and co-workers, and even stuck out in the minds of veteran law enforcement officers who investigated their deaths.

Young engaged in violent criminal activity other than the crimes charged in this case. (See Pen. Code, § 190.3, factor (b).) While in custody awaiting trial, he fashioned and hid numerous deadly weapons, then orchestrated the near-fatal stabbing of a fellow inmate. The victim was severely injured and permanently damaged by the attack. (LXII RT 6733-6737, 6739-6740.)

Finally, he was convicted of felonies before the crimes in this case, most notably the brutal attack on an elderly person that reduced a once-vibrant man to a shadow of his former self, and whose loss was felt deeply by his family. (See Pen. Code, § 190.3, factor (c).) When he was sentenced in that case, Young showed no remorse. (LXIV RT 6918-6920, 6923, 6929-6930, 6939-6940.)

In contrast, the mitigating evidence came down to factor (k) testimony that Young was abandoned by his father and possibly molested by a cousin, that he was slow at math and reading, and that after robbing and killing Perez and Reynolds, he learned a trade and became a good husband and father.

As the court informed the jury, any one aggravating factor can justify the death penalty. (XI CT 2425-2426; LXXII RT 7877.) Where, as here, the evidence in mitigation was so weak, and the evidence of aggravating factors so overwhelming and conclusive, there is no reasonable doubt the jury would have fixed Young's punishment at death simply had it not heard

this lone remark by the prosecutor. Accordingly, the error was harmless. (*People v. Bittaker* (1989) 48 Cal.3d 1046, 1110, citing *People v. Brown* (1988) 46 Cal.3d 432, 447 [test for penalty-phase error: judgment will be affirmed unless there is a reasonable possibility that, but for the error, the verdict would have been different].)

## VIII. THE TRIAL COURT DID NOT VIOLATE YOUNG'S FIRST AMENDMENT RIGHTS BY ADMITTING EVIDENCE THAT YOUNG BELIEVED HE DESERVED A BADGE OF HONOR FOR MURDERING MS. PEREZ, AND THAT YOUNG ENDORSED AND COMMITTED VIOLENCE AGAINST NON-WHITE PEOPLE

Young contends the trial court violated his First Amendment rights to free speech and association, as well as his rights to due process and a fair trial, when it admitted evidence, in the penalty phase, of his participation in, and adherence to a policy of, violence against people of color. (AOB 147-164.) Young is wrong. Evidence that he endorsed violence against non-white people, and that he bragged about violent acts he personally had committed against people of color, was admissible to rebut testimony from defense witnesses that Young was "good," "kind," and "not a violent person," and that the white supremacy group to which Young belonged was a simple barbecuing club.

### A. Young Opened the Door to Evidence of His Violent Racist Beliefs and Conduct

Before the second penalty phase, Young asked the court to suppress "all reference ... to ... membership/allegiance to any white supremacist group" because the evidence was more prejudicial than probative and violated his First Amendment rights to freedom of association. (IX CT 2080-2087.) The People responded that the tattoos upon which witnesses relied to identify Young, as well as evidence of the red laces Young put in

his boots immediately after the murder, were relevant as a circumstance of the crime; and that other evidence of Young's "white supremacist beliefs" might become relevant should Young introduce evidence of his good character. (IX CT 2103-2112, 2107.) The People's evidence would not violate Young's First Amendment rights because it would be no mere "narrow stipulation" of Young's abstract beliefs, but rather concrete examples whose significance would be given "context and meaning" by expert testimony. (IX CT 2103-2112, 2111, quoting *Dawson v. Delaware*, *supra*, 503 U.S. at p. 166.)

The court limited the People's use of Young's white supremacy beliefs and activities in its case-in-chief to only his "associations with various individuals in this case and the basis for those associations." (LIX RT 5991.) Reference to most of Young's tattoos was foreclosed, and the "nigger thrasher" tattoo by which Paula Daleo identified Young, and which was admitted in the guilt phase, was to be referred to only as a "unique tattoo."[14] (LIX RT 5990-5991.) The court also ruled, however, that evidence of Young's neo-Nazi tattoos and white supremacy beliefs might be admissible as rebuttal to defense character evidence. (LXII RT 6668.) It warned defense counsel that if they introduced evidence of Young's selfless and gentle nature, they would be "open[ing] the door ... for [the People] to come roaring back in rebuttal." (LXV RT 7037.)

In accord with the court's ruling, in the People's penalty phase case-in-chief, the extent of Jason Gestcher's testimony about Young's racist

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[14] The People were permitted to introduce evidence of the red laces and their meaning in the context of the skinhead subculture in their penalty-phase case-in-chief as evidence of circumstances of the crime, namely, lack of remorse. (IX CT 2108; L RT 4170; LXI RT 6454-6578.) This was proper for the same reasons set forth at Part II.C.2-3, *supra*, namely as an acknowledgement of his participation in the murder of Perez and a manifestation of his knowledge of his guilt.

beliefs was that Gestcher and Young were "good friends" in part because of their mutual membership in a skinhead brotherhood that believed in white supremacy; that Young introduced Getscher to Torkelson and Anderson; that Getscher caught Young putting red laces in his boots shortly after he killed Ms. Perez; and that in the skinhead subculture, red laces were a "badge of honor" for "dr[awing] the blood of any enemy[,]" (i.e., a "[n]onwhite"). (LXI RT 6428-6438, 6454-6458.) Paula Daleo's testimony on the subject was limited to the following: she met Young at a meeting of "Aryan Nation's," which was "more of a church thing" that tied white supremacy to the Bible, and whose meetings she, Raynoha, and Torkelson frequented; and Young had a tattoo of a Thor's hammer, which was an "Aryan Nations Christianity thing." (LIX RT 6083-6084, 6133.)[15]

Thereafter, the defense chose to present extensive character evidence, including testimony from multiple witnesses that Young was "good," "kind," and "not a violent person." (LXV RT 7043-7045, 7051; LXVI RT 7132, 7160-7161, 7222, 7224; LXVII RT 7350-7359, 7361-6363.) Young's friend and fellow inmate, Aaron Beek, further testified that Young was of a quiet, unassuming character. (LXVII RT 7298-7299.) Beek also asserted that the American Front skinhead group to which Young belonged was just a "working-class" social club that held barbecues. (LXVII RT 7279-7280, 7282, 7297.) And he insisted Young had noting to do with the

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[15] Young cites to pages LIX RT 6145 and 6147 as additional testimony from Paula Daleo about Young's racist beliefs elicited "over defense objection." (AOB 149.) That testimony was actually elicited by Young's own attorney on cross-examination. (See LIX RT 6145-6147.) Indeed, Young's attorney went into details about skinhead beliefs that the prosecutor had not raised, including asking whether skinheads wore red laces as a "fashion statement." (LIX RT 6145-6150.) Accordingly, on re-direct, the prosecutor asked about the other reason for which a skinhead might places red laces in his boots, namely, as "a badge of honor" for killing someone. (LIX RT 6162-6163.)

attack on Harger. (LXVII RT 7271-7272, 7287-7288.) A therapist testified that skinhead groups were just a "misguided" effort to protect the "poor little guy." (LXVIII RT 7442.) She pointed to the subculture's positive attributes, such as "honor, respect, [and] loyalty." (LXVIII RT 7442.) Young, therefore, opened the door to evidence of his violent racist beliefs. See *Payne v. Tennessee* (1991) 501 U.S. 808, 825 [111 S.Ct. 2597, 2608, 115 L.Ed.2d 720] [the People are entitled to "counteract[]" the defendant's mitigating evidence].)

Accordingly, on rebuttal, the People introduced evidence of a swastika and a Celtic rune painted in blood just outside Young's jail cell right after the attack on Harger. It also published to the jury several of Young's tattoos, including the following: swastikas, the Nazi totenkopf, Hitler's Schutzstaffel mark, the soldier resembling a notorious Nazi general responsible for mass executions, the "88" that stands for "Heil Hitler"; a crucified skinhead wearing red suspenders as a badge of honor for having "spilled the blood of" a Jew or "mud [person]"; the outline of boots that represents a violent act committed against a non-Caucasian person; the image of skinheads wielding bats and machetes; a noose that represents lynching of Black Americans; and the phrase "nigger thrasher."

The People also called an expert to explain the Nazi tattoos, and the fact that they declare the bearer's allegiance to a philosophy of racial purification by violent means; and that certain others, such as the "nigger thrasher" tattoo, represented specific acts of violence against people of color. The expert also testified about the violent and hateful nature of neo-Nazi skinhead doctrine, the consequent violent conduct of its adherents, and the fact that such violence was encouraged and rewarded in that subculture.

### B. The Evidence of Violent Racism Did Not Abridge Young's First Amendment Rights Because It Was Offered in Rebuttal and Was Far More Than a Mere Statement of an Abstract Belief

Citing *Dawson v. Delaware*, *supra*, 503 U.S. at page 166, Young contends that admission of any neo-Nazi and skinhead evidence violated his First Amendment right to free speech and association. (AOB 154-164.) However, the United States Supreme Court in that very case emphasized that "the Constitution does not erect a per se barrier to the admission of evidence concerning one's beliefs and associations at sentencing simply because those beliefs and associations are protected by the First Amendment." *Id.* at 165; *Wisconsin v. Mitchell*, *supra*, 508 U.S. at p. 486. Contrary to Young's assertions, *Dawson* actually cuts against him.

The problem in *Dawson* was that the State of Delaware gave the jury nothing but a naked stipulation that the defendant belonged to a "white racist" gang. (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 162.) What is more, the evidence was offered not in rebuttal, but in the People's penalty case-in-chief. (*Ibid.*) The high court held that the "narrowness" of the stipulation reduced it to no more than an announcement of the defendant's belief that white people were superior to those of other races, which was irrelevant to sentencing. (*Id.* at pp. 165-166.)

The *Dawson* court noted, however, that before entering into the stipulation, the People had asserted that its expert would testify that the gang was associated with drugs and violence, and advocated the murder of fellow inmates. (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 165.) The court remarked that had the People actually offered evidence to that effect, *Dawson* "would [be] a much different case." (*Ibid.*; see also *id.* at p. 167 ["Delaware might have avoided this problem if it had presented evidence showing more than [*Dawson*'s] mere abstract beliefs"]; *id.* at p. 168 ["the evidence which the prosecution in this case at one time considered

adducing by expert testimony ... would, if it had been presented to the jury, have made this a different case"].)

Here, the People offered exactly what the *Dawson* court said would have made the difference: no mere abstract stipulation, but concrete evidence, explicated by expert testimony, that, after beating a Black man, Young tattooed his body with the phrase "nigger thrasher"; that he put red laces in his boots—which in the skinhead subculture meant having shed the blood of a non-white person—immediately after executing a Latina woman; and that the group with which he closely associated, and whose boss he was in prison, advocated violence against all non-white people. Moreover, the evidence was offered only after Young provided extensive testimony of his good, kind, and non-violent nature. In other words, the prosecution here provided exactly the kind of context evidence of the violent nature of Young's neo-Nazi association that the Court said was missing in *Dawson*, and which the Court further suggested would have made the evidence in that case admissible. (See *Dawson*, at p. 165.) Accordingly, admission of the evidence did not violate Young's First Amendment rights. (See *People v. Quartermain*, *supra*, 16 Cal.4th at p. 631, citing *Dawson*, *supra*, at p. 165.)

### C. The Evidence Was Admissible to Rebut the Defense Witnesses' Testimony That Young Was a Kind, Non-violent, and Bookish Fellow Who Played No Role in the Attack on Harger, and That Skinhead Groups Were Mere Social Clubs

"[J]ust as the defendant has the right to introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own." (*Dawson v. Delaware*, *supra*, 503 U.S. at p. 167; see *Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) In capital cases, rebuttal evidence need not pertain to a statutory aggravating factor, and the prosecutor is

entitled to argue that it reduces the value of the defendant's mitigating evidence. (*People v. Hawthorne* (2009) 46 Cal.4th 67, 92.) The court's decision to allow this type of rebuttal evidence is reviewed for abuse of discretion. (*People v. Young*, *supra*, 34 Cal.4th at p. 1199; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438, quoting *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

Here, Young elicited evidence from his witnesses that he was good, kind, and non-violent. A defendant may "'elect[ ] to initiate inquiry into his own character,'" but "'the price a defendant must pay for attempting to prove his good name is to throw open a vast subject which the law has kept closed to shield him.'" (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 357.) Accordingly, the court was within the bounds of reason to allow the People to respond with the evidence detailed above that Young endorsed, advocated, and committed murder and violence. (Evid. Code, § 1102, subd. (b); see *People v. Giminez* (1975) 14 Cal.3d 68, 72 [abuse of discretion means the court's ruling "exceeds all bounds of reason"].)

Young also elicited testimony from a therapist and his friend, Aaron Beek, that the neo-Nazi group to which Beek and Young belonged was just a "group of working-class individuals that band together [and] have barbecues" and was a mere "misguided" attempt to protect the "poor little guy." (LXII RT 7289.) Beek denied that white supremacy was the primary focus of the group, and the therapist claimed it had positive attributes. (LXII RT 7289.) Beek also denied that Young was the boss of the skinhead group in jail; on the contrary, he said, Young was shy and retiring. And he denied that the attack on Harger was planned or organized, and claimed he acted alone.

The trial court was within the bounds of reason in permitting the People to rebut this testimony by adducing evidence that a rune and a swastika apparently rendered in blood appeared in or near Young's cell

shortly after the attack on Harger, that neo-Nazis in custody used Odinism as a ruse to congregate to plan attacks, and that the primary focus of neo-Nazi groups, as well as the quasi-religious subset Aryan Nation, was to promote white supremacy through violence and intimidation.[16] (LXIX RT 7627-7658.)

The simple fact that Young believed Caucasians to be superior to all other races—and to the extent certain of his tattoos, e.g., the god Thor, arguendo stood only for that belief and not for the endorsement of violence—while admissible to refute Beek's testimony, was nonetheless arguably inadmissible for any other purpose. Accordingly, the trial court expressly informed the jury that Young's "beliefs [and] allegiance" were "constitutionally protected by the first Amendment of the United States Constitution[,]" and admonished the jury that it was not to consider the evidence as an aggravating circumstance, but "only for the limited purpose" of evaluating the credibility of Young's character witnesses. (XI CT 2433; LXXII RT 7881.) This Court must presume the jury followed the instruction. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 725 ["The presumption is that limiting instructions are followed by the jury"]; *People v. Mickey* (1991) 54 Cal.3d 612, 689, fn. 17 ["The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions"].) The prosecutor reinforced this instruction when she told the jury it was not to consider Young's tattoos "under any of the statutorily aggravating factors," but simply for

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[16] To the extent Young suggests that the court's rational rulings nonetheless deprived him of a fair trial (AOB 159), he is wrong. Application of the ordinary rules of evidence does not infringe on a defendant's constitutional rights." (*People v. Boyette*, *supra*, 29 Cal.4th at pp. 427-428.)

whether the defendant's witnesses were believable. (LXXII RT 7955-7956.)

Young complains the instruction was "cynical" and "ineffective." (AOB 162-163.) But he failed to object to the instruction below, thereby depriving the People of a chance to respond contemporaneously, the trial court of an opportunity to cure the alleged error, and this Court of a developed record for review; accordingly, he forfeited the complaint for appeal. (*People v. Alvarez, supra*, 14 Cal.4th at p. 216, fn. 20 [where limiting instruction could have prevented jury from drawing the forbidden inference and no limiting instruction is requested, defendant cannot raise claim on appeal].) At any rate, even were the tamer of his tattoos inadmissible for rebuttal, their admission would be harmless because the admissible ones were far more disturbing.

### D. The Evidence Was Harmless

Even had the trial court erred in admitting evidence of Young's violent brand of racism, the error would have been harmless beyond a reasonable doubt. (See *People v. Aranda* (2012) 55 Cal.4th 342, 363 [*Chapman* standard of review applies to error implicating federal constitutional rights], citing *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 828, 17 L.Ed.2d 705, 710-711].) As set forth in part VI, *supra*, every statutory aggravating factor was established by overwhelming evidence. (See Pen. Code, 190.3, factors (a)-(c).) The circumstances of the crime were horrific. (See Pen. Code, § 190.3, factor (a).) Young engaged in violent criminal activity other than the crimes charged in this case, namely, orchestrating and participating in the near-fatal stabbing of a fellow inmate. (See Pen. Code, § 190.3, factor (b).) And he was convicted of felonies before the crimes in this case, including a brutal attack on an

elderly man that had lasting effects on the victim and his family. (See Pen. Code, § 190.3, factor (c).)

As the court informed the jury, any one aggravating factor can justify the death penalty. (XI CT 2425-2426; LXXII RT 7877.) Again, where, as here, the evidence in mitigation was so weak, and the evidence of aggravating factors so overwhelming and conclusive, there is no reasonable doubt the jury would have fixed Young's punishment at death simply had it not heard the evidence of his racist beliefs. Accordingly, even were admission of the challenged evidence error, it would be harmless.

## IX. THE TRIAL COURT PROPERLY ADMITTED EVIDENCE OF THE IMPACT OF YOUNG'S PAST CRIMES ON THE VICTIMS OF THOSE CRIMES

In argument IX, Young contends the trial court erred by admitting, over defense objection, victim-impact evidence of the armed assault Young and his accomplices committed against an elderly man less than ten years before he committed the crimes in this case. (AOB 164-174.) Young is wrong. This Court repeatedly has held that such evidence is relevant and admissible in the penalty phase. (AOB 164-174.)

### A. The Court Properly Admitted the Evidence Because the Effect of a Capital Defendant's Prior Violent Crimes on His Victims Is Admissible in the Penalty Phase of the Trial

In addition to the bare facts of the crime itself, the People introduced evidence that the victim, Mr. Lee Alvin, was a nice person who, after Young and his accomplices bashed in the head with a rock, seemed to lose his zest for life. (LXIV RT 6918-6920, 6923.) His decline was hard on his wife and son because he longer wanted to do the things they used to enjoy

together. Later, he developed cancer at the site of the head wound.[17] (LXIV RT 6920.) The detective who investigated the case called the attack "brutal" and "sad" (LXIV RT 6903) and said Young showed no remorse. The probation officer who prepared the report for appellant's sentencing in the assault case likewise characterized Young as callous and remorseless. (LXIV RT 6939-6940.) This Court has held repeatedly that "the prosecution may introduce evidence of the emotional effect of defendant's prior violent criminal acts on the victims of those acts" in the penalty phase of a capital trial. (*People v. Price* (1991) 1 Cal.4th 324, 478-479, cited with approval in *People v. Davis* (2009) 46 Cal.4th 539, 617; see *People v. Garceau*, *supra*, 6 Cal.4th at pp. 200-202, overruled on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117-118.).) The Court has also held that the impact of past crimes upon their victims is relevant to the determination of prior violent crimes under section 190.3, factor (b). (*People v. Davis*, *supra*, 46 Cal.4th at p. 617.) Accordingly, the evidence was admissible.[18]

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[17] Young contends that the testimony of Mr. Alvin's son, Lee Alvin, that Mr. Alvin lost his zeal for life after the attack, and that he later developed cancer at the site of the wound, was "speculative." (AOB 178.) Not so. Lee Alvin was a direct percipient witness to his father's marked decline, which began immediately after Young and his accomplices brutalized the man. (LXIV RT 6917-6919.) And he testified that the cancer, which developed on the scar that formed over the wound the son personally saw on Mr. Alvin's head as a result of the attack, was diagnosed after a biopsy. (LXIV RT 6917, 6919-6920.) There is nothing speculative about this testimony. To the extent Young means Lee Alvin speculated that the injury caused the cancer, Lee said no such thing. Moreover, defense counsel questioned Lee on that very issue, and Lee acknowledged that he was not a doctor himself and that no doctor has said that the cancer was caused by the prior injury. (LXIV RT 6922.)

[18] In argument X, Young complains that even if the victim-impact evidence was admissible, the probation officer's testimony that Young showed no remorse and the detective's characterization of the crime as

(continued...)

Young asserts that Price was wrongly decided because it cited *Benson* and *Karis*, neither of which addressed the precise issue of victim-impact evidence for prior crimes. (AOB 166-168, citing *People v. Benson* (1990) 52 Cal.3d 754 and *People v. Karis*, *supra*, 46 Cal.3d 612.) The *Benson* court "need[ed] not, and d[id] not, decide whether Booth ... applies to evidence [of] the personal characteristics of a victim of other criminal activity ..., the emotional impact of such criminal activity on the victim's family ...." (*Benson*, *supra*, 52 Cal.3d at p. 797 fn. 7.) *Karis* dealt only with testimony by the victims of the defendant's prior crimes to establish the fact of the crimes themselves, and distinguished it from other-crimes victim-impact evidence, which the high court had ruled inadmissible in *Booth v. Maryland* (1987) 482 U.S. 496, 507 fn. 10 [107 S.Ct. 2529, 96 L.Ed.2d 440]. (*Karis*, *supra*, 46 Cal.3d at pp. 638-640.)

Young's argument fails for two reasons. First, nothing in the holdings of either *Benson* or *Karis* militates against this Court holding admissible evidence of the impact on his victims of a defendant's prior crimes; as Young himself points out, neither case addressed the precise issue. And the

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(...continued)
brutal and sad were inadmissible because they were unrelated to the impact on the victim. (AOB 174-180.) Young is wrong. This testimony was direct evidence of the fact of the prior assault, which is admissible in the penalty phase. (See Pen. Code, 190.3, factor (b).) The absence of remorse can be relevant to a defendant's guilt, especially when he disclaims responsibility for the harm done. (See *People v. Bell* (2007) 40 Cal.4th 582, 606.) Here, Young's counsel elicited testimony from the detective and the probation officer presumably intended to suggest that Young was not responsible for the harm Mr. Alvin suffered, since he was only one of several assailants and did not personally strike Mr. Alvin. (LXIV RT 6907-6913, 6936-6938.) "Because remorse would more clearly be expected under this defense theory than under the prosecution theory of coldblooded [robbery and assault]" (*Bell*, at p. 606), the evidence was admissible to prove the prior crime itself.

mere fact that those cases did not reach an issue does not prevent this Court from resolving it.

Second, both *Benson* and *Karis* were decided before *Payne v. Tennessee*, *supra*, 501 U.S. at pages 825-827, which overruled *Booth*, and held victim-impact evidence of the capital murder admissible in the penalty phase of the trial. Young complains that admission of victim-impact testimony from other crimes is an improper application of *Payne*. (AOB 165-166.) Not so. It is directly in keeping with the rationale of *Payne*, which was that "for the jury to assess meaningfully the defendant's moral culpability and blameworthiness, it should have before it at the sentencing phase evidence of the specific harm caused by the defendant." (*Payne v. Tennessee*, *supra*, 501 U.S. at p. 825.) That is precisely what the other-crimes victim-impact evidence is: evidence of the specific harm caused by a defendant's prior violent crimes. Specifically, in this case, it let the jury know how the violent assault Young and his accomplices committed against Lee Alvin hurt that man and his family. Thus, *Payne* not merely accords with this Court's holding in *Price* and its progeny that such evidence is admissible, it is mandated by them.

Young points out that some states have held inadmissible the victim-impact evidence of a defendant's prior crimes, and argues this is evidence this Court got in wrong in *Price*. (AOB 170-171, citing *People v. Dunlap* (Colo. 1999) 975 P.2d 723, 744-745; *People v. Hope* (Ill. 1998) 702 N.E.2d 1282, 1288; *Sherman v. State* (Nev. 1998) 965 P.2d 903, 914; *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, 891, fn. 11; *Cantu v. State* (Tex.Ct.App.1997) 939 S.W.2d 627, 637.) This Court rejected the same argument, citing the exact same cases, in *People v. Davis*, *supra*, 46 Cal.4th at pages 617-618. Young offers this Court no compelling reason to overturn its decision in *Davis*.

### B. Any Error in Admitting the Evidence Was Harmless

Finally, even assuming the trial court erred in admitting the evidence, reversal is not required. As discussed in part VII, erroneous admission of victim-impact evidence is subject to harmless error analysis. (*People v. Johnson*, *supra*, 3 Cal.4th at p. 1246.) Here, there is no reasonable probability that Young would have enjoyed a more favorable outcome, absent the testimony of Mr. Alvin's son. (See *People v. Dykes*, *supra*, 46 Cal.4th at p. 781.) Moreover, any federal constitutional error would likewise be harmless beyond a reasonable doubt. (*Chapman*, *supra*, 386 U.S. at pp. 24-26.) The testimony very brief, comprising some eight pages of reporter's transcript, particularly in contrast to the extensive mitigation testimony Young presented. Further, as set forth in Part VII.B, *supra*, every statutory aggravating factor was established by overwhelming evidence quite apart from this. And finally, the trial court instructed the jury not to be swayed by prejudice against Young. (XI CT 2420 [CALJIC No. 8.84.1]; LXXII RT 7873.) The trial court also instructed the jury they were "free to assign whatever moral or sympathetic value you deem appropriate to each and all the various factors you are permitted to consider." (XI CT 2474 [CALJIC No. 8.88]; LXXIII RT 8085.) The jury is presumed to have followed these instructions. (*People v. Thomas* (2012) 54 Cal.4th 908, 939-940.)

In light of the brevity of the other-crimes victim-impact testimony, and the nature and quantity of the evidence in aggravation, the admission of the testimony in no way undermined the fundamental fairness of the penalty determination. Even if the victim-impact evidence had been excluded, the outcome would have been the same. Young's death sentence was not the product of unduly prejudicial victim-impact evidence; it was the result of his selfish, callous, and inexcusable, execution-style murder of

two helpless people whose only wrong was to be the unfortunate victims of a planned robbery and therefore potential witnesses to Young's crimes.

## X. THE TRIAL COURT PROPERLY EXCLUDED TENUOUS AND SPECULATIVE EVIDENCE OF THIRD-PARTY CULPABILITY AT THE PENALTY PHASE BECAUSE IT DID NOT RAISE A REASONABLE DOUBT ABOUT YOUNG'S GUILT

In argument XI, Young contends the trial court unconstitutionally deprived him of due process, a fair trial, and the right to present a defense when it denied his request to present third party culpability evidence that victim Jack Reynolds had been convicted of robbery over twenty years before the robbery-murders in this case, was a racist and had a Thor's hammer tattoo, and had promised his mother an exotic vacation that was beyond his means. (AOB 180-182.) Essentially, he argues that the exclusion of this evidence at the penalty phase violated his right to present mitigating evidence. (AOB 180-182.) Young is wrong.

As set forth in Part V, *supra*, third-party culpability evidence is admissible only if it links the third person to the actual commission of the crime. (*People v. Hall*, *supra*, 41 Cal.3d at p. 833; *People v. Linton* (2013) 56 Cal.4th 1146, 1202, quoting *People v. Brady* (2010) 50 Cal.4th 547, 558 and citing Evid. Code, § 352.) Evidence of a third party's mere motive or opportunity to commit the crime does not raise a reasonable doubt, and is therefore irrelevant and inadmissible. (*Hall*, *supra*, 41 Cal.3d at p. 833; *Linton*, *supra*, 56 Cal.4th at p. 1202, quoting *Brady*, *supra*, 50 Cal.4th at p. 558.) Third-party culpability evidence that is inadmissible at the guilt phase is likewise inadmissible at the penalty phase. (*Linton*, *supra*, at p. 1202, quoting *People v. Stitely*, *supra*, 35 Cal.4th at p. 566.)

As discussed in Part V, the trial court acted within its discretion in excluding the proffered third-party culpability evidence because it was tenuous and speculative. (See *People v. Lewis*, *supra*, 26 Cal.4th at

pp. 372-373 [exclusion of third-party culpability evidence is reviewed only for abuse of discretion].) Young offered nothing to connect the robbery of which Reynolds was convicted nearly a quarter of a century earlier to the robberies that took place here. As this Court said in *Linton*, "[g]iven the substantial length of time between the incidents, the fact they shared some relatively generic similarities [(both involved a male and a female victims)] did not suffice to link the two incidents." (*People v. Linton*, *supra*, 56 Cal.4th at p. 1202.) As far as the claim that Reynolds promised his aged mother a luxury he could not afford and told his brother he would be coming into money, that is scarcely motivation for an armed robbery, let alone a tangible link to the actual perpetration of the crime. Nor was Reynolds's supposed racism of any relevance whatsoever. Not only did Young fail to proffer any evidence to support this claim, but there was no evidence at all that Reynolds associated with Young and his accomplices or that he was in any way in on the scheme that left him shot through the head face-down on the ground next to his similarly violated co-worker. Thus, the evidence was inadmissible in the penalty phase for the same reason it was inadmissible in the guilt trial: it was irrelevant because it did not raise a reasonable doubt as to Young's guilt. (*Ibid.*) Therefore, the court properly excluded it from the penalty trial. (See id.) And since there was no error under state law, Young's constitutional claims must also fail. (See *id.*, quoting *People v. Robinson* (2005) 37 Cal.4th 592, 626-627 [""""as a general matter, the ordinary rules of evidence do not impermissibly infringe on the accused's state or federal constitutional right to present a defense""""].)

## XI. YOUNG RECEIVED A FAIR TRIAL AND MAY NOT OBTAIN RELIEF DUE TO ALLEGED CUMULATIVE ERROR

In argument XII, Young contends that, even if no individual error is prejudicial, reversal is required due to cumulative error. (AOB at 384-386.) As discussed in Parts VI through XI, *supra*, and XII-XIV, *infra*, there is no error. But even assuming for argument's sake the existence of more than one error, each must be evaluated under the applicable standard of prejudice. Given his detailed, recorded, confession to Jason Getscher, there is no doubt Young killed at least one of the victims deliberately and intentionally, and he was convicted and sentenced by juries that represented a fair cross-section of the community. Young was entitled to a fair trial, not a perfect one, and that is what he got. (See *People v. Box* (2000) 23 Cal.4th 1153, 1214, overruled on another ground in *People v. Martinez*, *supra*, 47 Cal.4that p. 948, fn. 11; *People v. Beeler*, *supra*, 9 Cal.4th at p. 994.) Any error did not significantly influence the fairness of the trial or undermine the penalty determination. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1038.)

## XII. CALIFORNIA'S DEATH PENALTY STATUTE IS CONSTITUTIONALLY SOUND

In argument XIII,[19] Young presents a series of challenges to California's capital sentencing scheme that have been repeatedly rejected by this Court. (AOB 186-197.) Acknowledging this Court previously has rejected his contentions, Young repeats these arguments to preserve federal review. He has presented no compelling reason for this Court to revisit any of its previous rulings; therefore, this Court should reject all of the claims.

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[19] Young erroneously numbers this argument "XII." Argument XII of the AOB is found at pages 183-185 and asserts cumulative error.

### A. Penal Code Section 190.3, Subdivision (a) Is Not Vague or Overbroad

In subsection 1, Young contends that Penal Code section 190.3, subdivision (a), allowing the jury to consider the circumstances of the crime as an aggravating factor is vague and limitless, thereby allowing prosecutors to argue every conceivable circumstance as an aggravating factor, even those that contradict each other from case to case, resulting in "arbitrary and capricious imposition of death," in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 236-237.) This Court has rejected the argument.

> It is not inappropriate ... that a particular circumstance of a capital crime may be considered aggravating in one case, while a contrasting circumstance may be considered aggravating in another case. The sentencer is to consider the defendant's individual culpability; there is no constitutional requirement that the sentencer compare the defendant's culpability with the culpability of other defendants. [Citation.] The focus is upon the individual case, and the jury's discretion is broad.

(*People v. Jenkins* (2000) 22 Cal.4th 900, 1051; accord *People v. Mai* (2013) 57 Cal.4th 986; *People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury* (2003) 30 Cal.4th 342, 439; *People v. Mills* (2010) 48 Cal.4th 158, 213.) Young has presented no reason to reconsider this issue; therefore, this Court should reject his argument.

### B. There Is No Requirement the Jury Find That the Aggravating Factors Outweigh the Mitigating Factors Beyond a Reasonable Doubt, Nor That It Unanimously Agree Upon Specific Aggravating Circumstances

In subsections 1 and 2, Young contends the jury needed to make factual findings beyond a reasonable doubt that (1) aggravating factors were present and (2) the aggravating factors were so substantial as to make death the appropriate punishment, and the failure to do so violated the Due

Process Clause and the Eighth Amendment to the Constitution. (AOB 187-188.) He cites *Ring v. Arizona* (2002) 536 U.S. 584 [122 S.Ct. 2428, 153 L.Ed.2d 556], *Blakely v. Washington* (2004) 542 U.S. 296, 303-305 [124 S.Ct. 2531, 159 L.Ed.2d 403], and *Cunningham v. California* (2007) 549 U.S. 270 [127 S.Ct. 856, 166 L.Ed.2d 856] as support for this proposition. (AOB 187-188.) He further contends that his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution were violated because there is no assurance the jury unanimously agreed on which aggravating circumstances warranted the death penalty, and that he engaged in prior criminality. (AOB 188-189.) Finally, he contends that expecting a jury to decide if he committed prior criminal activity when it already knows he has been convicted of first degree murder violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 189.)

California's death penalty statute is constitutional, and this Court has determined that the United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435], and *Ring v. Arizona*, *supra*, 536 U.S. 584, do not alter that conclusion:

> The death penalty law is not unconstitutional for failing to impose a burden of proof-whether beyond a reasonable doubt or by a preponderance of the evidence-as to the existence of aggravating circumstances, the greater weight of aggravating circumstances over mitigating circumstances, or the appropriateness of a death sentence. [Citation.] Unlike the statutory schemes in other states cited by defendant, in California 'the sentencing function is inherently moral and normative, not factual' [citation] and, hence, not susceptible to a burden-of-proof quantification. [Citations.] ¶ The jury is not constitutionally required to achieve unanimity as to aggravating circumstances. [Citation.] Recent United States Supreme Court decisions in *Apprendi v. New Jersey* (2000) 530 U.S. 466 and *Ring v. Arizona* (2002) 536 U.S. 584 have not altered our conclusions regarding burden of proof or jury unanimity.

(*People v. Brown* (2004) 33 Cal.4th 382, 401-402.)

In California "once the defendant has been convicted of first degree murder and one or more special circumstances has been found true beyond a reasonable doubt, death is no more than the prescribed statutory maximum for the offense; the only alternative is life imprisonment without the possibility of parole." (*People v. Ward* (2005) 36 Cal.4th 186, 221 quoting *People v. Prieto*, *supra*, 30 Cal.4th at p. 263.) The United States Supreme Court's decisions, including *Cunningham*, "interpreting the Sixth Amendment's jury trial guarantee [citations] have not altered our conclusions in this regard." (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 227-228.) *Cunningham* "involves merely an extension of the *Apprendi* and *Blakely* analyses to California's determinate sentencing law" (*People v. Prince* (2007) 40 Cal.4th 1179, 1297), and thus has no bearing on this Court's earlier decisions upholding the constitutionality of the state's capital sentencing scheme (*People v. Stevens* (2007) 41 Cal.4th 182, 212). Thus, California's death penalty withstands constitutional scrutiny, even after reëxamination in light of *Apprendi* and *Cunningham*. Young has presented no reason to reconsider this issue.

Turning to his complaint that in the absence of jury unanimity, he was deprived of this Eighth Amendment right to a reliable, non-arbitrary penalty phase determination (AOB 189), there is no constitutional requirement that a capital jury unanimously agree on specific aggravating factors. (*People v. Martinez* (2009) 47 Cal.4th 399, 455; *People v. Burney* (2009) 47 Cal.4th 203, 268.) Nor is there a constitutional requirement that a capital jury unanimously agree that prior criminal activity has been proven. (*People v. Martinez*, *supra*, 47 Cal.4th at p. 455; *People v. Dykes*, *supra*, 46 Cal.4th at p. 799.) And the alleged error does not implicate the Equal Protection clause. (*People v. Cook* (2007) 40 Cal.4th 1334, 1367; *People v. Griffin* (2004) 33 Cal.4th 536, 598.)

Finally, regarding Young's assertion that a jury that knew of his guilt of first degree murder could not be fair and unbiased in evaluating evidence of other uncharged crimes, this Court has expressly and repeatedly held,

> Allowing a jury that has convicted the defendant of first degree murder to decide if he has committed other criminal activity does not violate the right to an unbiased decisionmaker under the Sixth, Eighth, and Fourteenth Amendments to the federal Constitution.

(*People v. Williams* (2013) 56 Cal.4th 165, 201-202, citing *People v. Hawthorne* (1992) 4 Cal.4th 43, 77, and *People v. Medina* (1990) 51 Cal.3d 870, 907.)

### C. Factor (i) (Permitting Jury to Consider Defendant's Age) Is Not Impermissibly Vague

In subsection 4, Young contends section 190.3. factor (i), which allows the jury to consider a defendant's age, is void for vagueness. (AOB 190.) This Court has rejected the argument:

> [T]he United State Supreme Court has held that section 190.3, factor (i) is not impermissibly vague simply because it can be either aggravating or mitigating: "Both the prosecution and the defense may present valid arguments as to the significance of the defendant's age in a particular case. Competing arguments by adversary parties bring perspective to a problem, and thus serve to promote a more reasoned decision, providing guidance as to a factor jurors most likely would discuss in any event. We find no constitutional deficiency in factor (i)."

(*People v. Smithey* (1999) 20 Cal.4th 936, 1005, quoting *Tuilaepa v. California* (1994) 512 U.S. 967, 977 [114 S.Ct. 2630, 129 L.Ed.2d 750]; accord *People v. Myles* (2012) 53 Cal.4th 1181, 1223; *People v. Mills*, *supra*, 48 Cal.4th at p. 214.)

### D. CALJIC No. 8.85 Is Constitutionally Sound

Also in subsection 4, Young contends instructing the jury with CALJIC No. 8.85 [Penalty Trial—Factors for Consideration] violated Fifth, Sixth, Eighth, and Fourteenth Amendment rights because (1) it failed to delete inapplicable factors, (2) it contained vague and ill-defined factors, particularly factors (a) and (k), (3) unduly restricted factors (d) and (g) by use of the words "extreme" and "substantial," and (4) it failed to specify a burden of proof as to either mitigation or aggravation. (AOB 190-191.) This Court has repeatedly rejected these contentions and should do so again here.

First, the trial court is not required to delete the inapplicable sentencing factors. (*People v. Williams*, *supra*, 56 Cal.4th at p. 201; *People v. Burney*, *supra*, 47 Cal.4th at p. 261; *People v. Bramit*, *supra*, 46 Cal.4th at p. 1248.) Second, "[n]either factor (i) nor factor (k) of section 190.3 is unconstitutionally vague." (*People v. Tully*, *supra*, 54 Cal.4th at p. 1069, citing *People v. Slaughter* (2002) 27 Cal.4th 1187, 1224.) Third, "[t]he use of certain adjectives such as 'extreme' and 'substantial' in the list of mitigating factors in section 190.3 does not render the statute unconstitutional." (*People v. Williams*, *supra* , 56 Cal.4th at 201; *People v. Thompson* (2010) 49 Cal.4th 79, 143; *People v. Parson*, *supra*, 44 Cal.4th at pp. 369-370.) Finally, there is no requirement to instruct on the burden of proof as to either mitigation or aggravation. (*People v. Williams*, *supra* , 56 Cal.4th at 201.) This Court has explained, "Because the determination of penalty is essentially moral and normative [citation], and therefore is different in kind from the determination of guilt, there is no burden of proof or burden of persuasion. [Citation.]." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1135-1136, quoting *People v. Hayes* (1990) 52 Cal.3d 577, 643.) The penalty phase determination is "not akin to 'the usual fact-finding process,' and therefore 'instructions associated with the usual fact-finding

process—such as burden of proof—are not necessary.'" (*People v. Lenart*, *supra*, 32 Cal.4th at p. 1136, quoting *People v. Carpenter* (1997) 15 Cal.4th 312, 417-418.) Nor is there a requirement that the jury be instructed that there is no burden of proof. (*People v. Elliot* (2005) 37 Cal.4th 453, 488; *People v. Cornwell* (2005) 37 Cal.4th 50, 104.)

### E. California's Death Penalty Statute Is Not Unsound for Failure to Narrow the Class of Persons Eligible for the Death Penalty

In subsection 5, Young contends California's capital punishment scheme violates the Eight Amendment by failing to narrow the class of defendants eligible for the death penalty. (AOB 191.) This Court has rejected the claim repeatedly. (*People v. Harris* (2013) 57 Cal.4th 804; *People v. Mills*, *supra*, 48 Cal.4th at p. 213, citing *People v. Abilez* (2007) 41 Cal.4th 472, 533.) Young has presented no reason to reconsider this issue; therefore, this Court should reject his argument.

### F. The Trial Court Properly Did Not Instruct the Jury on Burden of Proof Respecting Aggravating and Mitigating Factors

In subsection 6, Young contends the trial court should have instructed the jury on burden of proof with respect to the finding and weighing of aggravating and mitigating circumstances. (AOB 191-192.) As set forth in Part D above, this Court repeatedly has held that the jury needs no such instructions because, except for prior violent crimes evidence and prior felony convictions under section 190.3, factors (b) and (c), whose proof burdens are provided for elsewhere in the instructions, there is no burden of proof or persuasion for the penalty phase. (*People v. Mills*, *supra*, 48 Cal.4th at p. 213; *People v. Lenart*, *supra*, 32 Cal.4th at p. 1136; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.)

### G. Written Findings Are Not Required

In subsection 7, Young contends the jury was obligated to write down its penalty-phase findings as to aggravating and mitigating factors, and that the failure to do so violated his rights under the Sixth, Eighth, and Fourteenth Amendments to the Constitution. (AOB 192-193.) This Court has rejected this claim repeatedly. (*People v. Jones* (2013) 57 Cal.4th 899; *People v. Mills*, *supra*. 48 Cal.4th at p. 214; *People v. Riggs*, *supra*, 44 Cal.4th at p. 329; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Cornwell*, *supra*, 37 Cal.4th at p. 105.) Young gives the Court no reason to depart from those holdings.

### H. The Court Had No Obligation to Instruct the Jury on a "Presumption of Life"

In subsection 8, Young contends the court should have instructed the jury that there is a "presumption of life" at the penalty phase of the trial, and the failure to do so violated his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. (AOB 193.) This Court has rejected this argument repeatedly. (*People v. McDowell* (2012) 54 Cal.4th 395, 444; *People v. Taylor*, *supra*, 48 Cal.4th at p. 662; *People v. McWhorter* (2009) 47 Cal.4th 318, 379; *People v. Carrington* (2009) 47 Cal.4th 145, 199; *People v. Abilez*, *supra*, 41 Cal.4th at p. 532; *People v. Perry* (2006) 38 Cal.4th 302, 321; *People v. Kipp*, *supra*, 26 Cal.4th at p. 1137.)

### I. CALJIC No. 8.88 Does Not Set an Unconstitutionally Vague Standard

In subsection 9, Young contends that the language in CALJIC No. 8.88 that the jury may impose the death penalty only if the aggravating factors are "so substantial" in comparison to the mitigating circumstances

"creates an unconstitutionally vague standard" and violated Young's Fifth, Sixth, Eighth, and Fourteenth Amendment rights. (AOB 193-194.) This Court has held, "The instruction that jurors may impose a death sentence only if the aggravating factors are 'so substantial' in comparison to the mitigating circumstances that death is warranted does not create an unconstitutionally vague standard." (*People v. Carrington*, *supra*, 47 Cal.4th 145, 199, citing *People v. Catlin* (2001) 26 Cal.4th 81, 174, and *People v. Mendoza* (2000) 24 Cal.4th 130, 190.)

### J. Neither Intercase Proportionality Review Nor "Disparate Sentence" Review Is Constitutionally Required

In subsections 12 and 13, Young contends the failure to conduct intercase proportionality review and "disparate sentence" review such as that afforded felons under the determinate sentencing scheme violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the Constitution. (AOB 194-195.) This Court has repeatedly rejected these contentions and should do so again here. (*People v. Jones*, *supra*, 57 Cal.4th at 899; *People v. Collins* (2010) 49 Cal.4th 175, 261; *People v. Thompson*, *supra*, 49 Cal.4th at pp. 143-144; *People v. Cornwell*, *supra*, 37 Cal.4th at p. 105; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488; *People v. Smith* (2005) 35 Cal.4th 334, 374; *People v. Jones* (2003) 29 Cal.4th 1229, 1267.)

### K. California's Death Penalty Law Does Not Violate International Law

Finally, in subsections 14 and 15, Young contends the death penalty violates international law, the Eighth Amendment and the Supremacy Clause, and "international norms of human decency"; and that it constitutes cruel and unusual punishment. (AOB 195-196.) This Court repeatedly has

rejected these arguments and should do so again here. (*People v. Rogers* (2013) 57 Cal.4th 296, 350; *People v. Mills*, *supra*, 48 Cal.4th at p. 215; *People v. Carrington*, *supra*, 47 Cal.4th at pp. 198-199.) "International law does not prohibit a sentence of death rendered in accordance with state and federal constitutional and statutory requirements. [Citation.]" (*People v. Alfaro* (2007) 41 Cal.4th 1277, 1322; accord *People v. Mungia* (2008) 44 Cal.4th 1101, 1143; *People v. Panah*, *supra*, 35 Cal.4th at p. 500; *People v. Elliot*, *supra*, 37 Cal.4th at p. 488.) And "[t]he death penalty does not violate the Eighth Amendment ...." (*People v. Collins*, *supra*, 49 Cal.4th at p. 261.)

### L. No Cumulative Error

Young contends the various constitutional errors he alleges cumulatively render California's capital sentencing scheme unconstitutional. (AOB 196-197.) As discussed in Parts A-K above, however, there is no such error; therefore, it cannot be cumulated.

## XIII. CALIFORNIA'S PROCESS FOR QUALIFYING JURORS FOR DEATH PENALTY CASES IS CONSTITUTIONAL

In argument XIV,[20] Citing the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and article I of the California Constitution, Young contends California's process for qualifying juries for capital cases is unconstitutional. (AOB 197-219.) Young forfeited this claim by failing to raise it below. (See *People v. Tully*, *supra*, 54 Cal.4th at p. 1066.) But even had he preserved it, the United States

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[20] Young erroneously numbers this argument "XIII." (See AOB 197.) His actual Argument XIII, which he erroneously numbers "XII" addresses the constitutionality of California's death penalty scheme and is found at AOB 186.

Supreme Court has upheld California's death qualification process against the claim that it results in death-penalty-prone juries, and this Court has upheld it against all of the other challenges Young raises.

Young's jury was death qualified through *Hovey* voir dire and the individual questioning of jurors about their views on the death penalty. (*Hovey v. Superior Court* (1980) 28 Cal.3d 1.) Young contends *Hovey* voir dire and California's death qualification in general is unconstitutional and requires reversal of his death sentence because it:

- violates a defendant's right to a trial by an impartial jury under both the Sixth and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification leads to juries "prone to convict" and prone to impose a death sentence (AOB 197, 205, 208);
- violates a defendant's right to a jury trial under both the Sixth and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification "defeats" the "purposes underlying the right to a jury trial" (e.g., death qualification makes "the 'commonsense judgment of the community' unavailable," "removes the constitutionally required 'hedge against the overzealous or mistaken prosecutor,'" fails to preserve public confidence, and removes the belief that the sharing in the administration of justice is a civic responsibility) (AOB 197, 210-211);
- violates a defendant's rights under the Sixth and Fourteenth Amendments, and article I of the California Constitution, because "the process" of death qualification "influences the deliberative process and the mind set of jurors concerning their responsibilities and duties" by

"indoctrinating" the jurors "to a pro-conviction and pro-death" view (AOB 197, 209-210);

- violates a defendant's rights under the Sixth, Eighth, and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification permits prosecutors to manipulate their exercise of peremptory challenges to obtain "pro-conviction" and "pro-death" jurors (AOB 197, 209-210, 212-215);
- violates a defendant's rights to a representative jury under the Sixth, Eighth, and Fourteenth Amendments, as well as article I of the California Constitution, because death qualification "disproportionately removes minorities, women, and religious people from sitting on capital juries" (AOB 197, 206-207, 210-211, 218-219);
- violates a defendant's Eighth Amendment right against cruel and unusual punishment and to heightened reliability because death qualification leads to juries "prone to convict" and prone to impose a death sentence (AOB 197, 205, 207-208);
- violates a defendant's Eighth Amendment right against cruel and unusual punishment because "evolving standards of decency" are the cornerstones of Eighth Amendment analysis, the actions of sentencing juries are one of the sole reliable factors in the "evolving standards" analysis, and death qualification leads to an entire segment of the community not having their values represented in jury sentencing determinations and the contemporary standards of decency analysis, (AOB 197, 210-211, 218-219); and

- violates a defendant's Fourteenth Amendment right to equal protection, Fourteenth Amendment right to due process, and identical rights under article I of the California Constitution, because death qualification produces juries "prone to convict" and prone to impose a death sentence (AOB 197, 207-208).

Recognizing that *Lockhart v. McCree* (1986) 476 U.S. 162 [106 S.Ct. 1758, 90 L.Ed.2d 137], forestalls most of his claims since the high court in that case upheld California's death qualification process notwithstanding studies that suggested it biased jurors toward the death penalty, Young also asserts *Lockhart* is outdated because "current empirical studies" cited in various journal articles show death-qualified juries are indeed conviction prone and death prone. (AOB 197-205.)

The defendant in *People v. Tully*, *supra*, 54 Cal.4th 952, presented the same—indeed, nearly identical word-for-word—claims to this Court. (See Appellant's Opening Br., filed July 22, 2005, Sup. Ct. No. S030402, Vol. 2, at pp. 598, 608-638.) This Court found them all "meritless." (*Tully*, *supra*, at p. 1066.) The Court first pointed out that it was bound by *Lockhart*. (*Id.*, at p. 1066; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243.) It also reiterated that *Lockhart* "remains good law despite some criticism in law review articles." (*Id.*, at p. 1066, quoting *People v. Howard* (2010) 51 Cal.4th 15, 26-27.) Finally, the Court held California's death qualification process constitutionally sound, and specifically found:

- "The impacts of the death qualification process on the race, gender, and religion of the jurors do not affect its constitutionality."
- The process does not violate a defendant's constitutional rights, "including the Eighth Amendment right not to be subjected to cruel and unusual punishment, by affording

the prosecutor an opportunity to increase the chances of getting a conviction."

- The voir dire process itself does not produce a biased jury.
- "Death qualification does not violate the Sixth Amendment by undermining the functions of a jury as a cross-section of the community participating in the administration of justice."
- The prosecutor's use of peremptory challenges to exclude jurors with reservations about capital punishment does not violate the defendant's constitutional rights.

(*Tully*, *supra*, at p. 1066, quoting *Howard*, *supra*, 51 Cal.4th at pp. 26-27.) Since this Court considered and rejected the exact arguments in *Tully* that Young presents in his opening brief, and since Young offers this Court no reason why it should depart from that case, Young's arguments must fail.[21]

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[21] Young also argues that should this Court find the death qualification process unconstitutional, it must also reverse the guilty verdict. (AOB 215, citing *Witherspoon v. Illinois* (1968) 391 U.S. 510 [88 S.Ct. 1770, 20 L.Ed.2d 776].) This Court has rejected that argument. (*People v. Ashmus* (1991) 54 Cal.3d 932, 962, disapproved on another ground in *People v. Yeoman*, *supra*, 31 Cal.4th at p. 117.) In any event, as discussed above, the death qualification process was constitutional.

## CONCLUSION

Accordingly, respondent respectfully requests that the judgment be affirmed.

Dated: October 16, 2013

Respectfully submitted,

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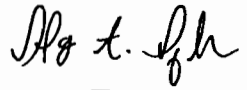

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## CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13-point Times New Roman font and contains 32,540 words.

Dated: October 16, 2013

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## DECLARATION OF SERVICE BY U.S. MAIL

Case Name: *People v. Jeffrey Scott Young*
No.: **S148462**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service with postage thereon fully prepaid that same day in the ordinary course of business.

On October 16, 2013, I served the attached **RESPONDENT'S BRIEF** by placing a true copy thereof enclosed in a sealed envelope in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 16, 2013, at San Diego, California.

STEPHEN MCGEE
Declarant

Signature

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