IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY BRIEF

Kathy R. Moreno
State Bar 121701
P. O. Box 9006
Berkeley, CA 94709-0006
(510) 717-2097
katmoreno@comcast.net

Attorney for Appellant
By appointment of the
California Supreme Court

DEATH PENALTY

TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TOPICAL INDEX

TABLE OF AUTHORITIES CITED

FEDERAL CASES

TABLE OF AUTHORITIES CITED

STATE CASES

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

TABLE OF AUTHORITIES CITED

STATUTES

TREATISES

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

INTRODUCTION

In this Reply Brief, appellant addresses specific contentions made by respondent, but does not reply to arguments already adequately addressed in Appellant's Opening Brief. The failure to address any particular argument, sub-argument or allegation made by respondent, or to reassert any particular point made in the Opening Brief, does not constitute a concession, abandonment or forfeiture of the point by appellant,[1] but reflects appellant's view that the issue has been adequately presented and the positions of the parties fully joined.

/

---

1 See *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3

GUILT PHASE ISSUES

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

(Reply to Respondent's Arg. I, RB 39-53.)

Appellant's claim that his statement to the police that they had "heard it all" was admitted in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 consists of four separate arguments:

(1) Part A, below: appellant's request that the police read him his rights was an *invocation* (AOB 60-66; Part C);

(2) Part B, below: the police playing of appellant's taped phone conversation with Jason Getscher prior to *Miranda* warnings was the *functional equivalent of questioning* (AOB 66-68, Part D);

(3) Part C, below: the use of *the two-step or "midstream" advisement* condemned by the United States Supreme Court, i.e., the deliberate delayed advisement of his rights, invalidated his subsequent waiver and statement (AOB 69-74; Part E, section 1);

(4) Part D, below: the police *"softening up"* of appellant invalidated any waiver (AOB 75-76, Part E, section 2.)

Respondent makes a selective response to these arguments, addressing only the first and fourth, i.e., respondent argues first that appellant waived his

right to silence and that the waiver was not coerced, and secondly, that there was no "softening up" of appellant. (RB 43-47, 48-49.) Respondent ignores appellant's other arguments and the principles and authorities appellant relies on, perhaps because of the lack of authority to refute the claims. Respondent skips over appellant's most significant arguments and asserts that there can be no harm from the admission of the challenged evidence. (RB 50-53.)

Appellant addresses each of his arguments in logical sequence, replying to the arguments respondent makes, and reiterating the arguments respondent fails to address.

A. Appellant Made a Sufficiently Clear Invocation Of His Right to Silence; The Police Violated His *Miranda* Rights by Continuing to Question Him Prior to Giving *Miranda* Advisements.

Appellant contends that he invoked his right to silence under *Miranda* when he asked the officer to give him his rights – a request blatantly ignored by his interrogator. (AOB 60-66.)

Respondent argues that although *Miranda* requires the police to advise suspects of their right to silence, the police "failure to [advise appellant of his right to silence] did not render [appellant's] subsequent waiver involuntary." (RB 47.) Respondent argues that because appellant's invocation was ambiguous, the police questioning was permissible. (As shown in more detail below, this argument sidesteps the meat of appellant's claim, that a two-

step or midstream *Miranda* advisement is ineffective.) Respondent first argues, in a footnote, that appellant's request to "get his rights" was not a sufficiently clear invocation of his rights. Respondent cites *Berghuis v. Thompkins* (2010) 560 U.S. 370 and *People v. Stitely* (2005) 35 Cal.4th 514, 535 and argues that the ambiguous or equivocal nature of appellant's request did not require the police to give him those rights before interrogating him. (RB 47-48, fn. 7.)

Appellant's request for his rights was a clear and unambiguous invocation of those rights. The interrogating officer clearly understood it as such as demonstrated by his response promising not to ask appellant any questions. (5CT 1091.) *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 directed that in determining whether an invocation is clear or equivocal, the defendant's words must be "understood as ordinary people would understand them." The officer's responses show he clearly understood petitioner had expressed a desire to remain silent. (*Cf. Hurd v. Terhune* (9th Cir. 2010) 619 F. 3d 1080, 1089 ["the interrogating officers' comments show that they subjectively understood Hurd's responses as unambiguous refusals.").

Respondent agrees that the officer must have interpreted appellant's response as a request for *Miranda* warnings (RB 48, fn. 7) – but respondent does not address the fact that the officer refused to give those warnings until after he played the tape recording of appellant's admissions (a functional

equivalent of an interrogation, as appellant argues in **Part **, pages *****, below). Instead, citing *People v. Stitely,* 35 Cal.4th at 535 and *Berghuis v. Thompkins,* 560 U.S. 370, respondent argues that appellant's "ambiguous" request permitted the officer to continue questioning appellant. (RB 47-48, fn. 7.) Appellant anticipated such an argument and addressed it in his Opening Brief. (AOB 64-65.)

Both *Berghuis v. Thompkins* and *People v. Stiteley* recognized that a suspect must receive *Miranda* warnings before any interrogation. Both cases involved ambiguous invocations made **after** *Miranda* advisements had been given – not, as here, an invocation made prior to any *Miranda* advisement.[2] *Miranda* itself so holds, stating that when "the police [have] not advised the defendant of his constitutional privilege . . . at the outset of the

---

[2] Appellant's Opening Brief cited, *inter alia*, *Sessoms v. Runnels* (9th Cir. 2012) 691 F.3d 1054 for the principle that the clear invocation rule applies only where the defendant has been advised of his rights, and not to an invocation made prior to the advisement, as here. *Sessoms* was subsequently vacated and remanded for consideration under *Salinas v. Texas* (2013) __ U.S. __ [133 S.Ct. 2174].) However, the vacatur does not affect the validity of appellant's argument, which cited to *Sessoms* only as additional authority for a principle clearly enunciated in the United States Supreme Court opinion in *Davis v. United States* (1994) 512 U.S. 452.

The Ninth Circuit recently issued its post-vacatur opinion, and analyzing the facts under *Salinas,* the en banc panel held that the defendant had made a sufficiently clear invocation, relying in part on the fact that the officers' response showed that they understood the defendant's statement as an invocation. (*Sessoms v. Grounds* (9th Cir. 2014) 768 F.3d 882, 895.) The panel also criticized the practice of delaying the administering of *Miranda* warnings until mid-interrogation, emphasizing that *Miranda* warnings are required at the outset of custodial interrogation. Interrogation does not begin once the officers get to the hard questions. (*Id.* at 895.)

interrogation," the suspect's "abdication of [that] constitutional privilege—the choice on his part to speak to the police—[is] not made knowingly or competently because of the failure to apprise him of his rights." (*Miranda*, 384 U.S. at 465.)

The unambiguous invocation rule set out in *Davis v. United States* (1994) 512 U.S. 452 explains that the "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves," and that only "*after* having [those rights explained to him]," the suspect is required to "affirmatively" invoke his rights. (512 U.S. at 460-61; emphasis provided.) *Berghuis* does not change the *Davis* rule that applies only after the *Miranda* warnings have been given: *Berghuis* recognized and emphasized that a suspect must be given his *Miranda* rights prior to any interrogation. (560 U.S. at ___; [130 S.Ct. at 2260].) The reason is logical: a suspect not fully aware of his rights—because in this case the police did not explain them -- cannot be reasonably expected to unambiguously waive them. In consequence, where as here, the invocation (ambiguous or not) is given before the suspect is read his rights, analysis is under *Miranda* and not the *Davis* rule.

B. The Police Playing of the Getscher Tape Recording Was the Functional Equivalent of Interrogation.

Appellant's argument — almost totally disregarded in Respondent's Brief — is that (1) the playing of the tape was the functional equivalent of an

interrogation; and (2) the two-step police tactic of deliberately[3] delaying the administering of *Miranda* advisements until after the tape-playing interrogation in order to get a statement (3) rendered appellant's purported waiver of his *Miranda* rights ineffective. This is the holding of *Seibert v. Missouri* (2004) 542 U.S. 600, in which the High Court denounced the increasingly popular police tactic of first interrogating the suspect, then giving warnings and re-eliciting incriminating statements, as a distortion of *Miranda* that furthered no legitimate countervailing interest. (*Id.* at 612-13; see AOB 70-74.)

Respondent does not address the relevant case law and ignores the principles set out in the precedents cited by appellant. Appellant therefore refers this Court to his Opening Brief. (See AOB 66-68, relying on *Rhode Island v. Innis* (1980) 446 U.S. 291, 301, *People v. Sims* (1993) 5 Cal.4th 405, 442; *People v. Davis* (2005) 36 Cal.4th 510, 555.)

Instead, respondent states the "the only thing" the police did was "to play a tape of Young's admissions to Jason Getscher." (RB 45.) Although respondent glosses over the "functional equivalent of an interrogation" argument by attempting to minimize it in this way, this Court cannot and should not do the same. The interrogation-by-tape is the underpinning of

---

[3] As set forth in the Opening Brief, the determining question is whether the delay was deliberate. Here, the officer's stark refusal to comply with appellant's request for *Miranda* advisements, and the officer's statement that he first had to play the tape (i.e., the functional equivalent of an interrogation) demonstrates without doubt that the delay was deliberate. (AOB 72-74.)

appellant's argument that the delayed or "midstream" *Miranda* warning was in violation of clear United States Supreme Court precedent, as set out below. (Respondent also ignored this argument.)

C. Deliberate Delay of the *Miranda* Advisements Renders Them Ineffective.

As stated above, respondent ignores the facts, premises and precedents upon which this argument is based.[4] Appellant therefore summarizes the discussion as set out in detail and at length in the Opening Brief. (See AOB 68-74.)

1. Detective McDonald first ignored appellant's initial request to hear his rights, stating that instead he would first play the tape of appellant's admissions to Getscher (the functional equivalent of an interrogation).

2. After the tape was played, the officer asked appellant if that was enough. Appellant said, "No, I heard about enough." This was appellant's first unadvised statement. (5CT 1092.)

---

[4] Respondent does suggest that appellant could have said he did not want to listen to the tape during "lulls" in the conversation. (RB 45.) Appellant's failure to stop the police from playing the tape, does not amount to a waiver of rights (which were not given) nor does it transform the playing of the tape from the functional equivalent of an interrogation into a consensual discussion. Respondent also mistakenly claims that the officer "promised not to ask questions *during the playing of the tape*." (Emphasis provided.) In fact, the officer did not say that. What he actually said was, "And then, after we're done [playing the tape], I'm not going to ask you any questions." (5CT 1091.)

3. The officer then (after some softening up) *Mirandized* appellant and said they had "everything on tape" and just wanted "some details," and asked appellant if he wanted to tell his side of the story. (5CT 1092-93.)

4. Appellant said "You heard it all." This was appellant's second statement, made after the midstream *Miranda* warnings, and the statement used against him at trial. (5CT 1095.)

5. *Seibert v. Missouri,* 542 U.S. 600 denounced the "two-step" or "question-first" police interrogation tactic in which the police deliberately delay administering *Miranda* warnings (see no. 1 above), then after eliciting incriminating information (see no. 2), give the warnings and re-elicit the admission (see no. 4). *Seibert* held that such a deliberately delayed *Miranda* warning renders them ineffective and distorts the meaning of *Miranda*. (*Id.* at 613, 621.)

The question is whether the delay was deliberate; the courts assess deliberateness by considering both objective and subjective evidence. The objective evidence in this case shows deliberate delay because of "the continuity of police personnel and the overlapping content" of the two statements. (See *id.* at 615.) The subjective evidence shows deliberate delay by Detective McDonald's refusal to *Mirandize* appellant at the outset despite appellant's express request, and his insistence on first playing the tape. (See *id.* at 615-16.)

Respondent refuses to recognize appellant's argument, and turning his back on the High Court precedent and the two-step police tactic, attempts to reframe the issue: Respondent agrees with appellant that the police should advise a suspect of his rights at the outset of an interrogation, but argues that the officer's "failure to do so in this case" does not taint appellant's subsequent statement made after a proper advisement so long as there was "no actual coercion." (RB 47.)

Respondent relies on the principle set out in *People v. Scott* (2011) 52 Cal.4th 452, 477 that as long as the defendant is eventually given his *Miranda* warnings, a valid waiver and subsequent statement is admissible despite a previous *Miranda* violation "so long as no actual coercion or other circumstances calculated to overcome his free will. (RB 47.)

Respondent's argument misses the point made by *Seibert*: deliberate delay in *Mirandizing* a suspect renders the delayed advisement *ineffective.* Because the delayed warning was in effect no *Miranda* warning, admissions made after the delayed warning are also in violation of *Miranda.* There is no valid subsequent *Miranda* warning (with a waiver) to render the subsequent statement admissible.

People v. Scott is inapposite as it does not address the key issue of a deliberate delay in giving the *Miranda* warnings. In *Scott*, the first unadvised police inquires were standard booking questions and asked about his hobbies,

including martial arts. All these statements were excluded. The question in *Scott* was whether the initial *Miranda* violation tainted the incriminating statements made by the defendant after he had received *Miranda* warnings. *Scott* found second statement voluntary, and held that the failure to give *Miranda* warnings prior to the standard booking questions and the defendant's hobbies did not therefore taint the defendant's subsequent voluntary statement. (*Id.* at 477.)

Scott does not provide a proper framework for the issue here. Appellant does not claim that the officer's initial failure to *Mirandize* appellant, followed by incriminating statements, tainted the second *Mirandized* statement, as the defendant argued in *Scott*. Rather, appellant contends that the *deliberate delay* in giving the *Miranda* advisements until *after* the playing of the tape recording (effectively, an interrogation) and his first incriminating statement rendered the delayed warnings ineffective. Thus appellant's statement "you've heard it all" was inadmissible against him.

D. Any Implied Waiver Must Be Deemed Invalid.

Appellant contends that he did not waive his *Miranda* rights because he invoked those rights; and because the midstream *Miranda* advisement, given after the functional equivalent of an interrogation, was ineffective, he could not make a knowing waiver. (Parts A, B and C, above.)

Alternatively, assuming *arguendo* that the above arguments are rejected, appellant contends that any implied waiver must be deemed invalid because it was obtained through improper "softening up" of appellant by the police, as in *People v. Honeycutt* (1977) 20 Cal.3d 150, 160.

Respondent argues that because the police officer did not seek to ingratiate himself with appellant, discuss former acquaintances, disparage the victim, as occurred in *Honeycutt*, there was no softening up resulting in a coerced waiver. (RB 49.) Appellant anticipated this argument and addressed it in the Opening Brief: In fact the detective discussed appellant's former acquaintances at some length, repeatedly stating that Torkelson and another guy were "looking to make a deal," and that this was appellant's "opportunity." (5CT 1090-91.)

Although respondent also argues that appellant was not coerced into waiving his rights because "the only thing" the officer did was to play the Getscher tape. (RB 45.) But this "thing" was an interrogation, as argued above. Respondent also suggests that appellant could have said he did not want to listen to the tape, and that he was noncommittal when the officer told him that he would give appellant his rights *after* the tape-playing interrogation. (RB 45.) Appellant contends that *Miranda* places the burden on law enforcement to advise the suspect of his rights prior to interrogating him; the

burden is not on the suspect to stop the interrogation prior to hearing his rights.[5]

E. Appellant's Statement "You've Heard It All" Was Irrelevant and Unduly Prejudicial.

Appellant's second alternative argument is that appellant's statement was inadmissible under Evidence Code section 352, as marginally relevant at best and unduly prejudicial.

Respondent argues that the statement was prejudicial because it suggested that the tape recording was accurate, as the prosecutor argued to the jury, and that it was not prejudicial in the sense that it tended to evoke an emotional bias against appellant. (RB 50.) That is, respondent contends that the *use* to which the prosecution put the evidence demonstrates its relevance, but this is not the proper test. In fact, the prosecutor's reliance on this statement shows not its relevancy, but rather its harm to appellant in a prejudice analysis.

---

[5] Respondent contends that because the transcripts of the tape recording of appellant's interrogation provided by the prosecution and the defense differ as to one statement, this Court must accept the prosecution's version. (RB 46, fn. 46.) Appellant disagrees. In the usual case, the tape recording is in evidence, and the reviewing court independently examines the tape and transcript. and then accepts the version favorable to the verdict "to the extent it is supported by the record." (*People v. Soto* (1984) 157 Cal.App.3d 694, 699.) However, in this case, the tape recording was not in evidence and there is no indication that the trial court listened to the tape; the colloquy at the hearing refers only to the transcripts and the record contains no substantial evidence to support one version over the other. (See *People v. Jackson* (1980) 28 Cal.3d 264, 300 (*rev'd on other* grounds in *People v. Cromer* (2001) 24 Cal.4th 889.)

On its own terms (without the prosecutor's spin), appellant's statement does not suggest that the statements on the tape were accurate. Standing alone, the statement is ambiguous and equivocal: it was not an adoptive admission but only an acknowledgment of the prosecution's evidence, as well as a statement of appellant's intention not to undergo further interrogation by the police. However, neither appellant's view of the prosecution's evidence nor his reluctance to continue the interrogation was relevant, particularly at the second penalty phase, where his guilt of murder was no longer in issue.

F. The Error Requires Reversal.

Appellant contends that the admission of this statement was extremely prejudicial. In the first place, the prosecutor used the statement to argue that it was a confession, affirming the truth of the contents of the taped recorded conversation between appellant and Getscher. A confession is the most damaging evidence that can be admitted against a defendant. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 292, 296.)

Respondent argues that any error in admitting the statement should be deemed harmless because the evidence against appellant was "overwhelming." (RB 51-52.) This "overwhelming evidence" consists of an identification of appellant with "75% certainty," the testimony of Jason Getscher, and the surreptitiously taped phone conversation between appellant and Getscher tape.

However, as pointed out in Appellant's Opening Brief, Getscher was of highly questionable credibility. He was a known thief and liar with some 30 criminal convictions, and only came forward three years after the fact to get a four-year reduction in his current eight-year sentence.

Moreover, appellant's defense was that he was posturing in the phone call with Getscher, in conformance with the relationship he had with Getscher: Getscher himself described appellant as his follower, who was "under his wing" and looked up to him. (29RT 2515-19.) The erroneous admission and subsequent prosecutorial use of the statement to bolster Getscher's testimony and the accuracy of the taped statements devastated appellant's defense, another indication of its prejudice. (*People v. Lindsey* (1988) 205 Cal.App.3d 112, 117; *People v. Vargas* (1973) 9 Cal.3d 470, 481.)

Respondent argues that no reasonable juror would have credited the "posturing" defense. (RB 52-53.) Appellant disagrees. The prosecution fought to admit the statement and relied heavily on it at trial, and obviously considered it important. The prosecution cannot have it both ways: if the evidence was obviously considered so important at trial, and even at the second penalty trial, an appellate argument that the evidence was insignificant should be rejected, as the court did in *Yohn v. Love* (3d Cir. 1996) 76 F.3d 508, 523-25, fn. 8; see also *People v. Powell* (1967) 67 Cal.2d 32, 55-57.)

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

(Reply to Respondent's Arg. II, RB 53-65.)

Appellant maintains that the admission into evidence of appellant's "Nigger Thrasher" tattoo, his use of red shoes laces, and his white supremacy beliefs violated appellant's federal constitutional rights, where the crimes were not alleged as hate crimes or gang crimes and there was no need to "identify" appellant through the offensive tattoo, since the witnesses were able to identify him the usual way, by looking at his face. Respondent contends that the admission of this evidence was "within the bounds of reason," and not violative of appellant's constitutional rights. (RB 53-54.)

Respondent first argues that the admission into evidence of appellant's "Nigger Thrasher" tattoo did not violate his First Amendment rights as set out in *Dawson v. Delaware* (1992) 503 U.S. 159, because it tended to prove more than "his associations and abstract beliefs," i.e., it tended to prove his identity. Respondent also argues that the "Nigger Thrasher" tattoo was admissible even if it did reveal him "to be a racist." (RB 59-60.) Without citation to applicable authority, respondent claims that despite the many defense objections, the

claim is forfeited, because the defense did not request a stipulation. (RB 61-61.) Appellant addresses each point below.

A. Evidence of Appellant's "Nigger Thrasher" Tattoo Was Irrelevant to Prove His Identity as Two Prosecution Witnesses Were Able to Identify Appellant Without Recourse to Describing His Tattoo.

Respondent insists that the "Nigger Thrasher" tattoo was admissible because it tended to prove his identity. (RB 59.) Appellant explained in the Opening Brief that although Paula Daleo described appellant to the police by his first name and by describing his tattoos, Daleo *knew* appellant personally and was able to identify him by looking at his face in a photograph or in person.

Daleo also identified Jason Getscher as "Tiger," and the police were then able to identify and locate Getscher by his nickname "Tiger." Getscher completed the identification of appellant and participated in the surreptitiously taped phone call.

Daleo and Getscher both identified appellant in person. The "Nigger Thrasher" tattoo was not even used by the police to identify appellant: the police used the moniker "Tiger" to identify Getscher, who then gave the police appellant's name. There was no need for Daleo to testify that she identified appellant to the police by describing a "Nigger Thrasher" tattoo on his arm,

when she knew his first name and was able to identify him by pointing to him in court.

Respondent does not address this argument, except to say, *ipse dixit*, that the offensive tattoo had a "strong relevance to establish identity." (RB 60.) Appellant disagrees. When two prosecution witnesses who knew appellant personally testified to his identity, additional evidence of a "Nigger Thrasher" tattoo is not "strong" evidence establishing his identity, an identity already fully established.[6] The strength of the in-person identifications greatly diminished any possible probative value of the offensive tattoo as a means of identifying appellant. This Court should consider what possible probative value exists for purposes of identifying appellant by telling the jury that he sported a tattoo including the word "Nigger," when two witnesses who knew appellant personally were able to identify appellant as one of the robbers, and when any further description by tattoo could have been accomplished by describing the tattoo as a unique descriptor, rather than with the word "Nigger."

In sum, appellant reiterates that the "Nigger Thrasher" tattoo evidence was marginally relevant at most, and unduly prejudicial.

---

6 The trial court allowed the "Nigger Thrasher" evidence to bolster Daleo's credibility, but this makes no sense (and respondent does not address this point). If the issue really was credibility, Daleo could have testified that she described appellant's "unique tattoos," and the police officer could have confirmed that appellant had such tattoos.

Respondent next argues, relying on *People v. Bivert* (2011) 52 Cal.4th 96, 117, that evidence of the "Nigger Thrasher" tattoo was not inadmissible just because it revealed him "to be a racist." (RB 59.) The reliance is misplaced.

Appellant addressed this case at length in the Opening Brief. (AOB 91-92, 95-96.) In the first place, *Bivert* deals not with racist tattoos as tending to prove identity, but with the defendant's own racist statements that proved his *motive and intent* to clean up the white race by ridding it of child molesters (the victim). (*Id.* at 116-17.) This holding is several logical gaps away from holding that a racist tattoo is admissible to prove identity, especially where, as here, (1) identity was established by other witnesses who knew appellant personally, and (2) the racist tattoo could have been used to add to the identity testimony by describing it as unique without reference to "Nigger." There was no evidence that appellant had any racist attitudes or antipathy towards African-Americans. The charged crime was motivated by money not hate or racism. The victims were not African-Americans.

Respondent also asserts that "even unsavory" tattoos are admissible to prove identity, citing *People v. Valdez* (2012) 55 Cal.4th 82, 130-31. *Valdez* involved the admission of tattoos of the gang names to prove membership in criminal street gang: the case says nothing at all about the admissibility of "unsavory" tattoos.

In fact, appellant has shown that the tattoo was more than "unsavory." *Lee v. Superior Court* [7] (1992) 9 Cal.App.4th 510, 514-16 described the racial epithet as one "which provokes violence," and is commonly used and understood as a demeaning and offensive racial slur, that is "particularly abusive and insulting," and so "repugnant" and "abhorrent" as to have "no place in civil society." The emphatic language used by the *Lee* court shows that the "Nigger Thrasher" tattoo packed an intense emotional punch far beyond a tattoo advertising a gang name or moniker.

B. Admission of the "Nigger Thrasher" Tattoo and Appellant's White Supremacy/Skinhead Beliefs Violated Appellant's First Amendment Rights Under *Dawson v. Delaware.*

Respondent argues that this evidence did not violate appellant's First Amendment rights under *Dawson v. Delaware,* 503 U.S. at 165 because the objectionable tattoos tended to prove more than his associations and beliefs, i.e., they tended to prove his identity.[8] (RB 60.) Respondent cites *People v. Lindberg* (2008) 45 Cal.4th 1, 39 for the proposition that the First Amendment

---

[7] This case is mistakenly entitled "*People v.* Lee" in Appellant's Opening Brief. (AOB 87.)

[8] In a footnote, respondent argues that the First Amendment claim should be forfeited because appellant did not challenge this evidence on First Amendment grounds at trial. (RB 59, fn. 10.) Appellant disagrees. The issue is cognizable on appeal. This Court recognizes "the well-established principle that a reviewing court may consider a claim raising a pure question of law on undisputed facts." (*People v. Yeoman* (2003) 31 Cal.4th 93, 118.)

"does not prohibit evidentiary use of a defendant's protected expression to prove the elements of a crime." (RB 59-60.) Appellant explained, at length and in detail, in the Opening Brief why the holding of *Dawson v. Delaware* applies here, and that the holdings of *Lindberg* and *People v. Bivert* (2011) 52 Cal.4th 96, 117 do not. (AOB 97-102.) *Dawson* found a violation of the First Amendment in the admission of evidence that the defendant was a member of a white racist prison gang because the charged murder was not shown to be tied to that gang in any way, so that the evidence invited inferences as to the defendant's beliefs, which were not relevant and were protected under the First Amendment.

Lindberg, by contrast, was a hate-murder prosecution, and the defendant admitted that he had killed the victim for "the racial movement, so that evidence of the defendant's racist beliefs were relevant. In *Bivert* the defendant's statements about his duty to clean up the white race by ridding the gene pool of persons with defects, such as pedophiles, were admissible in a prosecution for killing a white child molester, because the evidence tended to prove his intent to kill.

The facts of this case track *Dawson* rather than *Lindberg* and *Bivert*. The charged offenses were not hate crimes and no gang allegations were made. The crimes were felony murders: the motive was money, and no racial animus was involved. In contrast to both *Lindberg* and *Bivert,* appellant made no

racist or white power statements regarding the murders. That appellant used red laces *after* the crimes did not tend to show a racist motive in planning or carrying out the crime: He had no idea who the victims would be and his statements regarding the crime tended to show it was an unpremeditated blunder. Respondent quotes *People v. Quartermain* (1997) 16 Cal.4th 600, 628 for the proposition that evidence of the defendant's racial animus is relevant to premeditation by showing "the defendant's prior attitude toward the victim." (RB 63.) Respondent ignores the fact that there was no evidence of appellant's "prior attitude" toward the victims in this case, and thus the after-the-fact use of red laces, also a skinhead fashion statement, did not show his *motive*, a state of mind that necessarily exists before and not after the crime is committed.

At the time of the ruling, during testimony by Paula Daleo, the prosecutor asked for "clarification" of the court's ruling as to the scope of Daleo's testimony. The defense noted that there was "some question on the issue of red laces," and if the prosecutor went into that, the defense would have to deal with it. (28RT 2358.) The prosecutor said she did not intend to elicit anything as to the red laces "at this point" but that it could become relevant later (that is, when Genscher testified). (28RT 2358-59.) The court reiterated that the issue was going to become relevant and that it was "already resolved" that the "red laces" evidence was admissible. (28RT 2359.) After this

definitive ruling that the red laces evidence would be admissible despite the defense objection, defense counsel requested that they be allowed to go into the area of red laces if the prosecutor didn't, i.e., "at this point." (*Ibid.*)

Respondent inaccurately portrays this colloquy as a "reversal of [defense counsel's] previous position." (RB 56.) This is flatly incorrect. Nowhere did defense counsel request the admission of such testimony or "reverse" his objection. Defense counsel did nothing other than attempt to control the point at which the objectionable evidence would be elicited: The prosecutor stated that the red laces would be admissible in its case as some point but preferred not to say at what point. The trial court ruled that the evidence was admissible, per the prosecution's request and over the defense objection. The defense requested permission to go into the area with witness Daleo at the present time with the present witness, only after the trial court emphasized that "red laces" testimony was admissible.

Defense counsel's attempt to blunt the prosecution's evidence of racism by bringing it up with Daleo himself, instead of waiting for the prosecution to elicit the evidence at a point in time to its liking in no way diminishes either the error or its prejudicial impact.

A similar tactic is often used with evidence of the defendant's prior convictions, i.e., after objecting to the admission of such evidence, and an adverse ruling, the defense often elicits the testimony as part of its case. The

fact that the objecting party decides as a tactical matter to elicit the objectionable testimony, after an adverse ruling, does not forfeit the claim on appeal. (*People v. Calio* (1986) 42 Cal.3d 639, 643 ["An attorney who submits to the authority of an erroneous, adverse ruling after making appropriate objections or motions, does not waive the error in the ruling by proceeding in accordance therewith and endeavoring to make the best of a bad situation for which he was not responsible."].)

Respondent cites Daleo's testimony in detail to show that the prosecutor did not ask about the red laces (although she did ask about skinheads and white power), and that on cross-examination defense counsel did bring up the issue. (Respondent states that this was "over the prosecutor's objection," (RB 57), but the objection was "beyond the scope" — not inadmissibility — and the "red laces" testimony elicited by the defense was to show that red laces was a "fashion thing" in her group and that she herself wore them, i.e., a rebuttal of the prosecution's evidence and argument that appellant's use of red laces was "a statement that the wearer has shed blood or killed someone." (28RT 2447, 29RT 2479-80; 1CT 269.)

Respondent repeats the argument that the red laces, like the "Nigger Thrasher" tattoo, proved "more" than appellant's First Amendment protected

rights because they tend to prove he was a participant in the murder.[9] (RB 64.) Appellant has already shown that the use of the "Nigger" tattoo was entirely superfluous: if a witness, indeed if two witnesses, can identify their friend by looking at his photo, the use of a "Nigger Thrasher" tattoo in a case not involving a hate crime or any other racial animus, proves nothing other than his racist beliefs.

In one way the use of appellant's Nigger Thrasher tattoo (and his use of red laces) was a more egregious First Amendment violation than that in *Dawson*. The prosecutor convinced the trial court that appellant's use of the red laces was relevant in the "context" of his white power beliefs. The result is that in a case in which there was no evidence of racial animus, the prosecutor managed to introduce supposed evidence of appellant's racist beliefs (i.e., the red laces) *because* appellant had racist beliefs.

/

---

[9] Respondent also contends that the trial court admitted only minimal evidence of appellant's white supremacy beliefs and association in order to show "he closely associated" with other robbers and knew what red laces meant. (RB 64-65.) The argument is disingenuous at best, since neither the offensive tattoos nor the beliefs showed his association with the other robbers. The evidence showed that they were friends who had met in prison and were living together and hanging out together afterwards. White supremacy and racist beliefs were of minimal if any relevance to show his "association" with his friends and companions, and the prosecution's focus on them was indeed (as respondent concedes) "disturbing." Respondent contends that it was not so inflammatory as to invite irrational response or to divert the jury's attention. Appellant disagrees. The tattoo and the references to white supremacy and skinhead beliefs were precisely the kind of evidence that cannot be ignored.

C. Respondent's Claim that Appellant Forfeited His Constitutional Argument Is Without Legal Foundation.

As to appellant's First Amendment claim, respondent says that appellant has "appear[ed] to have overlooked the fact" that the trial court suggested the matter be resolved by stipulation. Respondent then argues that because defense counsel "never pursued" the stipulation, the claim should be forfeited. (RB 61.) Appellant did not "overlook" the applicable law, which he addresses below. On the other hand, the cases by respondent do not apply.

Respondent relies on *People v. Green* (1995) 34 Cal.App.4th 165, 182, fn.9 and *People v. Seijas* (2005) 36 Cal.4th 291, 301-02, neither of which relate to a supposed "requirement" to offer a stipulation. *Green* held that the defendant's claim that "the trial court should have allowed impeachment with 'sanitized' descriptions of his four identical prior convictions" was not cognizable on appeal because the he made no such request at trial. *Seijas* held that "a defendant who fails to object to a court's permitting a witness to assert the privilege against self-incrimination may not challenge the ruling on appeal." In this case, appellant repeatedly objected to the admission of the challenged evidence, and requested in the alternative that it be sanitized.

Neither case holds that a claim is forfeited after an objection at trial where the defense fails to suggest a specific stipulation. Indeed, such a suggestion would be futile because "the prosecution cannot be compelled to

accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness." (*People v. Chism* (2014) 58 Cal.4th 1266, 1307-08, quoting *People v. Edelbacher* (1989) 47 Cal.3d 983, 1007; see also *People v. Rogers* (2013) 57 Cal.4th 296, 329-30 [accord; collecting cases].)

The defense is not required to make futile acts. (*People v. Herrera* (2010) 49 Cal.4th 613, 622 [the law does not require the doing of a futile act].) A policy requiring the defense to preserve an issue for appeal by suggesting a stipulation that the prosecution is not compelled to accept, in addition to lodging an objection, would serve no useful purpose.

D. The Erroneous Admission of the "Nigger Thrasher" Tattoo and Appellant's White Power/Skinhead Beliefs Rendered His Trial Unfair and Requires Reversal of His Convictions.

Respondent argues that the prosecution's evidence as to appellant's participation in the skinhead movement was minimal, and because it revealed appellant's "regular association with the other robbers" it was harmless in light of the "overwhelming evidence" of his guilt. (RB 64-65.)

Appellant disagrees that the evidence of appellant's guilt was "overwhelming." As set out above (Arg. I, Part F, p. 14), this evidence consisted of a 75% certain identification of appellant, the testimony of Jason Getscher, and the surreptitiously taped phone conversation between appellant and Getscher tape. Getscher, however, was a known thief and liar who came

forward three years after the fact in an attempt to get himself a significant benefit when facing his 30th conviction — four years off of an eight-year sentence.

Moreover, appellant's defense was that he was posturing in the phone call with Getscher, in conformance with the relationship he had with Getscher. Respondent concludes that the jurors would not have considered appellant's statements on the Getscher tape as braggadocio since the content of those statements was so "humiliating."[10] (RB 65.) Appellant disagrees, and believes that what persuaded the jurors to dismiss the defense was the erroneously admitted evidence that appellant was a hate-mongering racist with a "Nigger Thrasher" tattoo on his arm.

Moreover, this Court cannot consider the prejudicial effect of the error standing alone, but must consider its cumulative impact. (*People v. Hill* (1998) 17 Cal.4th 800, 844; *Taylor v.* Kentucky (1978) 436 U.S. 478, 487. Appellant addresses the cumulative prejudice from the multiple constitutional errors below in Argument VI, pages 47-48.

/

/

/

---

10 Respondent apparently means appellant's description of the crime as a colossal blunder.

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

(Reply to Respondent's Argument III, pages 65-69.)

Appellant contends that the prosecutor erred by arguing to the jury that she was "certain" that the victims had been compliant with the robbers' demands but ultimately "very fearful." The guilt phase argument was doubly improper because the prosecutor vouched for her own interpretation of the victims' conduct and feelings, and urged the jurors to see the offense through the victims' eyes.

A. The Prosecutor Improperly Appealed to the Jurors' Emotions and Passions.

Respondent contends that because the defense "failed to object" to the prosecutor's emotion-packed questions to Detective Hill and the witnesses during the evidentiary portion of the trial, he forfeited those claims of prosecutorial error; and that in any case the questions to Detective Hill and the witnesses as to their emotional reactions and thoughts were not error. (RB 68-69.)

Respondent somewhat mischaracterizes appellant's argument as to the prosecutor's emotional play to the jurors' passions, i.e., respondent describes appellant's claim as stating that the prosecutor's argument should be considered prosecutorial error "because the prosecutor already had repeatedly committed

misconduct by 'play[ing] on [the jurors'] emotions throughout the trial.'" (RB 67.)

Appellant's actual argument is *not* (as respondent has it) that the prosecutor's questions eliciting emotional testimony stand alone as a claim of prosecutorial error. Rather, appellant argues that the prosecutor's conduct prior to the guilt phase closing argument remarks are a marker of the prejudice from those remarks, because the prejudice from improper prosecutorial argument is assessed by considering how the jury would have understood it. (See AOB, Part C. ["The Error Was Prejudicial."], pp. 110-112.)

As explicitly stated in the Opening Brief, appellant argued the prosecutor's questions eliciting testimony from Detective Hill as to her emotional reaction to the crimes, and testimony from the eyewitnesses as to their internal reactions to events, "accustomed the jury to viewing the evidence through an emotional prism," so that "the jury would have understood the prosecutor's emotion-based [vouching] argument as significant" and a proper focus in their deliberations, and for that reason the prosecutor's jury argument was prejudicial. (AOB 110-111.)

Respondent maintains that it was "reasonable" (and not reprehensible) for the prosecutor to elicit the detective's "human response" to the scene. (RB 68.) Appellant disagrees: the detective's "human," i.e., emotional, response was irrelevant and improper. Evidence Code section 210 defines relevant

evidence as that which has a tendency in reason to prove or disprove a disputed fact. The detective's "human" [sic: emotional] response to the crime scene did not tend to prove any disputed fact or element of the crimes.

As to the testimony elicited from the eyewitnesses, respondent concedes that it "may not have been necessary to the jury's resolution of the issue of guilt." (RB 68-69.) Appellant agrees to the latter statement: it was unnecessary. And it was also improper.

Appellant's point is that these repeated unnecessary references to the eyewitnesses' and detective's emotional responses foreshadowed or signaled to the jury the significance of an emotional reaction, which magnified the prejudicial impact of the improper prosecutorial vouching in argument to the jury. Respondent argues that the emotional testimony was "unlikely to hoodwink or inflame the jury." (RB 68-69.) But the question is not whether the jurors were "hoodwinked or inflamed" but whether the repeated appeals to passion and prejudice affected the jurors in their deliberations. The reason that such appeals are prohibited is precisely because of their inflated impact on human emotions and human decisions.

B. The Prosecutor Improperly Vouched by Arguing Her Personal Opinions as to The Victims' Fearfulness.

Respondent argues that the prosecutor did not improperly vouch when she told the jury, "I'm certain [that the victims] very fearful." (RB 65.)

Respondent again concedes that the prosecutor should not have used the first person but considers it a "minor misstep" and speculates that the prosecutor intended "merely to emphasize the obvious and inevitable conclusion," so that the argument should be deemed a fair comment on the evidence. (RB 66-67.)

Respondent relies on *People v. Lewis* (1990) 50 Cal.3d 262, 283, which held that in *penalty phase* the prosecutor could invite the jurors to put themselves in the victim's position, because the penalty determination turns not only on the facts but on the jury's moral assessment of those facts.[11] (RB 66.) *Lewis* is inapposite to appellant's argument because the prosecutor's comments here occurred at the *guilt phase.* Thus, in complete contrast to *Lewis*, the victim's viewpoint was not germane to the jurors' deliberations, since they were not making a sentencing decision.

In *People v. Stansbury* (1993) 4 Cal.4th 1017, this Court held definitively that what the victims felt or feared is *not* a matter for the jury's consideration at the guilt phase: "We have settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an

---

11 Respondent also cited *People v. Ledesma* (2006) 39 Cal.4th 641, in which the defendant raised a claim of vouching where the prosecutor asked and then answered rhetorical questions. *Ledesma* does not support respondent's argument because the prosecutor's comments in *Ledesma* were based on testimony in the record. (*Id.* at 726.)

objective determination of guilt." (*Id.* at 1057.) Respondent ignores this settled principle of law.

Moreover, the prosecutorial comments in *Lewis* did not involve the personal statements of prosecutorial certainty, as in the case at bar. Neither case cited by respondent involved a prosecutor expressing her personal belief about a matter that was not in evidence. *United States v. Kerr* (9th Cir. 1992) 981 F.2d 1050, 1053 put it bluntly: a prosecutor "has no business telling the jury [her] individual impression of the evidence."

C. The Prosecutorial Error Prejudiced Appellant.

Respondent argues that any error should be deemed harmless because the evidence against appellant was "overwhelming," and the reference was "fleeting." (RB 69.) Appellant maintains that the error in argument was not fleeting but was, as stated above, part of a repeated prosecutorial effort to inject into the factual analysis an emotional bias.

Even if the error is not prejudicial standing alone, this Court must review for cumulative prejudice in the context of the other errors. (*People v. Hill,* 17 Cal.4th at 844; *Taylor v. Kentucky* 436 U.S. at 487.) Appellant addresses the cumulative prejudice from the multiple constitutional errors below in Argument Vi, pages 47-48.

/

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

(Reply to Respondent's Argument IV, pages 70-74.)

Appellant maintains that his Sixth, Eighth and Fourteenth Amendments rights were violated by the trial court's order that he be restrained and that an "inordinate number of deputies" be present in the courtroom, in the absence of any evidence of manifest need and despite the prosecution's concession that no such evidence existed. (13RT 830-31; 17RT 981-82.)

A. The Trial Court Erred By Imposing Unfair Restraints on Appellant and Excessive Security In the Courtroom.

Appellant relies on the seminal case (to which respondent fails to refer) of *Deck v. Missouri* (2005) 544 U.S. 622, 630-31, which holds that "courts cannot routinely place defendants in shackles or other physical restraints visible to the jury" as it undermines the presumption of innocence and the fairness of the factfinding process; and can interfere with the defendant's ability to community with counsel and participate in his own defense. (*People v. Duran* (1976) 16 Cal.3d 282, 290.)

The trial court's reasons for restraining appellant during trial was that both appellant and Raynoha had had problems in custody involving "other

inmates and threats and weapons in other cases;" that "they have a problem with authority;" and that courtroom deputies "generally have problems" with in-custody defendants. (13RT 831.) The trial court did not specify or further describe the "problems" or even which defendant had which problem. Appellant did not have an extensive violent or criminal background: he suffered a single prior conviction and had let a peaceful and productive life for the three and a half years prior to his arrest and incarceration on the capital charges.

This Court has always required that the use of restraints must be based on actual facts, and not rumor, innuendo, or a general policy. Most recently, in *People v. Bryant, Smith and Wheeler* (2014) 60 Cal. 4th 335, 389-390, this Court emphasized that "the imposition of physical restraints without evidence of violence, a threat of violence, or other nonconforming conduct" is error, but found no abuse of discretion where the court based its decision on the particular facts of the case and not on "a generalized policy that any defendant charged with a violent crime must be restrained." Similarly, *People v. Montes* (2014) 58 Cal. 4th 809, 841 upheld the use of restraints after an extensive hearing at which evidence was presented that defendant posed a safety risk based on incidents in the jail and based on his studying the guns of the courtroom bailiffs.

The trial court here cited no credible evidence in support of its decision and the prosecution provided none. Indeed the prosecutor took the contrary view, and flatly stated for the record that "there [wa]s currently 'no manifest need' to subject [appellant] to shackles or other physical restraints while [] in court for his trial." (2CT 476.)

Respondent argues that the trial court's decision was justified because appellant was "caught with improvised stabbing weapons" on several occasions while awaiting trial, that he possibly ordered a beating of a fellow inmate, and that under the sheriff's policy he was to be accompanied by two deputies in restraints at all times while moving to and from the jail. (RB 71-72.) However, as the defense pointed out below, the incidents to which respondent refers were all unproven allegations at the time the court made its decision. (See AOB 114, citing 13RT 830-33.) The after-the-fact citations provided by respondent refer to aggravating testimony at the penalty phase of the trial,[12] rather than any report or evidence or testimony that was before the judge at the time he made his ruling. Respondent even refers to penalty phase testimony "suggesting" that appellant ordered the beating of an inmate.

---

12 Respondent attempts to shore up the trial court's decision made on August 8, 2004 (13RT 830) by citing to penalty phase evidence presented in court on June 27 to July 12, 2006, almost two years *after* the decision to restrain appellant. (See RB 71, citing penalty phase evidence.) The record contains no indication that this evidence was presented to the court on August 8, 2004, the date of the trial court's decision, and the court did not refer to any specific or credible report or evidence.

However, the trial court did not reference or rely on this evidence, and the record is bereft of evidence on which the trial court did rely, other than the statement that the defendants had problems with authority and with other inmates, and that courtroom deputies "generally have problems" with in-custody defendants. (13RT 831.)

Respondent contends there was "nothing absurd or arbitrary" about the court's decision and cites *People v. Lewis & Oliver* (2006) 39 Cal.4th 970, 1031, which held that the manifest need requirement for restraints is satisfied without a formal hearing, where there is "evidence that the defendant has threatened jail deputies, possessed weapons in custody, threatened or assaulted other inmates, and/or engaged in violent outbursts in court." In *Lewis & Oliver,* the record showed that the judge relied on "credible reports," in addition to his own observation of the defendants' non-compliant behavior in court.[13] By contrast here, there is no indication that the trial judge relied on any credible reports – to the contrary, the record shows that the judge relied at least in part on his generalized observations that courtroom deputies have

---

13 Respondent's reliance at RB 70 to *People v. Medina* (1995) 11 Cal.4th 694, 731 is inapposite as well. In contrast to the case at bar, the decision to restrain Medina because of his courtroom violence was based on "factual information properly brought to [the court's] attention" by the prosecution which was unrebutted and unobjected to. Here by contrast, the prosecution conceded that "there [wa]s currently 'no manifest need' to subject [appellant] to shackles or other physical restraints while [] in court for his trial." (2CT 476.)

problems with in-custody defendants." (39 Cal.4th at 1031; RB 70.) *Lewis & Oliver* rejects such reasoning and expressly holds that the "trial court's decision to physically restrain a defendant cannot be based on rumor or innuendo."[14] (*Id.* at 1032.)

B. The Court's Ruling on Restraints Requires Reversal.

Appellant contends that the erroneous ruling was prejudicial because it operated to coerce a waiver of appellant's right to presence at trial, and because the supposedly cautionary jury instruction actually alerted the jury to the restraints.

1. The trial court coerced a waiver of appellant's presence by warning about the adverse impact of the jurors seeing him in restraints.

Respondent contends there was no coercion because the trial court stated that it would "adhere" to appellant's wishes with respect to whether or not he wanted to appear. (RB 72-73, fn. 13.)

Appellant agrees that the coercion was indirect or implied, but no less coercive for that. The trial court emphasized that it would be "preferable" for

---

[14] *People v. Hawkins* (1995) 10 Cal.4th 920, 944 agreed that a "record of violence, or the fact that he is a capital defendant, cannot alone justify" shackling. Although *Hawkins* rejected an argument that shackling was justified "only when a defendant has attempted to disrupt courtroom proceedings or to escape from jail," this Court upheld the trial court's ruling on restraints because of the defendant's "extensive criminal history," together with reported prison fights.

appellant to waive his right to presence, and appellant's restricted choice was either waive his constitutional right to presence or give the jurors the impression that appellant was dangerous and guilty. The trial court acknowledged as much, stating that that unless appellant waived his right to be present, it could "leave an impression [with the jurors] that your clients don't want to start out with in this trial." (17RT 980-81

2. The trial court's instruction alerted the jury to the fact that appellant was shackled, resulting in prejudice to appellant.

Appellant anticipated respondent's argument that the constitutional error should be deemed harmless absent evidence that the jurors viewed the restraints; however, the trial court's instruction not to consider the restraints alerted the jurors to the fact that appellant had been shackled. (AOB 119.) Respondent counters that defense counsel requested the instruction and thus cannot complain of error in giving the instruction.[15] (RB 73.)

This is incorrect. Defense counsel did *not* request the instruction. When the instruction was addressed, the trial court stated:

"My inclination is not to give it. I don't think there's anything that indicated that he's been restrained to them." Defense counsel pointed out that

---

15 Appellant does not raise a claim of error based on the court's instruction to the jury (as respondent assumes). Rather, appellant expressly states that the giving of the instruction demonstrates *prejudice* to appellant because "it assured that the entire jury knew that appellant had been restrained in the courtroom." (AOB 119.)

"my client tells me that some of the jurors did see him when he was brought up one day." The trial court then "wonder[ed] if it applies to the restraints outside of the courtroom or simply inside? In an abundance of caution, I'll give it. I think that at this point — if that, in fact, has happened, it's probably a good idea to give it. I don't think that — they certainly must conclude that Mr. Young is in custody considering the type of charges that's he's facing." Defense counsel responded, "Right." (31RT 2775.)

Appellant does not believe that this colloquy amounts to a "request" that the instruction be given. Counsel corrected the trial court's first statement that there was nothing to indicate that the jurors had seen appellant in restraints, but did not continue with a request that the instruction be given. Defense counsel also agreed with the trial court's statement that the jurors would reasonably conclude from the charges that appellant was in custody. Appellant does not believe that either statement amounts to a "request" for the instruction.

Respondent also argues that in any case this Court should "presume" the jury followed the instruction to disregard the restraints. (RB 73.) There is an exception to this general rule, however, as appellant pointed out in the Opening Brief. (AOB 120, fn. 75.) *People v. McDaniel* (2008) 159 Cal.App.4th 736, 747, fn. 9 explains that if "reviewing courts automatically find [harmlessness based on this presumption], trial courts could shackle prison inmates as a matter of routine, knowing that a subsequent admonition and appellate

presumption would in most cases render any abuse of discretion harmless." Such a result "would undermine the trial court's sua sponte obligation" to make a finding of manifest need based on the record. (*Ibid.*)

3. Summary.

In sum, the erroneous ruling restraining appellant in the absence of any record of manifest need, and the resulting impairment of his ability to focus on the trial and communicate with counsel, require a reversal of appellant's convictions.

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

(Reply to Respondent's Arg. V, pp. 74-76.)

A. The Trial Court Denied Appellant's Request To Admit the Third Party Culpability Evidence.

Respondent begins by quibbling about a word used by appellant in his summary of procedural facts. Referring to the prosecution's motion to exclude evidence of Jack Reynolds' criminal history, and the hearing at which the defense argued the relevance of that evidence, stated that the trial court "denied the defense request without stating reasons." (AOB 122.) Respondent's complaint is that appellant made "no such request at the hearing he cites" because the hearing was on the prosecution's motion, although respondent

acknowledges that the defense argued for the admission of the evidence and the court refused to admit it.

This is much ado about nothing. Yes, the prosecution "requested" the exclusion, and the trial court did reject appellant's argument. There is no disagreement as to the procedural facts, except, apparently, that respondent takes umbrage at appellant's use of the word "request" when it was the prosecution's motion – and appellant did "request," ask and/or argue to have the evidence admitted.

B. The Trial Court Erred in Excluding the Proffered Defense Evidence.

Respondent makes two arguments. First, respondent argues that evidence of Reynolds' prior convictions was inadmissible character evidence; and second, that the other proffered evidence relating to Reynolds did not meet the standard for third party culpability evidence. (RB 75-76; 77-78.)

Two points must be made at the onset. First, respondent addresses the components of the offer of proof separately, in order to bolster the argument that that the defense did not meet the standard for third party culpability evidence. This reductionist view is incorrect. This Court must view the entirety of the offer of proof in assessing its adequacy.

Secondly, respondent asserts that "all" appellant offered, in addition to the prior convictions, was evidence suggesting Reynolds "racism and his

promise to his mother of luxuries he could not afford." (RB 78.) Respondent's summation omits half of the evidence offered by appellant in support of his theory that Reynolds was involved in the robbery plan. Appellant's proffer included evidence (1) that Reynolds had prior convictions for robberies similar to the charged robbery; (2) that he had a skinhead Viking tattoo similar to one appellant had, according to his brother, had racist attitudes; (3) that he told his mother he might be coming into some money and had promised he'd send her to the Cayman Islands; (4) that at the time of his death, Reynolds had only $6 in his account, and a number of pawn tickets; (5) that he had told the employees to prepare and not fuss if there was a robbery; and (6) that he had talked to Torkelson outside the trailer on the night in question.

1. The third party culpability evidence was not improper character evidence.

Respondent argues that the proffered third-party culpability evidence was properly excluded as prohibited "character evidence" under Evidence Code section 1101. Respondent concedes that Evidence Code section 1103 carves out an exception to section 1101, when the defense offers "character" evidence to prove conduct in conformity with the character or trait. (RB 75.)

Of the six items of proffered evidence, only the prior robbery conviction and the racist beliefs could arguably be considered character evidence, and in this case, all of the cited evidence was offered to prove conduct in

conformity.[16] Respondent does not really argue differently, but concludes the "character evidence" argument by suggesting that the trial court could have excluded the evidence under Evidence Code section 352. (RB 75-76.)

2. The proffered evidence met the standard for admission of third party culpability evidence.

Respondent argues that appellant's offer of proof fell below the standard. However, as stated above, this is because respondent ignores half of the defense proffer. (See above, Part B, page 43.) Respondent then calls it a "leap of faith" to conclude that the evidence (as only partially outlined by respondent) was sufficient to link Reynolds to the actual robbery "in which he was shot execution-style." (RB 78.)

Appellant does not contend that Reynolds participated in his own murder, as respondent implies. Appellant's contention is that the evidence was "direct or circumstantial evidence linking" Reynolds to the crime of robbery. The tragic result was that Reynolds was himself killed, but even the prosecution's evidence tended to show that the plan was to rob, and that the

---

16 Respondent sets up a straw man argument, asserting that although a victim's past violence is admissible under Evidence section 1103 where the defendant claims self defense, appellant did not raise a self-defense argument. (RB 76.) This argument is meaningless. Self defense does not come into it. Appellant argues that the six pieces of evidence amount to "direct or circumstantial evidence linking" Reynolds to the crime, and were thus admissible under *People v. Hall* (1986) 41 Cal.3d 826, 883-84 and federal due process guarantees.

killings were not part of the plan but a result of poor planning and adrenalin and not thinking straight. (AOB 16.)

Appellant's proffer did link Reynolds to the robbery: he ordered his employees to cooperate in any robbery; he communicated with the mastermind Torkelson immediately before the crime; he bragged that he would be coming into money. The proffer satisfied the requirements of *People v. Hall* , 41 Cal. 3d at 883-84 and the trial court should have admitted the evidence according to federal due process guarantees.

C. The Trial Court's Asymmetrical Rulings Violated Appellant's Federal Due Process Rights.

Appellant argues that the trial court's ruling also violated appellant's federal due process because it was an asymmetrical ruling, i.e., the prosecution was allowed to present evidence of appellant's extremely inflammatory tattoo to "verify" a witness' identification even thought he witness knew appellant well so that the tattoo identification was completely unnecessary. Yet the court prevented the defense from using Reynolds' tattoo as evidence tending to show his complicity and third party culpability. Such asymmetrical rulings violate federal due process. (*Gray v. Klauser* (9th Cir. 2002) 282 F.3d 633, 645-46; *Wardius v. Oregon* (1973) 412 U.S. 470; *Washington v. Texas* (1967) 388 U.S. 14, 22.)

Respondent fails to address this argument based on federal constitutional law. Appellant thus refers this Court to his Opening Brief. (See AOB 125-127.)

D. The Erroneous Exclusion of the Evidence Prejudiced Appellant.

Respondent concludes there was no error and thus does not address the prejudice from the trial court's ruling excluding the proffered third-party culpability evidence. (RB 78.) As appellant argued in his Opening Brief, the particular prejudice was as follows: Although the prosecutor was allowed to present appellant as a racist and white supremacist, the trial court's ruling prevented appellant from rebutting or blunting the impact of that evidence by showing that Reynolds was also involved, and that while the robbery might have been planned and carried out by some who were or had been skinheads, it was not a crime intended to further skinhead/white supremacy goals. The trial court erred in allowing the prosecution to "play the race card" in this case. But having allowed that play, the trial court's refusal to allow appellant to rebut it prejudiced him. (*Simmons v. South Carolina* (1994) 512 U.S. 154, 174 [Ginsburg, J. and O'Connor, J. concurring [defendant's right to rebut the prosecution's evidence is the "core requirement" and "hallmark" of due process].)

/

VI. THE CUMULATIVE PREJUDICIAL IMPACT OF GUILT PHASE ERRORS REQUIRES REVERSAL

(Reply to Respondent's Arg.VI, pp. 78-79.)

Assuming this Court finds that none of the errors in this case is prejudicial standing alone, the cumulative prejudicial effect of these errors nonetheless undermines the confidence in the integrity of the guilt proceedings and warrants reversal of the convictions and special circumstance findings. The prejudice from this constitutional error must be considered together with the cumulative prejudice from the other trial errors discussed above. (See *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [cumulative effect of trial court errors can violate federal due process rights]; *Donnelly v. DeChristoforo*, 416 U.S. 643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; see e.g., *Killian v. Poole* (9th Cir. 2002) 2828 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *People v. Hill*, 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error].)

Respondent argues *ipse dixit* that none of appellant's claims amount to serious errors that might have affected the verdict whether viewed individually or in combination. (RB 78-79.) Appellant disagrees. As demonstrated in Appellant's Opening Brief, and in the arguments above, serious constitutional errors occurred. Appellant's statement taken in violation of *Miranda* was a critical piece of evidence: the prosecutor relied on that erroneously admitted evidence as proof that appellant's statements to Getscher were true, thus striking at the heart of the defense case, i.e., that appellant was posturing in the taped conversation and Getscher was confabulating in his trial testimony.

In addition, the erroneously admitted evidence of appellant's racist tattoos and beliefs was exploited by the prosecutor in closing argument, resulting in a trial not based on the evidence, but on irrelevant and prejudicial information and argument as to appellant's supposed racism and the victims' feelings. The cumulative effect of the errors that occurred, in any combination, amounted to a denial of due process and a violation of the Eighth Amendment reliability requirement in capital cases,[17] resulting in a fundamentally unfair trial, requiring reversal. (See AOB 128-29.)

/

/

---

[17] See e.g., *Monge v. California* (1988) 524 U.S. 721, 732 [because of the severity and finality of the death penalty, the Eighth Amendment includes an "acute need for reliability in capital proceedings"].

PENALTY PHASE ARGUMENTS

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

(Reply to Respondent's Arg. VII, RB 79-84.)

A. The California Statute Mandating a Second Penalty Trial Following a Hung Jury And Mistrial Is Vastly at Odds with Evolving Standards of Decency Under the Eighth Amendment.

Appellant maintains that holding a second penalty trial after the first penalty trial ended in a hung jury and mistrial is cruel and unusual punishment in violation of the Eighth Amendment. Respondent notes that this Court rejected a similar argument in *People v. Taylor* (2010) 48 Cal.4th. 574, 633; and argues that the same ruling should apply here, since there has been no change in the California death penalty statute since the *Taylor*. (RB 79-80.)

The essence of appellant's argument is that the California statute is vastly at odds with the rule in other states and the federal jurisdictions, which permit only a single penalty phase trial, and thus is out of step with the evolving standards of decency, which is the standard by which cruel and unusual claims are assessed.

Respondent does not address the rule in other jurisdictions, even though the United States Supreme Court has held that "'legislation enacted by the country's legislatures'" is the "'clearest and most reliable objective evidence of contemporary values'" and thus of our evolving standards of decency. (*Atkins v. Virginia* (2002) 536 U.S. 304, 312, quoting *Penry v. Lynaugh* (1989) 492 U.S. 302, 331.)

Instead, respondent complains that appellant "fails to explain how mandatory, as opposed to optional, retrial should change the result in *Taylor*." (RB 80.) This is incorrect. Appellant explains why the result in *Taylor* should be changed by citing to objective evidence not addressed in the *Taylor* decision: As pointed out in the Opening Brief, of the 34 jurisdictions (33 states and the federal courts) that allow capital punishment, only seven (or 21%) permit a retrial. However, of these 34 jurisdictions, only two (California and Arizona) *require* a retrial. Thus, only 5.9% of the jurisdictions mandate a death penalty. The mandatory provision of the California statute – an issue not addressed in *Taylor*-- is stark and objective evidence that California is at odds with our country's evolving standards of decency, and that the mandatory retrial provision violates the Eighth Amendment.

/

/

/

B. Retrial of the Penalty Phase Contravenes The Constitutional Requirement that Each Juror Must Make an Individualized Determination as to the Appropriate Sentence.

Respondent deems "bizarre" appellant's argument that a second penalty trial devalues the requirement that each juror make an individual moral determination as to a life or death sentence. (RB 81.) Respondent states that there is nothing to support the claim, and that double jeopardy does not apply to a second trial after a mistrial. (RB 82.)

Appellant does not contend that the second penalty trial violated principles of double jeopardy, so respondent's latter point is moot. As to the former point, appellant has cited and addressed United States Supreme Court case law requiring each juror to make an individual moral decision as to the appropriate sentence in a capital case, a function described as maintaining a link between community values and the penal system. (See AOB 136-137 & cases cited therein.)

Appellant explained that the failure of the first penalty jury to reach a verdict is "a significant and reliable objective index of contemporary values" as described in *Gregg v. Georgia* (1976) 428 U.S. 153, 181. The California statute mandating a second penalty trial -- after a jury has already provided a reliable objective index based on contemporary community values that appellant did not deserve to die – directly tells the jurors and the community

that their individual moral judgments were neither reliable nor significant. Such a message conflicts with the Eighth Amendment's focus on evolving standards of decency as determined by the moral conscience of each individual juror in the first penalty trial.

C. Appellant's Death Sentence, Imposed After The Second Penalty Trial, Is Unconstitutionally Arbitrary and Capricious.

Respondent argues that appellant's argument claim that the second penalty trial was arbitrary and capricious is unsupported by the record. Respondent argues that the "mere fact" that one jury reaches a decision, and another jury does not, does not prove the caprice of the second jury. Respondent also notes that retrials regularly occur in our judicial system. (RB 81.)

As to the latter point, retrials may regularly occur in regular trials, but they do not "regularly" occur when the defendant has already once faced a death sentence.

As to the former point, appellant expressly pointed to the specific facts that rendered his death sentence arbitrary and capricious in this case. Both juries deliberated for six days, a clear indication that the evidence in favor of a death sentence was not and is not compelling. Appellant maintains that in any capital case, a second penalty trial after a hung jury is cruel and unusual. In

this case, however, the facts demonstrate that the eventual death sentence was also arbitrary, the result of throwing the dice twice.

D. Appellant's Second Penalty Trial Constituted Structural Error and Requires Reversal of His Sentence of Death.

Constitutional errors that occur during trial are of two types: Trial errors are those "which occur[] during the presentation of the case to the jury, and which may therefore be quantitatively assessed" in the context of the trial as a whole to determine whether they are harmless. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307-08.)

Structural errors, on the other hand, are defects "affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." (*Id.* at 310.) Structural errors are "defects in the constitution of the trial mechanism," and therefore defy analysis by harmless error standards, and reversal is automatic (*California v. Roy* (1997) 519 U.S. 2, 5, citing *Brecht v. Abrahamson* (1993) 507 U.S. 619, 629.) Examples of structural error include: erroneous reasonable doubt instruction, as in *Sullivan v. Louisiana* (1993) 508 U.S. 274; erroneous exclusion of grand jurors of the defendant's race, as in *Vasquez v. Hillery* (1986) 474 U.S. 254; denial of the right to self-representation at trial, as in *McKaskle v. Wiggins* (1984) 465 U.S. 168; denial of the right to a public trial, as in *Waller v. Georgia* (1984) 467

U.S. 39; total deprivation of the right to counsel, as in G*ideon v. Wainwright* (1963) 372 U.S. 335; and lack of an impartial trial judge, as in *Tumey v. Ohio* (1927) 273 U.S. 510.

The erroneous second penalty trial fits squarely within the framework of structural errors as it is a defect in the trial mechanism itself. Thus, the error requires reversal without resort to harmless error analysis. If the error is structural, then defendant's "criminal trial cannot reliably serve its function" and reversal is required.[18] (*Rose v. Clark* (1986) 478 U.S. 570, 577-78.)

E. Conclusion.

In conclusion, the national consensus against death penalty retrials, the recognition that "death is different," and the required individualized juror determination on penalty, require a prohibition against a repeated attempts by the state to sentence a defendant to death.

Because the error is indisputably structural, this Court must vacate appellant's death sentence and impose a sentence of life without the possibility of parole.

/

/

---

[18] Respondent argues that the error was harmless, citing appellant's references in the Opening Brief to differences between the first and second penalty trials. (RB 82-83, AOB 139-145.) These differences help demonstrate why a second penalty trial is fundamentally unfair. Appellant's position, however, is that the error is structural and requires reversal.

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

(Reply to Respondent's Arg. VIII, pp. 84-93.)

Appellant contends that the enormous amount of evidence of appellant's supposed white supremacist beliefs and Nazi tattoos, including expert testimony that those tattoos were "inherently racist," violated appellant's First and Eighth Amendment rights. The prosecutor urged the jury to reach a sentence of death **because of** those beliefs, thus rendering the error clearly prejudicial.

Respondent argues that the evidence did not violate appellant's First Amendment rights under under *Dawson v. Delaware* (1992) 503 U.S. 159, and that the evidence was in any case permissible rebuttal to appellant's good character evidence. Respondent is wrong as to both points, as shown below.

A. The Extensive Testimony as to Appellant's Tattoos and Beliefs, and the Expert Testimony As to Their "Inherently Racist" Meaning Violated Appellant's First Amendment Rights Under *Dawson v. Delaware.*

In *Dawson,* as in the present case, a group of prison buddies committed felony murder. The defendant challenged the admission, by stipulation, at

penalty phase of evidence that the defendant belonged to an Aryan Brotherhood prison gang in Delaware, that the Aryan Brotherhood originated in California, and that the gang entertained white racist beliefs.

The United States Supreme Court held that even if the Delaware gang to which appellant belonged had racist beliefs, "those beliefs [] had no relevance" to the penalty phase because "the Aryan Brotherhood evidence was not tied in any way to the murder of Dawson's victim." (*Id.* at 165-66.) The High Court noted that if the prosecution had presented "credible and admissible" evidence that the defendant's gang advocated murder, etc., it would be "a much different case."

The same is true here. The fumbled robbery murder at the parking lot was not tied to appellant's white supremacist or Nazi or Aryan Brotherhood beliefs. This connection between the racist beliefs of the gang and the facts of the crime is the *sine qua non* requirement that would permit such evidence at penalty phase. Thus, *Dawson* gave the counter example of a case in which such evidence was admissible, citing *Barclay v. Florida* (1983) 463 U.S. 939, 942-44, in which, "on the contrary, the evidence showed that the defendant's membership in the Black Liberation Army, and his consequent desire to start a 'racial war' were related to the murder of a white hitchhiker. (*Dawson*, 503 U.S. at 166.)

The facts of this case show that a group of prison buddies who identified as skinheads committed a money-motivated robbery that ended in murder; their skinhead associations and beliefs were not related to the robbery – no murder was planned, there was not even a plan to rob non-white victims, and the race of the victims were not known until afterwards.

Respondent argues that "the concrete evidence, explicated by expert testimony," produced by the prosecution in this case was "exactly the kind of context evidence of the violent nature of [appellant's] neo-Nazi association" that *Dawson* "suggested" would have been admissible. (RB 89.)

Appellant disagrees as to each point: (1) the evidence cited by respondent is not "concrete" but incorrect; (2) the expert testimony did much more than "explicate" the "concrete evidence," because the expert extrapolated wildly from the fact of appellant's tattoos to pronounce as to their specific meanings in terms of his abstract beliefs; and (3) *Dawson* did not suggest that such evidence would be admissible.

Before addressing respondent's specific arguments, it is important to distinguish between the evidence admitted in the prosecution's case-in-chief, and that which was admitted in rebuttal, since *Dawson* sets out differing standards for the two kinds of evidence.

The evidence presented by the prosecution in its case-in-chief consisted of:

(1) testimony by Daleo that she had seen appellant with Torkelson at Aryan Nation meetings, meetings which involved Bible readings, singing of songs, and references to white people being God's chosen people, "a church thing." (59RT 6083-84.)

(2) testimony by Getscher that appellant bought red laces after the offenses and said that he had killed a Mexican. (61RT 6453, 6460.)

The remainder of the evidence was admitted as rebuttal evidence, and was inadmissible under *Dawson* for that reason.

Respondent cites to three items of "concrete" evidence she claims are just what *Dawson* suggested would be admissible. The problem is that one of those items (that appellant beat a black man) has no evidentiary support in the record, and is either a mistake or a confabulation. In either case, respondent should make the correction. The second item, that appellant tried to lace his boots with red laces after the crimes, at least has evidentiary support, but, as argued above, this was an after-the-fact event, and does not provide the connection required under *Dawson* between the crime and a racist motive. Thirdly, although respondent asserts that these items of evidence were "explicated by expert testimony," in fact, the expert testimony was admitted in rebuttal, and was inadmissible under *Dawson* for that reason. Each of these points is addressed in more detail below.

/

1. There is no evidence whatsoever that appellant "beat a Black man," or that he thereafter added "Nigger" to his "Thrasher" tattoo.

Respondent cites the "concrete evidence" that "after beating a Black man," appellant tattooed his body with the phrase "Nigger Thrasher." (RB 89.) This is flatly and egregiously wrong. There is no evidence that Lee Alvin was a "Black man" and in fact he was not. Furthermore, the evidence is that appellant did not beat Alvin. Consequently, there can be no evidence that appellant had Alvin in mind when his "Thrasher" tattoo was modified to "Nigger Thrasher."

Respondent provides no citation to the record evidence in support of this slur (because none exists). Respondent's Statement of Facts refers to the Arizona "assault Young and his friends committed on a Black man named Lee Alvin in 1992." (RB 29, citing to 49RT 6894-6905.) However, nothing on the cited pages, which is comprised of testimony by the police officer, refers to the race of the victim, who is described only as an elderly man.

Appellant requests that this Court strike respondent's statement from the brief unless respondent can and does provide record support for the assertion.

The officer's testimony on these pages is clear on one thing: appellant did not assault the man. It was one of the other two young men with appellant, either Mauricio Perez or Jacob Havird, who hit Alvin on the head with a rock. (64RT 6905-08.) The record is also bereft of any testimony that appellant

tattooed "Nigger Thrasher" on his arm because of the Arizona crime. Appellant had the tattoo "Thrasher" (a skateboard brand) as early as 1992. (64RT 6903.) Getscher, who was in prison with appellant in Arizona testified that the "Nigger" was added to "Thrasher" in 1996 when he and appellant were together in prison. (29RT 2463-64, 2467, 2515-16.)

In sum, Lee Alvin was not African-American and appellant did not assault or "thrash" him. And contrary to what respondent implies, appellant did not run out and add "Nigger" to the "Thrasher" tattoo close after Mr. Alvin was hit by a rock by either Perez of Havird, not appellant. [19] Nor is there any evidence indicating that the "Nigger" was added because of any other racially motivated incident.

2. The red laces.

As demonstrated above in **Arg.** ***, pp. **, and adopted and incorporated by reference here, the fact that appellant used red laces *after* the crimes did not tend to show a racist motive in planning or carrying out the crime: He had no idea who the victims would be and his statements regarding the crime tended to show it was an unpremeditated blunder. There was no

---

19 Respondent's assumption is the logical fallacy described by the Latin phrase "post hoc ergo propter hoc," i.e., "after this therefore because of this." Just because one thing follows another (and in this case by many years) does not mean that it was caused or motivated by the first thing.

evidence that appellant committed the crime or any crime *because of* those beliefs.

3. The expert's "explication."

Respondent describes the expert testimony as "explicating" the concrete evidence, but it went far beyond that.

Dawson did not suggest that certain items of evidence could provide "context" for a flood of expert evidence that included assertions that most of appellant's tattoos were "inherently racist" and that the "Nigger Thrasher" tattoo " obviously referred to an act of violence against an African American. (See AOB 52-53.) Moreover, the extremely prejudicial expert evidence was admitted in *rebuttal,* and was improper for that reason, as discussed immediately below, in Part B. (See pp. 61-66.)

B. *Dawson* Does Not Permit Evidence of A Defendant's Abstract Beliefs, Unconnected To the Commission of the Crime, As Rebuttal To Good Character Evidence in Penalty Phase.

Except for the "Black man" and the "red laces" evidence, the remainder of the evidence of appellant's supposed racist attitudes and beliefs was admitted in rebuttal of testimony by mitigation witnesses who knew appellant as kind and non-violent. Respondent contends that this is "exactly the kind of context evidence of the violent nature of Young's neo-Nazi association" that *Dawson* "suggested" would be admissible. (RB 89-90.) The rebuttal evidence

consisted of apparent blood stains near appellant's cell and extensive testimony as to appellant's tattoos and their supposed and "inherent" racist significanc

Specifically, respondent points to testimony from Aaron Beek "elicited" by appellant that the neo-Nazi group he and appellant belonged to was just "a group of working class individuals" and did not have white supremacy as its focus. (RB 90.) Respondent argues that it was "reasonable" for the trial court to allow the prosecution to rebut this testimony with "evidence that a rune and a swastika *apparently* rendered in blood appeared *in or near Young's cell* shortly after the attack on [white inmate] Harger," and expert testimony from an employee of the Anti-Defamation League 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." (RB 90-91, citing 69RT 7627-7658; emphasis supplied.)

Appellant vehemently disagrees. Respondent is mistaken as to both the facts and the law. First, the cited testimony was **not** elicited by the defense, but was elicited by the prosecution on cross-examination of Beek as a defense witness. Beek testified in mitigation that that he was the sole assailant and the sole defendant in the assault against Harger. He testified that appellant was not present when he stabbed Harger. In other words, the defense presented Beek's

testimony to impeach the factor (b) evidence presented in aggravation by the prosecution.

The prosecutor then cross-examined Beek at length about his tattoos, and a letter Beek wrote saying appellant was a member of the American Front neo-Nazi group, which he described as a club of "white working class individuals." (67RT 7276-79.)

In short, because the prosecutor's cross-examination was on a matter collateral to Beek's testimony regarding the Harger incident, the prosecutor cannot rebut his own cross-examination with otherwise inadmissible and irrelevant evidence. A party cannot cross-examine on a collateral matter in order to elicit testimony only to contradict it. It is error to allow rebuttal on a matter before the jury only because of the prosecutor's improper cross-examination. (*People v. Lavergne* (1971) 4 Cal. 3d 735, 741; *People v. LoCigno* (1961) 193 Cal.App.2d 360, 379.)

In any case, the prosecutor went far beyond rebutting its own improper impeachment of Beek by presenting extensive and extremely inflammatory testimony from the Anti- Defamation League expert: Joanna Mendelson told the jury that all skinheads were neo-Nazis and that the American Front was an white supremacist "inherently racist" neo-Nazi organization; that the numbers "14" and "88" tattooed on appellant related to perpetuating the white race, and that the rune was also "inherently racist," that appellant's avowal of Odinism

was a ruse used by prisoners as a means of conducting criminal activity and violence from inside the prison; that the Doc Martin boot referred to carrying out a violent act, such as stomping a victim; that the red suspender tattoo showed blood spilled from a Jew or "mud person," etc. (See AOB 51-53.)

Even if the prosecution was entitled to rebut its own improper cross-examination, very little of Mendelson's testimony would have or could have been understood as relating to, or restricted to, Beek's credibility, since Mendelson was testifying with great certitude as to the abstract beliefs represented by appellant's tattoos.[20] Respondent does not explain why the prosecution should have been allowed to rebut the credibility of Beek or other mitigation witnesses with "expert explications" as to how and why appellant's tattoos showed appellant's abstract beliefs.

Even assuming *arguendo* that the prosecution properly rebutted its own evidence (to appellant's great disadvantage), the rebuttal was not condoned by *Dawson* as respondent claims.

Respondent selectively quotes a single sentence from *Dawson*, which recognizes the general principle that the prosecution is entitled to rebut mitigation evidence. (RB 89.) However, respondent fails to quote or refer to the rest of the *Dawson* rationale, which expressly held that despite the general

---

[20] Evidence of appellant's tattoos was presented by the prosecution. (49RT 7567, 7585, 7591-92; see RB 36.)

principle of rebutting mitigation evidence, the Aryan Brotherhood evidence presented could not be viewed as relevant bad character evidence in its own right. Appellant quotes the relevant portions in full:

> "We have held that a capital defendant is entitled to introduce any relevant mitigating evidence that he proffers in support of a sentence less than death. [] But just as the defendant has the right introduce any sort of relevant mitigating evidence, the State is entitled to rebut that evidence with proof of its own. [] *In this case, Dawson's mitigating evidence consisted of testimony about his kindness to family members*, as well as evidence regarding good time credits he earned in prison for enrolling in various drug and alcohol programs. Delaware argues that because Dawson's evidence consisted of 'good' character evidence, it was entitled to introduce any 'bad' character evidence in rebuttal, including that concerning the Aryan Brotherhood. The principle of broad rebuttal asserted by Delaware is correct, but the argument misses the mark because, as stated above, *the Aryan Brotherhood evidence presented in this case cannot be viewed as relevant 'bad' character evidence in its own right.* " (503 U.S. at 168; emphasis supplied and internal citations omitted.)

The same conclusion is mandated here. The prosecution was not entitled to rebut mitigation evidence as to appellant's kindness and non-violence with expert testimony described by respondent as "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." (RB 87.) The reason is the same as that set out in *Dawson*: the prosecution failed to tie the "hateful nature of neo-Nazi skinhead doctrine" and its encouragement and reward of violence to appellant's

commission of the crime. Without that connection (which was present in *Barclay* because of the evidence of the defendant's membership in the Black Liberation Army, and his consequent desire to start a racial war were related to the murder of a white hitchhiker), the flood of evidence presented by the expert was not proper rebuttal to appellant's mitigation evidence. (*Dawson*, 503 U.S. at 166.)

Respondent's premise is faulty: respondent showed no concrete evidence tying the crime to appellant's skinhead associations, and quite a lot of evidence of his abstract beliefs in racism and racial violence.

C. The Cautionary Instruction Did Not and Could Not Diminish the Prejudicial Impact of the Inflammatory and Inadmissible Evidence of The "Hateful Nature of the neo-Nazi skinhead Doctrine."

Respondent argues that this Court should presume that the jury followed the instruction not to consider evidence of appellant's beliefs [and] allegiance" except for the limited purpose of evaluating the credibility of appellant's character witnesses. (RB 91.) Appellant addressed the ineffectiveness of this instruction at length in his Opening Brief. (AOB 161-164.)

The limitation was meaningless. The evidence of how appellant's tattoos and the symbols near his cell showed his violent and racist nature could not and would not be understood as a way of evaluating other witnesses' credibility as to whether appellant was kind or not – except insofar as it tended

to prove his abstract beliefs, which under *Dawson* is prohibited without credible evidence that appellant's skinhead gang or the American Front "had committed any unlawful or violent acts, or had even endorsed such acts." (*Dawson* 503 U.S. at 166.) The limiting instruction thus could not and would not have been followed by the jurors, and this Court should not presume otherwise. As in *Dawson*, "one is left with the feeling that the Aryan Brotherhood evidence was employed simply because the jury would find these beliefs morally reprehensible. (*Id.* at 167.)

Respondent also argues that the court's instruction was "reinforced" by the prosecutor who said not to consider appellant's tattoos as an aggravating factor, but simply as to whether the defense witnesses were believable. (RB 91-92, citing 72RT 7955-56.)

In fact, the prosecutor repeatedly told the jurors they could consider the challenged evidence as proof of what appellant "was thinking and about who [he is];" the prosecutor told the jury that the rune symbol Mendelson testified was "inherently racist" showed "his attitude" and "who he is." "How offensive is that? That's who he is. That's what he does." (72RT 7956-57.) The prosecutor said that appellant's tattoos made him "a walking billboard of hate" and he became a skinhead "because that's who he is." (72RT 7955-56.) The prosecutor relied on Mendelson's testimony as tending to show that appellant "believe[d] only white people are the chosen people, that everybody else is

either descended from Satan, the devil, or they are mistakes, mud people." (62RT 7928.)

D. The Sentence of Death Is Unreliable Under The Eighth Amendment And Must Be Vacated.

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

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

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

"obviously" violent. She also testified that "all" skinheads were neo-Nazis, and that appellant's Odinism religion was just a "ruse" for prisoners who used the right of freedom of religion to conduct crimes and violence inside the prison.

E. Appellant's Death Sentence Must Be Vacated.

Appellant contends that the transformation of the penalty phase as an attack on appellant as a violent racist neo-Nazi was prejudicial standing alone. Nonetheless, the prejudicial impact of this error must be considered in conjunction with the other penalty phase errors. (*People v. Hill*, 17 Cal.4th at 844; *United States v. Frederick* (9th Cir. 1995) 78 F.3d 1370, 1381; *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [several errors considered together violated the defendant's rights to due process and a fair trial].)

Respondent argues that any error should be deemed harmless beyond a reasonable doubt because "the circumstances of the crime were horrific," and he participated in a stabbing of a fellow inmate, and was convicted of "a brutal attack" on an elderly man. (RB 92-93.) According to respondent, "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."[21] (RB 93.)

---

[21] Respondent's language here is telling in that it acknowledges and recognizes that the evidence the jury heard was of appellant's *abstract beliefs* – and not evidence showing more than those abstract beliefs, or that those abstract beliefs were connected to the crimes, or that those abstract beliefs showed that appellant's mitigation witnesses should not be believed. This is appellant's point throughout: the evidence of his abstract beliefs is inadmissible under *Dawson*.

Appellant disagrees. At trial, the prosecutor dedicated eight witnesses to proving that appellant was a Hitler-loving Nazi "monster" in a case that was neither a hate-crime or gang prosecution. The prosecutor relied on that evidence in argument, exacerbating the prejudice, and the evidence and argument was so provocative that no limiting instruction could have blunted its inflammatory effect.

Where, as here, the prosecution at trial was hell-bent on presenting evidence of appellant's supposed hateful and violent abstract beliefs at trial, an appellate argument that the evidence was insignificant should be rejected, as the court did in *Yohn v. Love*, 76 F.3d at 523-25, fn. 8; see also *People v. Powell*, 67 Cal.2d at 55-57.)

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

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

(Reply to Respondent's Arg. IX, RB pp. 93-98.)

Respondent addresses appellant's Arguments X and XI in a single argument numbered Argument IX. Respondent addresses appellant's Argument

IX in the text at RB 93-96. Respondent addresses appellant's Argument X in two lengthy footnotes at RB 94, fn. 17, and RB 94-95, fn. 18.)

A. Victim Impact Evidence on a Crime Unrelated to The Capital Murder Is Inadmissible.

Appellant contends that the admission of victim impact evidence on crimes other than the capital charges violated appellant's federal constitutional rights under the Eighth and Fourteenth Amendments. (AOB, Arg. IX, pp. 164-74.)

Respondent argues that this Court has repeatedly found such evidence "relevant and admissible in the penalty phase." (RB 93.) Respondent's argument relies on *People v. Price* (1991) 1 Cal.4th 324, 478 and *People v. Benson* (1990) 52 Cal.3d 754, and the cases following their lead.

Appellant addressed these cases at length in the Opening Brief: the holding in *Price*, which upheld the admission victim impact evidence on past crimes unrelated to the circumstances of the capital murder, is not supported by the cases cited in its rationale, and is wrong under relevant United States Supreme Court precedents. (RB 94; AOB 167-69.)[22]

---

22 Other cases cited by respondent at RB 94, such as *People v. Davis* (2009) 46 Cal.4th 539, 618, *People v. Garceau* (1993) 6 Cal.4th 140, 167-68, and *People v. Bramit* (2009) 46 Cal.4th 1221, 1241 are all based on the flawed reasoning in *Price* and *Clark*. (See AOB 167-69.)

Respondent does not dispute appellant's summary of the facts of holdings of *Price* and *People v. Benson*, but argues instead that because neither case addressed the issue of unrelated victim impact evidence, nothing in those holdings "militates against this Court holding admissible evidence of the impact on his victims of a defendant's prior crimes." (RB 95; AOB 167.) Although this assertion may be narrowly correct, the more salient and significant point, and the argument made by appellant, it is that United States Supreme Court precedent does militate against admission of victim impact evidence of crimes unrelated to the capital murder, i.e., *Price* represents an unwarranted expansion of victim impact evidence, despite the explicit limitation put on such evidence by the High Court in *Payne v. Tennessee* (1991) 501 U.S. 808, 827, 830, fn. 2. (See AOB 165-66.)

Respondent makes the spurious argument that *Benson* and *People v. Karis* (1988) 46 Cal.3d 612 were decided before *Payne* but this is meaningless. (RB 96.) (*Price*, the leading case by this Court, was decided after *Payne*). Whether the cases came before or after *Payne v. Tennessee* is not significant to appellant's argument that the admission of other-crimes victim-impact evidence does not conform to *Payne*.

Respondent's final point is misleading at best. Respondent asserts that the admission of such evidence is "directly in keeping with the rationale of *Payne*," a rationale it quotes as saying that the jury "should have before it at the

sentencing phase evidence of the specific harm caused by the defendant." (RB 96, quoting *Payne*, 501 U.S. at 825.)

However, respondent's citation to *Payne* has been selectively lifted from its context. As set forth below, the entire context makes it crystal clear that the "specific harm" referred to in *Payne* in the phrase quoted by respondent refers to the "*specific harm caused by the crime in question*," that is, the capital murder, and not other unrelated crimes remote in time and circumstance from the capital crime:

> "Victim impact evidence is simply another form or method of informing the sentencing authority about the crime in question, evidence of a general type long considered by sentencing authorities . . . Courts have always taken into consideration the harm done by the defendant in imposing sentence, and the evidence adduced in this case was illustrative *of the harm caused by Payne's double murder.* [¶] We are now of the view that that a State may properly conclude 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. The State has a legitimate interest in counteracting the mitigating evidence [] by reminding the sentencer that just as the murderer should be considered as an individual, *so too the victim is an individual whose death represents a unique loss to society and in particular to his family*." (*Payne*, 501 U.S. at 530 [internal citations and quotation marks omitted; emphasis provided].)

Payne speaks of the specific harm to the victim of the murder for which the defendant faces the death penalty, and not to "specific harm" the defendant might have caused (in this case only vicariously, i.e., through his co-defendant) to another person who was not a victim of the capital crime.

In short, respondent is simply wrong in quoting a portion of the *Payne* decision to support his assertion that other-crimes victim-impact evidence is "precisely" the type of "specific harm" testimony permitted and even "mandated" by the High Court in *Payne*. (RB 96.) The emphatic and precise holding of *Payne*, as articulated by the High Court itself, stated that its decision permitting (and certainly not "mandating" victim impact evidence) was limited to "evidence and argument relating to the victim and the impact of the *victim's death* on the victim's family." (*Payne*, 501 U.S. at 827 [emphasis provided; see AOB 166.)[23]

B. Testimony as to the Arizona Offense Was Irrelevant and Speculative Rendering Appellant's Death Sentence Unreliable.

Appellant makes a separate argument that the victim impact testimony on unrelated crimes admitted in this case exceeded even the boundaries of the case law by this Court, in that it included victim impact testimony by proxy and speculation, and law enforcement opinion testimony as to appellant's

---

[23] Appellant's Opening Brief cited cases from other states that interpreted *Payne* in a manner consistent with appellant's argument: these cases held that victim impact evidence of unrelated and previous crimes was irrelevant and inadmissible. (AOB 170-71.) Respondent notes that this Court rejected this argument in *People v. Davis*, 46 Cal.4th at 617-18. (RB 96.) Appellant acknowledged this (citing the *Davis* case and other cases from this Court) in his Opening Brief. (AOB 169.) Appellant maintains, nonetheless, that this Court has wrongly decided those cases. Even though this Court has permitted victim impact testimony relating to uncharged crimes, the United States Supreme Court has never expanded the constitutional boundaries of victim impact testimony to include other crimes unconnected to the capital crime.

supposed lack of remorse. (AOB 176-78.) None of this Court's cases allowing victim impact evidence on unrelated crimes has so radically expanded the scope of such testimony to permit testimony by proxy as to injuries and speculative injuries not caused by the defendant.

In an apparent attempt to minimize the force of appellant's arguments, respondent relegates his responses to two lengthy footnotes. (RB 94, fn. 17 [speculative testimony by proxy] and RB 94-95, fn. 18 [law enforcement opinion testimony as to supposed lack of remorse].

1. Law enforcement lay opinion as to appellant's supposed state of mind regarding the offense in Arizona was erroneously admitted.

The trial court allowed testimony by the probation officer and police officer on the seven-year-old prior offense from Arizona as follows: appellant was callous and uncaring, the assault (not committed by appellant) was brutal; that the victim was "really nice; " and that it was "really sad" that someone (not appellant) hit an elderly man with a rock. (64RT 6903-05.)

Respondent does not address appellant's argument that this testimony was inadmissible under this Court's own precedent as improper lay opinion. (See AOB 177, citing, *inter alia*, *People v. Melton* (1988) 44 Cal.3d 713, 744 [police officer lay opinion testimony inadmissible as irrelevant].)

Instead, respondent tries to characterize the testimony as "relevant" victim impact evidence because it was "direct evidence of the fact of the prior assault." (RB 94-95, fn. 18.) Respondent does not explain why the police officer's adjectives describing the severity of the crime and his emotional response to it should be deemed "direct evidence" of the fact of the prior crime. Direct evidence is that which proves a fact without an inference or presumption, and which in itself, if true, conclusively establishes that fact. (Evid. Code, section 410.) Opinion testimony is not and cannot be "direct evidence," because an opinion is an inference from facts observed. (Witkin, 1 California Evidence (3d ed. 2000), p. 528.) An opinion about a crime, i.e., that it was "brutal" or "sad" does not and conclusively establish that fact, for the simple reason that it is an opinion and not a fact.

As to the probation officer's opinion that appellant was callous and uncaring about the crime, respondent cites *People v. Bell* (2007) 40 Cal.4th 582, 606 for the proposition that the absence of remorse can be relevant to a defendant's guilt "especially when he disclaims responsibility for the harm done." (RB 95, fn. 18.) A quick review of the reasoning in *Bell* reveals the weakness of this argument.

In the first place, appellant did not merely "disclaim" responsibility for the harm done. The undisputed evidence was that he was **not** personally responsible for Mr. Alvin's injury. (64RT 6903.) Secondly, the defense theory

in *Bell* was that he killed not to facilitate his theft (which was the prosecution's theory) but that he killed "during a psychotic break in which [he] was motivated by displaced, long-repressed rage over his own treatment as a child." *(Bell*, 40 Cal.4th at 606.) This Court reasoned that the defendant's failure to express remorse the next day was relevant because "one might reasonably expect" a person "recovering from the psychotic episode and realizing the senseless violence he had done, to feel tremendous remorse for his unprovoked killing of a child with whom he had felt empathy." (*Ibid.*)

The of *Bell* reasoning does not apply here: Bell's failure to express remorse was relevant because he claimed to have acted without realizing what he had done, and if this were true, then he would be expected to feel remorse when he came to realize that had killed a child to whom he was close. In *Bell*, the defendant "'placed the issue of his remorse into question.'" (*Ibid.*) Appellant, on the other hand, did not raise any defense (either at the time or at the penalty phase) that he had not injured the victim. To the contrary, he pleaded guilty to the offense and accepted responsibility. (64RT 6908.) Since appellant took responsibility for his actions, and did not himself injure the victim, and did not know the victim, there would be no reasonable expectation for him to feel remorse, and thus no need for the prosecution to "prove" that remorse. Moreover, in *Bell*, the officers testified that Mr. Bell did not express remorse during police interviews. In this case, the probation officer and the

detective testified to their own *opinions* that appellant was not remorseful, rather than appellant's failure to express remorse to the police.

In sum, respondent's footnoted analysis should be rejected: it relies on *Bell* for a proposition not set forth in that case, i.e., that law enforcement officers can testify to their opinion of the defendant's supposed remorse where the defense did not place remorse in issue and the facts (that appellant did not cause the victim's injury) do not prompt a reasonable expectation of remorse.

2. Speculative testimony by the son of the victim of the Arizona offense was erroneously admitted.

Appellant contends that the trial court erred in allowing the son of the victim of the unrelated Arizona crime to testify as to the impact and speculative impact on his father (the victim) and his mother (who was not a victim). (AOB 171-72.)

Respondent argues in a footnote that the son's testimony was not "speculative" at all since he was a "direct percipient witness to his father's marked decline, which begin immediately after Young and his accomplices brutalized the man." (RB 94, fn. 17.) Respondent does not address the son's testimony regarding the impact on his mother, who was not a victim of the crime.

Respondent's assertions are wrong in several respects. First, there was no evidence at all that appellant "brutalized the man." Instead, the evidence

was that appellant did *not* participate in injuring Mr. Alvin. Secondly, contrary to respondent's claim, Mr. Alvin's decline did not begin immediately after the robbery, but "within a year of the incident," at a time when Alvin was 70 to 71 years old. (64RT 6923.) Thus, even if the son did observe his father's decline, there was no evidence that Mr. Alvin's decline, which eventually led to dementia, was a "harm caused by" the robbery.[24]

Respondent also points out that defense counsel cross-examined Mr. Alvin's son, as if the defendant's right to cross-examine a witness can and/or should cure the error of admitting his testimony in the first place. (RB 94, fn. 17.)

C. The Emotionally Powerful But Erroneously Admitted Victim Impact Evidence Prejudiced Appellant by Tipping the Scales Towards a Death Verdict in What Must Be Described as a Close and Difficult Penalty Phase Decision.

Respondent argues that any error should be deemed harmless because the testimony was brief, the aggravating evidence was "overwhelming," and that the death verdict was the outcome of appellant's callous and inexcusable murders. (RB 97.)

Appellant disagrees completely. The United States Supreme Court has described the inherent danger and emotional power of victim impact evidence

---

[24] Respondent also points out that defense counsel cross-examined Mr. Alvin's son, as if the defendant's right to cross-examine a witness can and/or should cure the error of admitting his testimony in the first place. (RB 94, fn. 17.)

in encouraging a verdict of death. (*Baze v. Rees* (2008) 553 U.S. 35, 84-85 [Stevens, J. conc.]; see AOB 174.)

Moreover, the hung jury on the first trial, and the long deliberations (six days) on the second penalty trial, both give testament to the fact that the aggravating evidence was not "overwhelming." (See AOB 173.) Finally, respondent's claim of harmlessness disregards the cumulative prejudicial impact of the multiple errors in this case, from the unfair presentation of evidence of appellant's tattoos and skinhead beliefs and the exclusion of evidence that victim Reynolds held similar beliefs and tattoos. (See AOB 183-85.)

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

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

(Reply to Respondent's Arg. X, RB pp. 98-100.)

Respondent argues that the defense proffer contained "nothing to connect" Reynolds's prior robbery conviction to the present case. (RB 99.) Respondent relies on *People v. Linton* (2013) 56 Cal.4th 1146, 1202. However, *Linton* upheld the exclusion of a defense proffer of evidence that an

unidentified intruder entered a home around the corner from the victim's neighborhood years before the assaults on the victim in her home, the second of which resulted in her death. This Court correctly pointing out that nothing connected the unidentified intruder in the neighbor's home with the first assault on the victim.

By contrast, in this case, the defense offered a number of evidentiary items connecting Reynolds to the charged crimes, as set out above in Argument V, pages 41-46, and adopted by reference and incorporated here. Respondent argues that this evidence was "irrelevant," because his need for money and claim that he would be coming into money was "scarcely motivation" and that his "supposed racism" was irrelevant. (RB 99.) Appellant disagrees: the lack of and/or need for money does tend to show a motivation to take money. (See e.g., *People v. Bordelon* (2008) 162 Cal.App. 4th 1311, 1321; *People v. Reid* (1982) 133 Cal.App.3d 354, 362.) Respondent's claim that Reynolds' tattoos and racist beliefs were not of "any relevance whatsoever" is hollow indeed, where appellant's tattoos and supposed racist beliefs were central to the prosecution's case against him.

Respondent argues that the excluded evidence was properly excluded from the penalty trial and thus does not address prejudice. (RB 99.) However, as appellant explained in the Opening Brief, the refusal to allow appellant to present this evidence was particularly prejudicial at the penalty phase, in which

the prosecution focused heavily on appellant's tattoos and skinhead beliefs as reasons to punish him with death. Had the trial court admitted evidence that Reynolds entertained similar beliefs and a similar tattoo, the prosecution's argument that such tattoos and beliefs made appellant a Hitler-loving monster deserving of a death sentence would have been much less persuasive to the jurors.

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

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

(Reply to Respondent's Arg. XI, p.100.)

Respondent argues that appellant got a fair trial and that any errors that occurred "must be evaluated under the applicable standard of prejudice." (RB 100.) Although respondent does not articulate the "applicable standard" he

believes should be used, he apparently means to argue that this Court need not consider cumulative prejudice. Appellant disagrees.

The prejudice from the constitutionals error at penalty phase must be considered, in any combination, as to their cumulative prejudice. (See *Taylor v. Kentucky*, 436 U.S. at 487, fn. 15 [cumulative effect of trial court errors can violate federal due process rights]; *Donnelly v. DeChristoforo*, 416 U.S. 643 [cumulative errors may so infect "the trial with unfairness as to make the resulting conviction a denial of due process"]; see e.g., *Killian v. Poole* (9th Cir. 2002) 2828 F.3d 1204, 1211 ["even if no single error were prejudicial, where there are several substantial errors, 'their cumulative effect may nevertheless be so prejudicial as to require reversal'"]; *Cooper v. Fitzharris* (9th Cir. 1987) 586 F.2d 1325, 1333 ["prejudice may result from the cumulative impact of multiple deficiencies"]; *People v. Hill*, 17 Cal.4th at 844 [a series of trial errors, though independently harmless may in some circumstances rise by accretion to the level of reversible prejudicial error].)

Assuming this Court finds that none of the errors in this case is prejudicial standing alone, the cumulative prejudicial effect of these errors nonetheless undermines the confidence in the integrity of the guilt and the penalty proceedings and warrants reversal of the convictions, special circumstance findings, and judgment of death.

The errors in appellant's second penalty trial began with the unconstitutional and structural error of a second penalty trial after appellant had already once faced the death penalty once (Arg. VII), and continued with evidentiary and prosecutorial errors in violation of his federal due process rights and Eighth Amendment rights, requiring reversal unless the prosecution can show the errors to be harmless beyond a reasonable doubt under *Chapman v. California* (Arg. VIII-XI.) Respondent does not address any of appellant's specific arguments showing cumulative prejudice at penalty phase; appellant therefore refers the Court to his discussion in the Opening Brief. (See AOB 183-185.)

The jury deliberations themselves show the unreliability of the ultimate death sentence in violation of the Eighth Amendment as set out in also *Monge v. California,* 524 U.S. at 732 [because death penalty is unique in its severity and finality, there is an "acute need for reliability in capital proceedings"].) The first jury failed to reach a verdict after six days of deliberation, and the second jury also had difficulty in reaching a unanimous decision as to the moral appropriateness of the death sentence.

In sum, the cumulative effect of the errors that occurred, in any combination, amounted to a denial of due process and a violation of the Eighth

Amendment reliability requirement in capital cases,[25] resulting in a fundamentally unfair trial, requiring reversal. (See AOB 128-29.)

XIII.[26] CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION

(Reply to Respondent's Argument XII, RB 100-109.)

In *People v. Schmeck* (2005) 37 Cal.4th 240, a capital appellant presented a number of often-raised constitutional attacks on the California capital sentencing scheme that had been rejected in prior cases. As this Court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.* at 303.) This Court acknowledged that it had given conflicting signals on the detail needed in order for an appellant to preserve these attacks for subsequent review. (*Id.* at 303, fn. 22.) In order to avoid detailed briefing on such claims in future cases, the Court authorized capital appellants to preserve these claims by "do[ing] no more than (i) identify[ing] the claim in the context of the facts, (ii) not[ing] that we previously have rejected the same or a similar claim in a prior decision, and (iii) ask[ing] us to reconsider that decision." *(Id.* at 304.)

---

25 *Monge v. California,* 524 U.S. at 732 [because of the severity and finality of the death penalty, the Eighth Amendment includes an "acute need for reliability in capital proceedings"].

26 As noted by respondent, appellant mistakenly labeled this argument "XII" instead of "XIII" in the Opening Brief. Appellant herein makes the correction.

Accordingly, in the Opening Brief, appellant identified the systemic and previously rejected claims relating to the California death penalty scheme that require reversal of his death sentence and requested the Court to reconsider its decisions rejecting them.

Respondent argues in some length and detail that this Court has rejected these claims in prior cases. Appellant acknowledged the same in his Opening Brief, and raised the claims under *Schmeck* in order to preserve them. (See AOB 186-197.) Consequently, because the arguments are squarely framed and addressed sufficiently in order to preserve them, appellant makes no reply to respondent's reiteration of the fact that this Court has rejected similar claims in previous cases.

XIV.[27] THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE

(Reply to Respondent's Arg. XIII, pp.109-113.)

Respondent first argues that appellant has forfeited this claim by failing to raise it below. (RB 109.) Appellant disagrees.

Appellant's claim is a pure question of law based on undisputed facts. It is a "well-established principle that a reviewing court may consider [such a

---

27 As noted by respondent, in Appellant's Opening Brief at page 100, appellant mistakenly labeled this argument "XIII" instead of "XIV." Appellant herein makes the correction.

claim]." (*People v. Yeoman,* 31 Cal.4th at 117-118.) Moreover, the right to appeal a fundamental constitutional right is not forfeited even in the absence of an objection. (*People v. Vera* (1997) 15 Cal.4t 269, 276-77; accord *People v. Saunders* (1993) 5 Cal.4th 580, 592, 589, fn. 5; see also *Hale v. Morgan* (1978) 22 Cal.3d 388, 394 [appellant court has authority to review constitutional claims not raised below].

Respondent next argues that even if the claim is preserved, the California death qualification process is constitutional. (RB 109-113.) Appellant contends that the arguments supporting this claim are squarely framed and sufficiently addressed in Appellant's Opening Brief (AOB 197-219) and therefore makes no reply.

CONCLUSION

Wherefore, for the foregoing reasons, appellant respectfully requests that this Court reverse his convictions and his sentence of death, and that the Court remand for a new trial at which he will not be subjected to another penalty phase trial; however, if this Court declines the rule that the scheme requiring penalty retrials if unconstitutional, then appellant request a new penalty trial as well as a new guilt trial.

DATED: December __, 2014

Respectfully submitted,

KATHY R. MORENO
Attorney for Appellant
Jeffrey Scott Young

CERTIFICATE PURSUANT TO RULE OF COURT 8.630(b)

I, Kathy R. Moreno, attorney for Jeffrey S. Young certify that this Appellant's Reply Brief does not exceed 102,000 words pursuant to California Rule of Court, rule 8.630(b). According to the Pages word- processing program on which it was produced, the number of words contained herein **is** **** **and** the font is Times New Roman 13.

I hereby declare, under penalty of perjury, that the above is true and correct, this ____ day of December, 2014, in Berkeley, CA.

_____
KATHY R. MORENO

CERTIFICATE OF SERVICE

I, Kathy Moreno, certify that I am over 18 years of age and not a party to this action. I have my business address at P.O. Box 9006, Berkeley, CA 94709-0006. I have made service of the foregoing APPELLANT'S REPLY BRIEF by depositing in the United States mail on December ___, 2014, a true and full copy thereof, to the following:

Attorney General, Capital Appeals, Attn Stacy Tyler
110 West A St., Ste. 1100
San Diego, CA 92101

Clerk of Court, San Diego Co. Super. Ct.
ATTN: The Hon. John M. Thompson
220 W. Broadway
P. O. Box 122724
San Diego, CA 92101

CAP, Attn Valerie Hriciga
101 Second St., Ste. 600
San Francisco, CA 94105

Elizabeth McClutchey, Deputy Dist. Atty.
330 West Broadway, Ste. 1100
San Diego, CA 92101

Jeffrey Young
San Quentin, CA 94974

Executed this ___day of December, 2014, in Berkeley, CA under penalty of perjury.

KATHY MORENO