

# SUPREME COURT COPY

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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**PEOPLE OF THE STATE OF CALIFORNIA,**

**Plaintiff and Respondent,**

v.

**JEFFREY SCOTT YOUNG,**

**Defendant and Appellant.**

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) **Calif. Supreme**  
) **Court**  
) **No. S148462**  
)  
) **San Diego**  
) **Co.Super.Ct.**  
) **No. SCD173300**

SUPREME COURT  
**FILED**

DEC 15 2014

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**APPELLANT'S REPLY BRIEF**

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**DEATH PENALTY**

## TOPICAL INDEX

INTRODUCTION	1
GUILT PHASE ISSUES	2
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	2
A. Appellant Made a Sufficiently Clear Invocation Of His Right to Silence; The Police Violated His <i>Miranda</i> Rights by Continuing to Question Him Prior to Giving <i>Miranda</i> Advisements.	3
B. The Police Playing of the Getscher Tape Recording Was the Functional Equivalent of Interrogation.	6
C. Deliberate Delay of the <i>Miranda</i> Advisements Renders Them Ineffective.	8
D. Any Implied Waiver Must Be Deemed Invalid.	11
E. Appellant's Statement "You've Heard It All" Was Irrelevant and Unduly Prejudicial.	13
F. The Error Requires Reversal.	14

## TOPICAL INDEX

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	16
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.	17
B.	Admission of the "Nigger Thrasher" Tattoo and Appellant's White Supremacy/Skinhead Beliefs Violated Appellant's First Amendment Rights Under <i>Dawson v. Delaware</i> .	20
C.	Respondent's Claim that Appellant Forfeited His Constitutional Argument Is Without Legal Foundation.	26
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.	27
III.	THE PROSECUTORIAL ERROR IN CLOSING ARGUMENT DEPRIVED APPELLANT OF HIS FEDERAL CONSTITUTIONAL RIGHTS TO DUE PROCESS AND A FAIR TRIAL	29
A.	The Prosecutor Improperly Appealed to the Jurors' Emotions and Passions.	30
B.	The Prosecutor Improperly Vouched by Arguing Her Personal Opinions as to The Victims' Fearfulness.	31

## TOPICAL INDEX

C.	The Prosecutorial Error Prejudiced Appellant.	33
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	34
A.	The Trial Court Erred By Imposing Unfair Restraints on Appellant and Excessive Security In the Courtroom.	34
B.	The Court's Ruling on Restraints Requires Reversal.	38
1.	The trial court coerced a waiver of appellant's presence by warning about the adverse impact of the jurors seeing him in restraints.	38
2.	The trial court's instruction alerted the jury to the fact that appellant was shackled, resulting in prejudice to appellant.	39
3.	Summary.	41
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	41

## TOPICAL INDEX

A.	The Trial Court Denied Appellant's Request To Admit the Third Party Culpability Evidence.	41
B.	The Trial Court Erred in Excluding the Proffered Defense Evidence.	42
1.	The third party culpability evidence was not improper character evidence.	43
2.	The proffered evidence met the standard for admission of third party culpability evidence.	44
C.	The Trial Court's Asymmetrical Rulings Violated Appellant's Federal Due Process Rights.	45
D.	The Erroneous Exclusion of the Evidence Prejudiced Appellant.	46
VI.	THE CUMULATIVE PREJUDICE FROM GUILT PHASE ERRORS REQUIRES REVERSAL	47
	PENALTY PHASE ISSUES	49
VI.	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	49
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.	49

## TOPICAL INDEX

B.	Retrial of the Penalty Phase Contravenes The Constitutional Requirement that Each Juror Must Make an Individualized Determination as to the Appropriate Sentence.	51
C.	Appellant's Death Sentence, Imposed After The Second Penalty Trial, Is Unconstitutionally Arbitrary and Capricious.	52
D.	Appellant's Second Penalty Trial Constituted Structural Error and Requires Reversal of His Sentence of Death.	53
E.	Conclusion.	54
VIII.	THE TRIAL COURT VIOLATED APPELLANT'S FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO FREE SPEECH AND ASSOCIATION, TO A FAIR TRIAL AND DUE PROCESS, AND TO A RELIABLE SENTENCING PROCEEDING BY ALLOWING THE JURY TO CONSIDER APPELLANT'S RACIST/ NAZI TATTOOS AND WHITE SUPREMACY/ SKINHEAD BELIEFS AT PENALTY PHASE	55
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 <i>Dawson v. Delaware</i> .	55
1.	There is no evidence whatsoever that appellant "beat a Black man," or that he thereafter added "Nigger" to his "Thrasher" tattoo.	59
2.	The red laces.	60

## TOPICAL INDEX

3. The expert's "explication. 61
- 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. 61
- 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." 66
- D. The Sentence of Death Is Unreliable Under  
The Eighth Amendment And Must Be  
Vacated. 68
- E. Appellant's Death Sentence Must Be Vacated. 69
- IX. THE ADMISSION OF VICTIM IMPACT  
EVIDENCE ON FACTOR (B) CRIMES VIOLATED  
APPELLANT'S FEDERAL CONSTITUTIONAL  
RIGHTS UNDER THE EIGHTH AND  
FOURTEENTH AMENDMENTS 70
- 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 70
- A. Victim Impact Evidence on a Crime Unrelated  
to The Capital Murder Is Inadmissible. 71
- B. Testimony as to the Arizona Offense  
Was Irrelevant and Speculative Rendering  
Appellant's Death Sentence Unreliable. 74

## TOPICAL INDEX

1. Law enforcement lay opinion testimony as to appellant's supposed state of mind regarding the Arizona offense was erroneously admitted. 75
  2. Speculative testimony by the son of the victim of the Arizona offense was erroneously admitted. 78
- 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. 79
- 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 80
- 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 82



## TOPICAL INDEX

XIII. CALIFORNIA'S DEATH PENALTY STATUTE, AS INTERPRETED BY THIS COURT AND APPLIED AT APPELLANT'S TRIAL, VIOLATES THE UNITED STATES CONSTITUTION	85
XIV. THE PROCESS USED IN CALIFORNIA FOR DEATH QUALIFICATION OF JURIES IS UNCONSTITUTIONAL AND WAS UNCONSTITUTIONAL IN THIS CASE	86
CONCLUSION	87
CERTIFICATE OF COMPLIANCE	

## TABLE OF AUTHORITIES CITED

### FEDERAL CASES

Arizona v. Fulminante (1991) 499 U.S. 279	14, 53
Atkins v. Virginia (2002) 536 U.S. 304	50
Barclay v. Florida (1983) 463 U.S. 939	56
Baze v. Rees (2008) 553 U.S. 35	80
Berguis v. Thompkins (2010) 560 U.S. 370	4-7
Brecht v. Abrahamson (1993) 507 U.S. 619	53
California v. Roy (1997) 519 U.S. 2	53
Connecticut v. Barrett (2987) 479 U.S. 523	4
Cooper v. Fitzharris (9th Cir. 1987) 586 F.2d 1325	47, 83
Davis v. United States (1994) 512 U.S. 452	6
Dawson v. Delaware (1992) 503 U.S. 159	16, 20-21, 55-58, 61, 64-66
Deck v. Missouri (2005) 544 U.S. 622	34
Donnelly v. DeChristoforo (1974) 416 U.S. 637	47, 83
Gideon v. Wainwright (1963) 372 U.S. 335	54
Gray v. Klauser (9th Cir. 2002) 282 F.3d 633	45
Gregg v. Georgia (1976) 428 U.S. 153	51
Hale v. Morgan (1978) 22 Cal.3d 388	87
Hurd v. Terhune (9th Cir. 2010) 619 F.3d 1080	5
Killian v. Poole (9th Cir. 2002) 2828 F.3d 1204	47, 83

## TABLE OF AUTHORITIES CITED

Lockett v. Ohio (1986) 438 U.S. 586	68
McKaskle v. Wiggins (1984) 465 U.S. 168	53
Mills v. Maryland (1988) 486 U.S. 367	68
Miranda v. Arizona (1966) 384 U.S. 436	2-12
Monge v. California (1988) 524 U.S. 721	48, 84-85
Payne v. Tennessee (1991) 501 U.S. 808	72-74
Penry v. Lynaugh (1989) 492 U.S. 302	50
Rhode Island v. Innis (1980) 446 U.S. 291	7
Rose v. Clark (1986) 478 U.S. 570	54
Salinas v. Texas (2013) [133 S.Ct. 2194]	5
Seibert v. Missouri (2004) 542 U.S. 600	7, 9-10
Sessoms v. Runnels (9th Cir. 2012) 691 F.3d 1054	5
Sessoms v. Grounds (9th Cir. 2014) 768 F.3d 882	5
Simmons v. South Carolina (1994) 512 U.S. 15	46
Sullivan v. Louisiana (1993) 508 U.S. 275	53
Taylor v. Kentucky (1978) 436 U.S. 478	28, 33, 47, 69, 82-83
Tumey v. Ohio (1927) 273 U.S. 510	54
United States v. Kerr (9th Cir. 1992) 981 F.2d 1050	33
United States v. Frederick (9th Cir. 1995) 78 F.3d 1370	69
Tumey v. Ohio (1927) 273 U.S. 510 (1927)	54

## TABLE OF AUTHORITIES CITED

Vasquez v. Hillery (1986) 474 U.S. 254	53
Waller v. Georgia (1984) 467 U.S. 39	53
Wardius v. Oregon (1973) 412 U.S. 470	45
Washington v. Texas (1967) 388 U.S. 14	45
Yohn v. Love (3d Cir. 1996) 76 F.3d 508	16, 69

### STATE CASES

Lee v. Superior Court (1992) 9 Cal.App.4th 510	20
People v. Bell (2007) 40 Cal.4th 582	76-78
People v. Benson (1990) 52 Cal.3d 754	71-72
People v. Bivert (2011) 52 Cal.4th 96	19, 21
People v. Bordelon (2008) 162 Cal.App.4th 1311	81
People v. Bramit (2009) 46 Cal.tth 1221	71
People v. Bryant, et al. (2014) 60 Cal.4th 335	35
People v. Calio (1986) 42 Cal.3d 639	24
People v. Chism (2014) 58 Cal.4th 1266	27
People v. Cromer (2001) 24 Cal.4th 889	13
People v. Davis (2005) 36 Cal.4th 510	7
People v. Davis (2009) 46 Cal.4th 539	71, 74
People v. Duran (1976) 16 Cal.3d 282	34
People v. Edelbacher (1989) 47 Cal.3d 983	27

## TABLE OF AUTHORITIES CITED

People v. Garceau (1993) 6 Cal.4th 140	71
People v. Green (1995) 34 Cal.App.4th 165	26
People v. Hall (1986) 41 Cal.3d 826	44
People v. Hawkins (1995) 10 Cal.4th 920	38
People v. Herrera (2010) 49 Cal.4th 613	27
People v. Hill (1992) 3 Cal.4th 959	1
People v. Hill (1998) 17 Cal.4th 800	28, 33, 47, 69, 82-83
People v. Honeycutt (1977) 20 Cal.3d 150	12
People v. Jackson (1980) 28 Cal.3d 264	13
People v. Karis (1988) 46 Cal.3d 612	72
People v. Lavergne (1971) 4 Cal.3d 735	63
People v. Lewis (1990) 50 Cal.3d 262	32
People v. Lewis & Oliver (2006) 39 Cal.4th 970	37
People v. Ledesma (2006) 39 Cal.4th 641	32-33
People v. Lindberg (2008) 45 Cal.4th 1	20-21
People v. Lindsey (1988) 205 Cal.App.3d 112	15
People v. Linton (2013) 56 Cal.4th 1146	80
People v. LoCigno (1961) 193 Cal.App.2d 360	63
People v. McDaniel (2008) 159 Cal.App.4th 736	40
People v. Medina (1995) 11 Cal.4th 694	37
People v. Melton (1988) 44 Cal.3d 713	75

## TABLE OF AUTHORITIES CITED

People v. Montes (2014) 58 Cal.4th 809	35
People v. Powell (1967) 67 Cal.2d 32	17, 69
People v. Price (1991) 1 Cal.4th 324	71-72
People v. Quartermain (1997) 16 Cal.4th 600	22
People v. Reid (1982) 133 Cal.App.3d 354	81
People v. Rogers (2013) 57 Cal.4th 296	27
People v. Saunders (1993) 5 Cal.4th 580	87
People v. Scott (2011) 52 Cal.4th 452	10-11
People v. Schmeck (2005) 37 Cal.4th 240	85-86
People v. Seijas (2005) 36 Cal.4th 291	26
People v. Sims (1993) 5 Cal.4th 405	87
People v. Soto (1984) 157 Cal.App.3d 694	13
People v. Stansbury (1993) 4 Cal.4th 1017	32
People v. Stitely (2005) 35 Cal.4th 515	4-5
People v. Taylor (2010) 48 Cal.4th 574	49
People v. Valdez (2012) 55 Cal.4th 82	19
People v. Vargas (1973) 9 Cal.3d 470	15
People v. Vera (1997) 15 Cal.4th 269	87
People v. Yeoman (2003) 31 Cal.4th 93	20, 87

## TABLE OF AUTHORITIES CITED

### STATUTES

Evidence Code, sect. 210	30
Evidence Code, sect. 352	13
Evidence Code, section 1101	43
Evidence Code, sect. 1103	43

### TREATISES

Witkin, 1 California Evidence (3d ed. 2000)	76
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v.	)
	)
JEFFREY SCOTT YOUNG,	)
	)
Defendant and Appellant.	)

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**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,<sup>1</sup> but reflects appellant’s view that the issue has been adequately presented and the positions of the parties fully joined.

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<sup>1</sup> 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. Stitley*, 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.<sup>2</sup> *Miranda* itself so holds, stating that when "the police [have] not advised the defendant of his constitutional privilege . . . at the outset of the

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<sup>2</sup> 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<sup>3</sup> 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

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<sup>3</sup> 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.<sup>4</sup> 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.)

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<sup>4</sup> 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-elicite 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