IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**DEATH PENALTY CASE**
	)	
	)	**No. S093756**
Plaintiff/Respondent,	)	
	)	
v.	)	**(Contra Costa**
	)	**Superior Court**
COREY LEIGH WILLIAMS,	)	**No. 961903-02)**
	)	
Defendant/Appellant.	)	
	)	

APPELLANT'S OPENING BRIEF

On Automatic Appeal From A Sentence Of Death
From The Superior Court Of California, Contra Costa County
The Honorable RICHARD ARNASON, Judge Presiding

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THE PEOPLE OF THE STATE OF CALIFORNIA,	)	**CAPITAL CASE**
Plaintiff/Respondent,	)	**No. S093756 (Contra Costa Superior Court**
v.	)	**No. 961903-02)**
COREY LEIGH WILLIAMS,	)	
Defendant/Appellant.	)	

STATEMENT OF APPEALABILITY

This is an automatic appeal following a sentence of death. (Pen. Code, § 1239, subd. (b).)[1]

STATEMENT OF THE CASE

On October 10, 1996, a Grand Jury returned indictments against appellant and codefendant Dalton Lolohea charging each with the murder (§187) of Maria Elena Corrieo (Count One) and Maria Eugenia Roberts (Count Two). The indictment alleged three special circumstances: multiple

1. Unless otherwise noted, all statutory references are to the California Penal Code.

murder (§190.2 subd. (a)(3)), murder while engaged in the commission of burglary (§§ 190.2, subd. (a)(17), 459) and murder in the commission of robbery (§§ 190.2, subd. (a)(17), 211). Personal use of a firearm was alleged against appellant as to each count. (Pen. Code, §§ 187, 12022.5(a).) Codefendant Lolohea was alleged to have been armed with a firearm. (§12022(a)(1).) Both pled not guilty. (2CT 394-401; 1RT 8.) Appellant and Lolohea were given separate trials, on motion of appellant. (3CT 878-881; 1RT 225.)

Codefendant Lolohea was tried first, and found guilty as charged. (11CT 4277-90.) The jury fixed Lolohea's penalty at life without parole. (12CT 4645.) The trial court imposed Lolohea's sentence on May 5, 2000. (12CT 4910.)

Appellant's jury trial commenced on July 11, 2000. (13CT 5015.) On August 18, 2000, the jury found appellant guilty of murder in the first degree on both counts, and found the special circumstance and firearm use allegations to be true. (14CT 5464.)

Appellant moved for leave to proceed in propria persona at penalty proceedings. His motion was granted, and he proceeded to act as his own counsel at a penalty trial commencing September 11, 2000. (14CT 5614, 5628.)

On September 14, 2000, the jury fixed appellant's sentence at death.

(15CT 5881-82.) A motion for new trial based solely on guilt phase error was presented by his former counsel and denied. (15CT 5925.) The automatic motion to modify the verdict was denied, and the judgment of death was imposed, on November 15, 2000. (15CT 5932.)

STATEMENT OF THE FACTS

I. Prosecution Case

A. Remains at the Corrieo home

On August 16, 1995, Lily Williams discovered the bodies of her 74-year old mother, Maria Elena Corrieo, and her 52-year old sister, Eugenia ("Gina") Roberts, on the floor of the family home in Orinda. Ms. Roberts' body was in the hallway. Her hands were tied behind her back. (10RT 2585.) Ms. Corrieo's body was between the family room and the hallway leading to the bedrooms. (10RT 2586.) Her hands were also tied behind her back. (10RT 2618.)

Ms. Williams noted that her mother's car was parked in front of the house in an unusual way, and there were objects on the ground by her car door. (10RT 2585.) The phone lines to the house were cut. (10RT 2588.) The door to the home was wide open. (10RT 2585.)

Ms. Corrieo had come from Mexico in the 1950's. She lived in her Orinda home for over 30 years. She owned and operated a restaurant.

She had expressed a distrust of banks, and carried large sums of money in her apron and in her car. (10RT 2572-73.)

Contra Costa County Sheriff Criminalists Steven Ojena and Paul Holes inspected the scene at the Corrieo home, which appeared to have been ransacked. Both women were lying face down when the criminalists found them. (10RT 2624.) Ojena and Holes found a number of .40 caliber shell casings, three near Corrieo and four near Roberts. (10RT 2625, 2630.)

Blood spatters indicated that Corrieo may have been sitting or standing when shot, and shot again while her head was on the floor. (10RT 2623-24.) A clothing store bag made of paper was stuck to her face at the point of contact with the floor. On the bag was a print made by codefendant Lolohea's boot. (10RT 2632-36.) Rugs underneath Corrieo's body covered two silver rings. (10RT 2648-50.) Two bullets were embedded in the floor underneath Corrieo's head, and three were directly underneath that of Roberts. (10RT 2655.)

Missing from the scene was a very heavy 32" television set. Criminalist Holes believed the television set was too large for any one man to carry alone. (10RT 2659.)

Forensic pathologist Arnold Josselson performed autopsies on the bodies of Maria Elena Corrieo and Maria Eugenia Roberts on August 17,

1995. He found Corrieo's hands bound behind her back with a black cord, and two entry gunshot wounds on her head. One shot entered on the right side of the back of Corrieo's head, went through the brain, and exited just above the right eyebrow. The second gunshot entry wound on Corrieo's head was located on the left upper scalp towards the rear. The bullet that entered through that wound passed through the brain but did not exit the head. Either wound by itself would be fatal. (11RT 3015-16.) Roberts' hands were bound behind her back with an electrical cord. Her head bore four gunshot entry wounds. All four shots exited. Any one of the wounds would have been fatal. There was also a small scratch on the skin on the left side of her nose, a small scratch on the left side of her upper lip, and the inner surface of her upper lip had several small tears in it. (11RT 3018.) None of the gunshot wounds appeared to be contact wounds. (11RT 3021-22.) There was no way to establish which wound was inflicted first. (11RT 3022.) Blood that did not belong to either victim was found on Mr. Lolohea's clothing. (10RT 2651, 12RT 3125.) Nothing found at the scene of the crime was inconsistent with the hypothesis that Lolohea and Ross were the only two individuals involved. (10RT 2656-2657.)

B. David Ross' testimony

David Ross testified for the prosecution pursuant to a negotiated agreement. He said he robbed Corrieo and Roberts while accompanied by

appellant and codefendant Dalton "Tony" Lolohea, but was not personally involved in the killings.

Ross said he was persuaded to commit the crime by Lolohea, his former best friend. (10RT 2666, 2673.) He testified that Lolohea told him that $30,000.00 could be taken from the trunk of restauranteur Maria Elena Corrieo's green Volkswagon Rabbit convertible. (10RT 2666.)

Initially, Ross did not believe Lolohea's claim that $30,000.00 could be found in the back of someone's car. (19RT 2742.) He came to believe it only later, when Lolohea said his source of information was a man he knew as "Manual" and that Manual had received the information from the restaurant's cook. (10RT 2745.)

Ross testified that Lolohea later told appellant this information, in the presence of Ross, about three weeks to a month before the crimes. According to Ross, the three went together to the Corrieo home to see the car. (10RT 2666.) Later, on the night of August 16, just before the crimes, Ross met up with Lolohea and appellant at their regular meeting place at the Solano Drive-In in Concord. (10RT 2665.) Lolohea was driving a white car, appellant was with him, and Ross "ended up jumping in with them." (10RT 2665.) At first the plan was to break into Ms. Corrieo's car. (10RT 2664.) Nevertheless, Lolohea told Ross to "grab the gun" – a .40 caliber Glock that Lolohea had given Ross previously – and to

"wear black clothes and grab gloves" as they drove from the Solano Drive-In to Ross's home. When Ross said he had no gloves, Lolohea told him to get some socks. Each of the men had ski masks. (10RT 2667-70.)

From Ross's house, they drove to the restaurant "because that's where the car was" and parked nearby. As they were getting out of the car, Lolohea gave Ross the gun and told him to put it in the bushes "in case police come." Ross wrapped the gun in plastic and did so. The three men walked to the restaurant and saw the car. Lolohea told Ross to look inside the restaurant. Ross did so, and reported seeing two ladies doing paperwork. Ross and appellant said "let's break into the car." But Lolohea said they would wait until they got to the house. (10RT 2672.) Lolohea followed the Corrieo car from the restaurant to the Corrieo home.

While driving, "Lolohea told us that we were just going to take them into the house and have them, uh, tell us where the money was at." (10RT 2664.) Further, Lolohea said they were going to take them out of the car and into the house. Ross testified that he was told by Lolohea to give the gun to appellant, and that he (Ross) and appellant were "going to meet them at the car and take them out ourselves." (10RT 2681.) All covered their hands with socks and donned ski masks before pulling up to the house. All wore dark clothes. (10RT 2684.) Ross knew the gun had bullets in the magazine. (10RT 2680-81.)

Ross said appellant jumped out of Lolohea's car when it pulled up somewhere behind the victims' car. Appellant went to the driver's seat with the gun in his hand, and, with Ross, told the ladies to "get out." (10RT 2681.) Ross did not know how appellant handled the gun with a sock on his hand, but he knew that appellant handled it somehow. (10 RT 2682.)

Ross asserted that he became involved for the money. His usual job was selling drugs and stolen goods. (10RT 2682.) Ross denied knowing what Mr. Lolohea was doing for a living. Ross believed appellant did nothing. (10RT 2682-83.)

After Lolohea pulled up behind the ladies' car and turned off the lights, he grabbed one of the women and told her to go sit on the "bench." Appellant told the other lady, the driver, to do the same, or in Ross's words, "I mean the porch." (10RT 2683.) Lolohea grabbed the keys from the ignition, looked through the car quickly, and threw the keys to appellant, who unlocked the door and gave Lolohea back the keys. Lolohea threw the keys to Ross and told him to search the car. (10RT 2683.)

Lolohea told Ross to put everything he found in the victims' car into Lolohea's car. Ross searched the victims' car and found a blue pouch containing money. (10RT 2684.) He also found shoe boxes and plastic bags in the trunk, which he threw into Lolohea's car. He then entered the house. (10 RT 2684-85.)

Ross saw the younger woman in the room to the left of the hallway. The older woman was in the hallway itself. (10 RT 2685.) They were not yet restrained. (10RT 2686.) Ross began searching for money in the living room, but the only thing of value he found was a television set, which he and Lolohea carried to Lolohea's car. (10RT 2687, 2691-92.) Appellant was standing by the women with a gun. (10 RT 2687.) Ross heard the older woman say, in Spanish, "It's not worth it." (10RT 2691-92.)

After covering up the television set in Lolohea's trunk, Ross and Lolohea returned to the house to resume the search. Ross asked appellant "to ask the lady where the money was at, and called appellant by the nickname, C-Dog. (10RT 2691-92.) In so doing, Ross violated Lolohea's direction to call each other "baby." Appellant yelled back, "'Don't fucking call me by my name' I mean, 'Don't call me by my name. Don't call me C-Dog.'" Ross apologized and continued searching the rooms of the house for the money. (10RT 2692.)

At some point, Ross grabbed hold of one of the women and took her to a desk in the kitchen, where she pointed in response to demands to disclose the location of the money. Ross pulled the woman back from the desk, thinking she might be reaching for a weapon. He opened the desk drawer and allowed her to grab a crystal necklace. (10RT 2718-19.)

Ross and Lolohea tied up the older woman after Ross put her hands behind her back. Appellant and Lolohea tied up the younger. (10RT 2692-93.) The younger woman then began to say, "you fucking can't do this, this is my house and get out." Ross then "pushed her – I kicked her in the back so she'd go down 'cause she struggled to her – she got onto her knees." (10RT2694.) The younger woman continued "cussing, telling them to get out, and got up again." Ross told appellant to "knock her out." Appellant hit her full force with his fist in her face, about three or four times. "Then she fell down." Ross told Lolohea, "Let's go." (10RT 2695.) Lolohea told Ross to go to the car because Lolohea and appellant "were just going to check everything out, make sure everything was tied, the phone lines were cut and everything ...." (10RT 2695.) Ross then walked out of the house.

Ross claimed he heard a gunshot inside the house while sitting in the car, waiting for his cohorts. He testified that he saw Lolohea running out of the house while three more shots were being fired. Appellant ran out of the house about a minute later. (10RT 2696.)

The three men drove to Walnut Creek to drop off the television set at the home of a friend of appellant, Josh Arias. While in transit, Ross asked appellant what he did. Appellant said he had shot "them bitches." (10RT 2697.) Ross asked appellant why he did so. Appellant said he did

it because Ross had called him "C-Dog," a nickname that was tattooed on appellant's hands. (10RT 2697-98.) Lolohea told Ross "not to worry." (10RT 2698-99.)

Appellant and Lolohea carried the television from Lolohea's car into the home of Josh Arias. Ross told Arias he would be picking up the television the next day. Appellant, Ross and Lolohea then went to a parking lot in "Stanwell," an industrial area in Concord where they often met friends, to look at the other things they had stolen. Ross and Lolohea got out of the car, and appellant stayed inside. A car with three friends drove up before the examination was complete. Lolohea directed the friends, Jerome Saravia, Aura Balasco, and Michelle Marcott, to leave, and they did so. Lolohea told Ross to search a ladies' purse. It had keys, credit cards, and two dollars, which Ross put in his own pocket All three men hugged and gave each other "high fives" for about five minutes after appellant announced "we got the money." Lolohea then directed the group to throw everything they wished to keep in a big bag in his trunk, get rid of the rest, and move on to a place where all the money could be counted. (10RT 2698-2703.) The group moved on to Ross's home. (10RT 2703.)

Lolohea and appellant left Ross alone at his house, with all the money, and went to "ditch the car" at the home of a friend of Ross named Jesse. (10RT 2705, 2707.) Ross was told that he should pick up appellant

and Lolohea at Jesse's house. After Ross extracted and hid about $4000.00 for himself, he met his cohorts at the appointed place and rode back to his house in the back of his mother's truck. (10RT 2705, 2707.)

Back at Ross's home, in Ross's bedroom, with Lolohea and appellant, Ross divided the money into three piles. (10RT 2705.) The divided loot included about $700.00 that Ross had found in the blue pouch in the car. (10RT 2758.) The money was mostly hundreds, twenties and fifties. He believed it totaled about $50,000.00. (10RT 2706.) But Ross also testified that each of the three piles he made contained only about $12,000.00 each. (10RT 2757.)

After the men divided the money, Ross decided to ask his sister to hide his ski mask and black sweater in her room so that they would not be found in his room if the police were to search it. He took five hundred dollars from his stack, went to his sister's room, and gave her $500.00 along with mask and sweater, asking her to hold the latter two items. (10RT 2707-08.) Ross returned to his room and rejoined appellant and Lolohea, who said they wanted a ride back to the car used in the robbery. Ross transported them as requested. (10 RT 2708.)

Ross saw appellant the next day at the home of Jerome Saravia. Ross took appellant from there to Sun Valley Mall in Concord because appellant said he wanted to buy something for his girlfriend. Ross saw

appellant buy a bracelet, and asked Ross to drive him to his girlfriend's home. (10RT 2708-09.) Ross took appellant to the home of Wendy Beach in Concord, and saw appellant hand her a bracelet. After speaking with Beach for awhile, appellant asked Ross to take him back to Jerome Saravia's house because he wanted to "put his money up." (10RT 2710.)

Ross left appellant at Saravia's house, and went home. Lolohea telephoned Ross there and told him he wanted to rent a room at the Embassy Suites in order to "lay low" but was unable to do so because he had forgotten to bring identification. Ross went over to the Embassy Suites and rented the room. The two men then hosted a party to celebrate their "winnings." Appellant did not attend. (10RT 2710-11.)

Ross had known appellant for about two years at that point. They were friends. Ross and Lolohea used to be "best friends" and were second-best friends at the time of the crime. (10RT 2673, 2744.)

Ross personally netted about $16,000.00, including the $4,000.00 he had secreted from his cohorts. He spent all of his funds buying a truck, music for the truck, clothes, food, and "partying." (10RT 2712.)

Ross discussed the crime with several people prior to his arrest: Clemus West, Josh Adcock, and Keri Meran. Ross did not think he said anything about it to his sister. (10RT 2712-13.) Ross denied telling Clemus West that he had hit one of the women in the face, but admitted that

he instructed appellant to knock one of the women out. Apart from that one instruction Ross gave to appellant, Lolohea gave the orders. Lolohea was in charge. (11RT 2791-92.)

C. Impeachment of Ross on Cross-Examination

Ross lied repeatedly when police interrogated him about the crime. (10RT 2723-24.) When they convinced Ross that they knew he had been in the car involved in the crime, he told them he had been dropped off at a gas station in Orinda before it happened. (10RT 2762.) When they convinced him they knew that was a lie, he told them he went to the victims' house but stayed in the car. (10RT 2763.) He took a long time to admit participating at all. (10RT 2723-24.) Then he lied about the extent of his participation, told police that his cohorts took all the money, and denied knowing that Lolohea had planned to steal when they went out that night. (10RT 2734, 2747.) He lied because he was scared. (10RT 2748.)

Ross falsely told police that appellant helped Ross dispose of property stolen in the robbery at times when appellant was actually in jail, but did not consider this falsehood a lie. In Ross's words, "I just– I didn't really lie. I forgot that he was in jail. I was just – I was just making whatever I could to the deputies so I can – so I wouldn't go to jail." (11RT 2850.)

Ross also understated his own criminal history in describing his past crimes as "stealing." He was a dealer of crack and marijuana, a burglar, a robber, a shooter, and a fighter, but did not mention those crimes when police investigating the Corrieo murder asked him about his past because he thought they were asking only about the crimes for which he had been convicted. (10RT 2736-38.) When he testified before the grand jury, he forgot that he had been twice arrested for rape and that he had shot at people in a passing car. (11RT 2810-11.)

As to the discrepancy in his direct testimony respecting the amount stolen and the amount he placed in each of the piles he made on his bed, Ross said he "just didn't calculate on the money" before opining that they ultimately obtained a total of about $50,000.00. (10RT 2756-57.) He did not retract his testimony that the three piles of money he laid out on his bed had only about $12,000.00 each. (10RT 2757.)

Ross acknowledged that he was the one who had possession of the gun before the crime, having kept it hidden in a desk in an unused room in his family home. He retrieved it on the night of the robbery, held it in the car, hid it in the bushes, and gave it to appellant at Lolohea's direction. (10RT 2724-25.) After the robbery, he again took the gun, and hid it outside of his house, near his front gate. (10RT 2726.)

Ross later gave the gun to his friend, Clemus West, to get rid of it.

(10RT 2731.) He also gave West some jewelry and may have given him some Mexican coins taken in the robbery. (10RT 2750.) He sold the TV set taken in the robbery for $300.00. (10RT 2732.) He "cashed in" a bag full of half- dollar coins he obtained in the robbery and gave the proceeds to his mother, without telling her about the robbery. (10RT 2731.) He hid most of his loot in his backyard. (10RT 2727.) He asked West to hold a stolen ring for him. West lived in Las Vegas. (10RT 2750-51.)

Ross was unable to explain why he wanted his sister to hold his ski mask and black sweater in her room in their shared home. (10RT 2728-29.)

After taking the other stolen items from Ross, Clemus West began calling him frequently. Ross found West seemed "too eager" for Ross to come to see him. Ross began suspecting that Clemus West had told the police about the crime and that police were listening to his phone calls. In one telephone communication, West told Ross "the cops knew." Fearing that police were listening, Ross said he did not know what West was talking about. (10RT 2753.) Ross was scared, and did not know what to do. (10RT 2754.) But a lot of his anxieties were allayed when he discussed the situation with Lolohea, who assured him he need not worry. Consequently, Ross did not construct a story to tell police until he was brought into the sheriffs office for an interview on January 10, 1997. (10RT 2755.)

Soon after Ross was brought in for interrogation, sheriffs department interrogators told Ross they knew he was troubled by having been with "two guys when they did something terrible." (11RT 2820.) They asked Ross why he killed "those two ladies" but accepted his denial of having done so, assuring Ross that "we know you didn't." (11RT 2821.) Ross was given additional encouragement when one of the interrogators told Ross that he may not have known that "they were going to kill somebody" and that he may not even have known that anyone would be robbed. (11RT 2822, 2824.) The interrogators told Ross they had already talked to his "friends." Ross understood the friends referred to by his interrogators were those who had gotten all of their information about the crime from Ross himself. (11RT 2823.) The interrogators told him they knew that he had "confided" in Clemus West, that they had received information from three sources, all of whom said that Ross was a "decent guy." (11RT 2824.) Ross's interrogation session began at 3:00 p.m. on January 10 and ended at about 1:00 a.m. on January 11, 2006.

When Ross first told police he participated in the robbery, he said that he could *not* identify the person or persons who committed the murders. He said was sitting in a car outside the house when he heard shots fired, and that both Lolohea and appellant were inside the house at that time. (11RT 2829-30.) Shortly afterwards, Clemus West was brought in to the

interrogation room and was allowed to confer with Ross alone, under the surveillance of a video camera. (11RT 2783-85, 2830-31.) Ross complained to West that the police "are trying to tell me who shot them. I honestly wasn't in the house when they were – when they got shot. . . . I don't know who shot them, bro. So I can't pinpoint who did it. . . . they was both in the fucking house." (11RT 2831.)

Ross did not say how he subsequently came to testify that Lolohea was not inside the house, but was running to the car, when Ross heard the shots fired. [2] When asked to explain his prior statement placing Lolohea inside the house during the killings, Ross said he was trying to "protect" Lolohea "from being the shooter." But Ross denied knowing that Lolohea was indeed the shooter, denied that appellant "wasn't even there" and

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[2] The video recording and transcript of Ross' interrogation provided to the court as exhibits to defense motions show West advising Ross to "Just name (unintelligible) whatever you know . . .". (8CT 3173.) Sergeant Ingersoll entered the room shortly afterwards, and asked West if he told Ross what he had told police about Ross's statements about the crime. West answered affirmatively, and was then told to repeat that account in the presence of Ingersoll and Ross together. (8CT 3173.) West did so, ending the story as follows: "Corey [appellant] was inside and he was grabbing shit out the car, I guess, he was grabbing shit out the house. And he gets in the car. Dude comes out and gets in the car or whatever. They cut. And then dude goes in there and he just pops the women, popped them ladies. That's the way the shit went." (8CT 3174.) West was removed from the interrogation room at that point, without clarifying the identity of the shooter referred to only as "dude." Alone with his interrogators afterwards, Ross recounted the crime again, and put appellant alone inside the house when all the shots were fired. (9CT 3210.)

insisted that appellant "was in the house." (11RT 2832.)

Ross acknowledged that police allowed him to confer with Lolohea, who was brought into Ross's interrogation room while in custody on another matter. (11RT 2783-85, 2841.) Left alone in the room, Ross and Lolohea whispered to avoid being overheard and recorded. (11RT 2841.) Ross told Lolohea that West had "come in and talked with [him]" and that he had told the police that Lolohea was with him in the car when the shots were fired. (11RT 2841, 2844.) Ross and Lolohea were allowed to converse in this manner for 14 minutes. (11RT 2842.) Ross was not sure if they talked about appellant at all during that time. (11RT 2847.)

Before he testified at grand jury proceedings, Ross was promised that he would not receive the death penalty if he testified in this case. (11RT 2795.) After he testified before the grand jury, he was offered 25 to life. His attorneys advised against taking it. He wanted a better deal, and his attorney told him he would get one. Two weeks before he testified at trial, he was offered and accepted an opportunity to plead guilty in exchange for a 19-year sentence. (11RT 2795-98.)

D. Corroboration of Ross

Concord Police Officer Steven Guy Horn testified that he encountered appellant, Ross, Jerome Saravia, Josh Arias, and other people, in an apartment in Concord, on December 12, 1994. (11RT 2880-82.)

Jesse Coward, a "fading friend" of Ross, testified that he saw Ross and appellant together on at least one occasion after introducing them to each other. (11RT 2889.) Coward recalled being present when Ross was offering to sell a television to the man from whom police recovered the television taken from the Corrieo home. (11RT 2891.) Coward also recalled meeting Ross walking his dog in a park, in the Fall of 1995, and Ross "saying something about having done some ill-assed shit" and that "we were supposed to rob them." (11RT 2897.) Ross did not mention any names, and used the word "they" in referring to whoever committed the crime with him. (11RT 2898.)[3] Ross seemed close to crying at the time. (11RT 2891, 2197.)

Nathan Carlock testified that he had been friends with Ross and Lolohea since 1988. After the murders, Ross took him out to dinner at Benihana and otherwise spent money on him. Before the murders, he was in an automobile with Ross, Lolohea and appellant when one of them said "we might lick these fools." (RT 2912.) The conversation was between Ross and Lolohea only. (11RT 2918.)

Aziz Al-Ouran testified that he purchased a gun from Clemus West

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[3] When the prosecutor pressed Coward to confirm that Ross's use of the word "they" meant that at least two others participated in the crime, Coward responded: "If the word `they' means other participants, then that's what he said, they." (11RT 2898.)

in the Fall of 1995. The gun was a Glock, like the one in evidence. The gun he bought was taken from him sometime later by a sheriff's lieutenant seated in the courtroom. (11RT 2953-54.)

Deborah Hall, an employee of a business located on Stanwell Drive in Concord, testified about seeing a pile of partially burned things in an alley off of Stanwell on August 16, 1995. Among the burned items was a matchbook from Maria Elena's Restaurant, top tabs from restaurant receipts, and similar things. (11RT 2948-49.)

Sergio Corrieo, son of Maria Elena and brother of Gina Roberts, identified the charred remains of a card as one of a set of collectible Valvolene Oil cards that he had given his mother on the evening of August 15, 1995. (11RT 3032.)

Aura Belasco, a friend of appellant, Ross and Lolohea, testified that she recalled the night that appellant was arrested. She recalled that on the previous night she had been driving in her car with her friends Jerome Saravia and Michelle Marcot, but did not recall where she drove. (11RT 2958.) The arresting officer said the date of appellant's arrest (on unrelated charges) was August 16, 1995, the day after the Corrieo robbery. (11RT 2950-51.)

Ross's younger sister Bernadette Ross testified that she lived with

her mother and brother in Concord in August of 1995. She recalled a night when her brother came to her room and gave her $500.00 and a ski mask, which she hid. (11RT 2960.) In walking from her room to the bathroom afterwards, she saw appellant in the house. (11RT 2963.) Some time "shortly after that night" her brother told her "that they had robbed some ladies" and that appellant and Lolohea were involved in that crime, and that it was appellant who had killed the ladies. (11RT 2961-63.) Her brother said he obtained around $12,000.00 from the robbery, and that appellant received "[l]ike $23,000.00 or a little bit more than that." (11RT 2963-64.) He also said that appellant, Lolohea and Jerome burned some things at Stanwell. (11RT 2965.)

Wendy Beach, appellant's girlfriend at the time of his arrest, testified that appellant and Ross came to her home in Concord late in the afternoon on the day he was arrested. Appellant gave her a small gold bracelet. He told her he bought it at a store in the Sun Valley Mall. It was not the first time he gave her jewelry; he had previously given her a small gold ring. (11RT 2981-84.) Appellant did not have a job at that time, nor "any means of motorized transportation." He simply stayed with friends. (11RT 2984-85.) After appellant's arrest he called her from the jail and asked her to go to Jerome Saravia's house to pick up money he had left there. The money, about $20,000.00, was in the bathroom. (11RT 2986.)

It was mainly in one hundred dollar bills. She spent about $5,000.00 of it. The rest was taken by police executing a search warrant at her house on January 10, 1996. (11 RT 2987.) She initially told police that the money came from appellant's father. She changed her account after police put her in a room with appellant's father and he denied having given her any money. (11RT 2988.) At the time of appellant's arrest, Wendy was pregnant with his child. (11RT 2980.)

Shannon Kaemper testified that she was "good friends" with appellant at the time of his arrest in August of 1995. He called from the jail to her home "collect" on numerous occasions after his arrest and occasionally asked her to use her three-way calling ability to enable him to speak with other friends, including Jerome Saravia. (11RT 3005-06.) She once heard appellant say to Saravia that "they came up with money hella quick." (11RT 3007.) She understood that to mean "a few hours maybe, not something over a time period." Appellant said the money was being held at the home of a girlfriend named Wendy. (11RT 3008.) These phone calls took place a week and a half or two weeks after appellant's arrest. (11RT 3009.) When interviewed by police in January of 1996, Kaemper said that Saravia and appellant were talking about "a few grand." (11RT 3010.)

Contra Costa Deputy Sheriff Matt Malone found more than

$20,000.00, all in one hundred dollar bills, when he executed a search warrant at the home of Wendy Beach on January 10, 1996. (11RT 3012.)

E. Evidence that appellant "confessed"

In December of 1996, Sergio Corrieo, son of Maria Elena and brother of Gina Roberts, was in "New Folsom" prison serving a sentence for a fourth drunk driving offense and working as a clerk in the prison's "receiving and releasing" area when he saw appellant, a "suspect" in the Corrieo killings, getting off a bus from San Quentin and entering New Folsom Prison as an inmate. (11RT 3033-36.) Corrieo had previously seen appellant's picture, and was aware that appellant had been charged and arraigned. (11RT 3041.) Corrieo also saw appellant's name on the manifest for the bus. (11RT 3042.) Corrieo "became very agitated" and told his supervisor, Correctional Officer Darryl White, "that the man in question was a suspect in my family's murder and that I didn't want to do anything stupid so he excused me from my job." (11RT 3037.) Corrieo then went to a different area of the building, and asked a coworker where appellant was being held. The coworker pointed to a cell with a solid door with an opening at the bottom through which he could hear people in the cell but not see them. Corrieo dropped to his hands and knees and said, "Hey, Corey." Appellant said, "Yeah." Corrieo asked, "Do you remember Maria Elena Corrieo?" After a pause, Corrieo heard appellant say, "Yeah"

again. Corrieo responded, "You're a dead man, mother fucker." (11RT 3039.)

Correctional Officer White recalled the arrival of the bus and the initial conversation he and Corrieo had about appellant's presence. Yet White said he locked Corrieo in a holding cell at the direction of his lieutenant, who interviewed Corrieo and then directed White to keep Corrieo in a holding cell until the new inmates were housed. (11RT 3048, 3058.) As soon as he finished locking up Corrieo, White found that his lieutenant had completed his review of appellant's central file, and was ready to interview appellant for placement. (11 RT 3051, 3058-59.)

White recalled appellant saying "I need to lock up"[4] at the commencement of the placement interview. Lieutenant Reed asked him why. Appellant replied, "because they are going to stab me." Reed asked who was going to stab him. Appellant said "I'm not going to say, but they are going to stab me." White asked appellant why they would stab him. Appellant reportedly said, "because I killed two Hispanics." (11RT 3052.) White testified that he "jotted down the time and his name and number and a couple of things on a piece of paper, probably within a half an hour after he said it so I could refresh my memory later." (11RT 3071.) White

[4] To White, these words meant that appellant felt his life was in jeopardy and he therefore wanted to be placed in a secure housing unit. (11RT 3051.)

subsequently prepared People's Exhibit 19, a "chrono" report that said that appellant "admitted that he had in fact killed two Hispanic people" during the interview. (11RT 3069-73.)

Lieutenant Reed was called by the defense. When asked if appellant told him about a threat of any kind, Reed did not answer yes or no. He instead responded by recalling that appellant's central file showed that he had come from a lock-up unit at San Quentin, showed "case factors" relating to his placement, and "him also telling me that he had safety concerns." (11RT 3083.) Reed recalled asking appellant why he wished to be locked up. Appellant's response "indicated that it was due to current case factors . . . [a]nd that was part of the reason he was locked up at San Quentin, too." (11RT 3084.) Asked to recall if appellant said anything about committing a crime, Reed said, "I recall that he did say something about having –two people were ended up killed – in a homicide case." (11RT 3084.) He confirmed that White's report "was accurate." (11RT 3086.)

F. Other Prosecution Evidence

At 6:38 p.m. on August 16, 1996, at a shopping center in Concord, appellant was arrested on unrelated charges. The arresting officer handcuffed him, and did not notice any damage to his hands in so doing. (11RT 2950-51.)

Nina Higgins, a neighbor of the victims, heard four shots in rapid succession around 2:00 to 2:30 a.m. on August 16. (10RT 2596-99.)

A car that detectives believed was used in the homicide was found in an auto dismantling shop in Tijuana. Lolohea's prints were on an envelope and an owner's manual found in that vehicle. (10RT 2653.)

G. The Defense Case

While in custody for the crimes against the Corrieo family, David Ross told inmate William Hazelton that he feared never seeing his child because he had a "serious case" and had "wasted those two bitches." Ross spoke to Hazelton on another occasion as well, saying he was trying to make a deal. (12RT 3195-3201.)

Sheriff's lieutenant and lead investigator Raymond Ingersoll recalled hearing Ross give "three, four or five different" answers when interrogated about how much money was obtained from the Corrieo residence. At one point Ross said there was a blue bag that had $600.00, and that he had received none of it. At another point, he said there could have been as much as $10,000 taken, but he did not know, because he never saw it. For quite some time, Ross said he knew nothing about any robbery. At one point he said he had been in the car on the way to the robbery but was let out at a gas station. Ross said a lot of things he later changed. (12RT 3212-14.)

At some point during his first interview of Ross, Ingersoll put Lolohea and Ross in a room together for twelve minutes. The purported purpose was to show Lolohea that they had been talking to someone else involved in the case, and they might know more than he thought they knew. A tape recorder was running, and picking up sound before and after, but the conversation between Lolohea and Ross cannot be heard on the tape, despite FBI efforts at enhancement. (12RT 3223-27.)

When Ross testified before the grand jury, he asserted that he told Lolohea to tell the truth, because the police knew everything. Yet Ross also told the grand jury that he told Lolohea that he had told police that Lolohea was in the car with Ross. Ross testified that he said that to Lolohea to make Lolohea feel that Ross "looked out for" Lolohea in making his own statement to police. (12 RT 3229.)

After David Ross testified before the grand jury, his attorneys spoke to Ingersoll. Ingersoll later spoke with Ross' sister, Bernadette Ross, as a result of what Ross' attorneys had said. (12RT 3222.) Bernadette told Ingersoll that her brother David had told her he received about $12,000.00 and that appellant received between $23,000.00 and $26,000.00 in robbery proceeds. (12RT 3223.)

In December of 1995, in between committing the Corrieo crime and being arrested for same, Ross was caught attempting to invade another

home, and responded with lying and brutal violence. Manuel Hernandez Veliz and James Grady witnessed Ross attempting to burglarize their neighbor's home, and heard him claim that the home was that of his aunt. Ross assaulted Hernandez Veliz when he attempted to call the police. (12RT 3180-91.) Grady saw Ross punch and knock Hernandez Veliz to the ground, and kick him "real brutally." Grady at first thought Hernandez Veliz was killed in the attack, but he emerged gasping for air, hurt "very badly." (12RT 3188.)

Appellant's possession of a large amount of cash was explained by his mother, Teri Barela, whose testimony was partially corroborated by a probate attorney and related records. Ms. Barela inherited approximately $85,000.00 from her grandmother's estate over a period of years beginning in 1992. (12RT 3137-42, 3149-3154, 3175-77.) During the years in which her inheritance was being distributed, she was earning about $2000.00 per week in prostitution, and she was using cocaine and other drugs. (12RT 3128.) When she had only $25,000.00 remaining from her inheritance, Barela entrusted appellant with that sum, telling him to tell no one and hold the money for her in a secret place until they both agreed that she was "clean and sober." (12RT 3158-60.) She was subsequently jailed in Las Vegas. While there, FBI agents told her that her son was a suspect in a robbery and asked her if she knew how her son might have come into

possession of a large amount of money. Suspecting a trick, appellant's mother said she had recently inherited $40,000.00 but denied giving appellant anything more than he needed to buy a car. She did not realize until she was released from custody that her son's situation was serious enough to require that she disclose the transfer of funds. (12RT 3164-72.)

Paper currency expert Don Antonio examined defendant's exhibit 19, a one hundred dollar bill printed in 1993. Such bills were circulated from 1993 until 1996, when a new series with a bigger picture and new design was released. (12RT 3231-38.) In closing argument, defense counsel pointed out that none of the bills found in Wendy Beach's possession was from the 1993 or 1996 series. Almost all of them are 1990 bills, and some are from the 1970's. (13RT 3546-3547.)

Counsel stipulated that no relevant fingerprints were found on the paper money seized from the Beach residence, true copies of which the jury was allowed to view as defense exhibit 20. (12 RT 3242-44.)

II. Penalty Phase

A. Prosecution Case

Sergio Corrieo described his mother as the nucleus of his large family. After her death, no one held the family together. His sister Gina Roberts had learning disabilities, and was cared for by their mother. His

mother's home was sold to fund the operation of the restaurant and pay bills after the murder. He and his sisters worked 10 to 18 hours a day to keep the restaurant going long enough to sell it and pay off the bills, but the restaurant had to close after a few months. Sergio Corrieo's feelings about the defendant have not changed since the time he encountered him in Folsom. (14RT 3716-20.)

Alicia Fuentes Dorado (nee Todd) was appellant's girlfriend in 1993. He did not like her seeing other males after she terminated the relationship. On November 6, 1993, he punched her on the right side of her face while they were arguing. Her face became bruised and swollen, but she did not seek treatment. (14RT 3723-24.)

Danielle DeBonneville met appellant when she confronted him after hearing him fighting with his girlfriend in an apartment upstairs from her own. DeBonneville found that appellant had punched his girlfriend in the face and knocked her out. Appellant had a little bat, with which he threatened to kill DeBonneville if she took the girlfriend to the police. (14RT 3734-35.)

On August 10, 1995, a "couple of months" after meeting appellant, DeBonneville and a male companion were attacked by a gang of eight to ten men while walking in Cambridge Park in Concord. Appellant was among the men. The men had bats, dark clothes, and wore ski masks and red

bandanas. She associated the color red with the Norteño gang, and believed her male companion had friends affiliated with the rival gang known as the Surteños. (14RT 3741-42.)

The men surrounded her and her companions and demanded to know "what do you claim." She understood this to be a demand to know their gang affiliations. She said "we do not claim anything." Men hit her. Appellant punched her in the face, knocking her unconscious. Others beat her with bats and kicked her. One tried to pick her up and break her back, causing her to temporarily lose feeling in her legs. A man tried to pull her pants down, but her jeans did not come off all the way. Other men put her on her knees, held her hands behind her back, while appellant stood in front of her. She recognized appellant's voice, and could see his face, having ripped off his mask during the attack. (14RT 3743-46.)

Appellant screamed at her, saying that she was a scrap, a "B", a snitch, and was going to die. He held a small gun to her forehead while another gang member told her to "say goodnight." (14RT 3747.) She punched the gun, causing it to go off. The shot entered her head near the upper left scalp line. She acted like she was dead until after the men fled. (14RT 3748.)

She contacted police, who took her to a hospital twenty minutes later, where four stitches and 13 staples were used to repair damage to her

head. Bruises covered her face, legs and part of her back. A bullet was surgically removed from her head two years later. [5](14RT 3748-50.)

Conducting his own cross-examination, appellant asked DeBonneville only if she thought he was sorry that she was shot. She answered affirmatively. Appellant responded by denying that he was sorry, and declined to ask any other questions. (14RT 3752.)

At the prosecution's request, the court took judicial notice of appellant's "no contest" plea to assault with a deadly weapon, specifically, a baseball bat, and his admission of enhancements for inflicting great bodily injury and committing the crime while participating in a criminal street gang, in connection with the DeBonneville attack. (14RT 3726-27, 3753.)

B. Defense Case

Acting as his own attorney, appellant presented no evidence in mitigation. He gave the following statement as his closing argument.

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[5] Appellant asked that her direct testimony be stricken due to the prosecution's failure to provide him, the jury, or the court with information regarding her mental disability, in that she is under the care of the North Central Regional Center, and regarding the gang mark she claimed was made by the imprint of a bat on her back. He also asked that her testimony related to gang activity be stricken as a violation of the court's gang evidence exclusion order, and that the jury be admonished to disregard it. He also asserted that the District Attorney elicited an identification from witness DeBonneville on an in court spectator, without informing the court or the jury that her identification was incorrect. Each request was denied. (17RT 3796.)

Now that you've heard the aggravating circumstances against me, it's your time to decide if I receive life or death. I'm not going to stand up here and cry or ask you for any sympathy. I know that you've noticed that I don't seem to care what happened with DeBonneville. It's because I actually don't. That is a side of me you'll never understand. But at the same time I regret having assaulted Alicia Todd. She was honestly an innocent victim. I also regret leaving my daughter fatherless. I want to make it clear that I do feel sorry for certain things. Either today or tomorrow you will decide my punishment for a crime in which I still claim my innocence. No matter what you decide, I will always be me. You the jury have found me guilty of all counts in this case, and have heard aggravating circumstances. You will notice that I did not put on a defense to show mitigating circumstances of people testifying on my behalf. That's because I don't blame my lifestyle on other people. My actions are my actions and mine alone. I chose the life I lead. It might seem outrageous to you people, but it's a lifestyle that I understand. I would like for you people to have the heart to look me in the eye when you've decided my punishment. At least try to. I want you people to try and realize that our frame of mind is not that much different. It's just that I am willing to do whatever I feel needs to be done. I understand there are consequences and repercussions for everything I do in life, and I'm willing to take the chance and deal with the outcome later. So in your deliberations, do as you deem necessary. Thank you. That's it. (14RT 3861-62.)

I. THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE THAT APPELLANT CONFESSED TO CORRECTIONAL OFFICERS AFTER BEING THREATENED BY THEIR CLERK VIOLATED APPELLANT'S RIGHTS UNDER THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND STATE CONSTITUTIONAL COROLLARIES

A. The Relevant Facts

Prior to trial, appellant sought an order excluding incriminating statements made to correctional officers at Folsom Prison because they were coerced and obtained in violation of *Miranda*[6] and *Massiah*.[7] (3CT 4920-39.) The Folsom statements reportedly included a confession to killing "two Hispanics." Numerous previous interviews of appellant conducted by Contra Costa County authorities had produced no such evidence. (2RT 304-338.)

At appellant's request, the trial court took judicial notice of his case file. (3RT 622.) Records from the Department of Corrections filed as exhibits to appellant's motion were admitted into evidence with a stipulation to forgo the laying of any foundation. (3RT 622-623.)

The historical facts were not in dispute. Appellant was serving a sentence in San Quentin State Prison for an unrelated offense when he was

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[6] *Miranda v. Arizona* (1966) 384 U.S. 436.

[7] *Massiah v. United States* (1964) 377 U.S. 201.

indicted on the Contra Costa County capital murder charges underlying this case. In light of the seriousness of the charges, San Quentin Prison officials placed him in administrative segregation pending review by a classification committee. (13CT4957.)[8] He was soon taken to Contra Costa County, arraigned, given appointed counsel, and returned to San Quentin. (13CT 4959.) (The record does not disclose why he was not allowed to remain in Contra Costa County's pretrial detention facility.) Ten months later, his file was "endorsed" for transfer from San Quentin to "SAC-IV" – jargon for the level IV housing at California State Prison Sacramento (CSPS). The endorsement noted that he was being held for a capital crime. (13CT 4960-61.)

Sergio Corrieo, the son of victim Maria Elena Corrieo and brother of victim Gina Roberts, was a CSPS inmate "clerk" assigned to assist correctional officers in receiving newly transferred prisoners when appellant arrived at CSPS. (3RT 685.) He saw appellant's name on the manifest of prisoners for a bus arriving from San Quentin, and recognized the name as that of a man he knew to have been charged with the murder of his mother and sister. He saw appellant walk into the reception area, and

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[8] As previously noted, the trial court took judicial notice of appellant's case file. (3RT 622.) Pursuant to stipulation, records from the Department of Corrections filed as exhibits to appellant's motion to exclude statements to correctional officers were admitted in evidence. (3RT 622-623.)

recognized him from a photograph he had previously seen. (3RT 593-594.) He was, in his words, very upset. (3RT603.)

Corrieo told his supervisor, Correctional Officer Darryl White, that he had "a problem" dealing with a man who had just arrived because he was "a suspect in the murder of my mom and sister." (3RT 594-595.) Sergio let White know that he was feeling strong emotions and "might do something stupid" if he stayed in the area. (3RT 595.) Sergio was "very upset." Corrieo recalled that White told him to "take a break. Get out of here. Go over there. Stay there." (3RT 603-604.) White recalled telling Corrieo to "stay right there where he was at and I'd be right back." (3RT 603.)

Left alone, Corrieo went to a room separated from the holding cell used for new arrivals by a door with a hole in the bottom. (3RT 595-596.) The co-worker who had taken over Corrieo's work visited Corrieo in the property room and asked Corrieo how he was doing.

Corrieo asked the coworker, "Where do they got Williams?" The coworker pointed directly to the door separating the holding cell from the property room. Corrieo could hear people talking in the cell. (3RT 596-597.)

Corrieo walked up to the door but could not see into the cell. He shouted, "Hey, Williams." A voice answered, "Yeah." Corrieo asked,

"Do you remember Maria Elena Corrieo?" Hearing an affirmative response after a pause, Corrieo replied, "You're a dead man." (3RT 598.)

Meanwhile, Correctional Officer White went to Lieutenant Reed's office and informed him that Corrieo "had a problem" with appellant and needed to talk with Reed. Corrieo was then brought in to Reed's office, where White stood by while Corrieo told Reed what he had told White. (3RT 604.) Reed instructed White to place Corrieo in a holding tank or holding cell. White then locked Corrieo up in a controlled area in another facility where he had no access to the receiving area. (3RT 604-605.)

After locking up Corrieo, White escorted appellant to Reed's office for an interview. Per standard procedure, appellant was handcuffed. (3RT 610.) In response to unspecified questioning by Reed,[9] appellant said "he needed to lock up"[10] and something to the effect of "they're going to stab me." (3RT 612.) Either Reed or White asked appellant "who's going to

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[9] The trial court's written statement of decision states that appellant expressed fear of being stabbed and was asked by White, in a "private conversation" that Reed heard about from White, to say who would stab him, whereupon Reed asked the "fateful question, to wit why would anyone stab him." (13 CT 5030.) There is no evidence that White and appellant spoke privately, nor that Reed (as opposed to White) asked the fateful question. However, the trial court's error on this particular point does not appear to be related to its ruling.

[10] White understood this statement to mean that appellant needed to be placed in "a secure housing area, not in general population." (3RT 610.)

stab you?" Appellant said he could not or would not say. (3RT 613-614.) White asked, "Well, why are they going to stab you?" According to White, appellant looked at White and said, "Because I killed two Hispanics." (3RT 614-615.)

White did not testify to any reason for asking appellant "why" he feared that someone would stab him. However, he testified that he did not interview appellant for the purpose of assisting in the investigation of any crimes appellant might have committed outside of prison walls; his intent in speaking with appellant "was for prison purposes." (3RT 618.)

Officer White and Lieutenant Reed were responsible for reviewing the incoming inmates files, searching the inmates' bodies, and taking their pictures. Officer White was responsible for asking incoming inmates what if any gang affiliations they had. (3RT 619.) The appropriate housing was determined by "first what level they were" and "if they had enemies." (3RT 607.) Lieutenant Reed was individually responsible for reviewing the "central file" of each incoming inmate and interviewing each of them to determine appropriate housing. (3RT 606-607.) Neither officer specified any particular "prison purpose" to be served by asking the questions they asked of appellant.

After the interviews, White prepared an informational memo – a "C.D.C. 128-B" – with Corrieo's name and prison number, primarily for

Corrieo's file and "possibly also for informational purposes in Williams' file." (3RT 609, 620.) He did not know how the report was later distributed. (3RT 620.) The report (13CT 2231) read as follows:

> December 19, 1996, at approximately 1830 hours, inmate CORRIEO (K24179), assigned to post #CLK-M.032 (R&R clerk), informed me that he had a problem. In a private area, CORRIEO stated that inmate WILLIAMS (J-78875), who had just arrived from San Quentin via Bus Schedule "B" was possibly involved in the murder of his mother and sister. I removed Corrieo from R&R and notified Lt. K. Reed of the situation. Lt. Reed interviewed Corrieo at which time CORRIEO claimed that Williams was from Contra Costa County. A later review of the Williams file confirmed this. CORRIEO also stated that Williams' presence at San Quentin was the reason he (CORRIEO) was placed at CSP-SAC. CORRIEO was kept out of R &R until Williams was escorted to Ad Seg. During the new arrival interview, Williams admitted that he had in fact killed two Hispanic people. WILLIAMS was not questioned about knowledge of inmate CORRIEO.
>
> DATE December 19, 1996 D.T. WHITE
> Correctional Officer

On the day immediately following the date of this report, Sergio's sister Malena Rubino contacted Contra Costa Sheriff's Department Sargent Ingersoll and reported her brother's observation of appellant at Folsom Prison. Five days later, Ms. Rubino contacted Ingersoll again, adding that her brother had important information regarding appellant and the case, which information her brother did not wish to discuss on the telephone. (13CT 4941.)

Ingersoll interviewed Corrieo and White at the prison, and returned another day to interview Reed. As to Reed's account, Ingersoll reported:

> While he was conducting the incoming interview with Williams, Williams told him he had to be locked down in Ad. Seg (Administrative Segregation) because of his charges. Lieutenant Reed said he asked Williams what his crime was because everyone is there for something. He said Williams told him "I killed two people". He said Williams went on to tell him that he runs with Hispanics and claimed it was a gang shooting. Lieutenant Reed said Officer White was present during the interview and he had Officer White document it. I asked Lieutenant Reed if he would write a report to document his memory of the incident. He said he would do it and fax me a copy of his report.[11] (13CT 4944.)

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[11] Reed denied having personally documented his conversation with appellant in any way. (3RT 701-702.) However, among the documents placed in evidence at the hearing was the Order and Hearing for Placement in Segregated Housing completed and signed by Reed on December 19, 1996, the date appellant arrived. It includes Reed's report of the intake interview. It says nothing about asking appellant what crimes he had committed nor any indication of appellant confessing to having killed anyone or fearing retribution. This report states that Reed placed appellant in Administrative Segregation and deemed appellant "a threat to the safety and security of the institution" because "review of the files that arrived with you reflect that you arrived from an Ad-Seg Unit due to the seriousness of your crime." (13CT 4962.) Reed wrote that appellant "can read and understands the reasons for his placement in AD/SEG." (13CT 4962.) Appellant signed a portion of the order to indicate that he wished to have a hearing to review his placement in segregated housing as soon as practical, and was waiving his right to advance notice and opportunity to prepare for that hearing. (13CT 4963.) Before ruling, the court said that counsel had "introduced all these documents in evidence" and that the court had read them. (3RT 712.) For reasons not disclosed in the record, neither Reed nor White was forced to testify about the inconsistency between this report of the intake interview and their testimony about it.

Reed testified at the suppression hearing ten days after White, pursuant to defense counsel's successful motion to reopen the evidence while the matter was under submission. (3RT 654.) Reed acknowledged having told Ingersoll he had asked appellant "what his crime was because everybody is here for something" but denied recalling asking appellant that or any particular questions. (3RT 694, 705.) He said that in asking such a question, his intention would be to have appellant tell him about the offense for which he had been committed to state prison. (3RT 698-699.) Reed asked White to document appellant's response because it was surprising; inmates asking to be locked down during an intake interview "normally don't blab that they done just killed anyone." (3RT 699.)

Like White, Reed denied having any interest or duty to aid the prosecution of appellant on pending charges, but offered no clear explanation for asking appellant the questions asked. He acknowledged that he had looked through appellant's central file prior to interviewing appellant. (3RT 688.) He was aware that appellant's file had "an endorsement" for transfer to Sac- IV custody, which also showed that he had a county "hold." (3RT 690, 13CT 4960.) Reed denied that the endorsement gave any indication of the cause of the hold, but admitted that it expressly said "hold capital crime." (3RT 690-91, 704.) He acknowledged knowing that a capital crime "could be a homicide, . . . a 187

. . . something of a serious nature. . . . A felony offense." (3RT 705.)

B. Trial court opinion

The trial court issued a written decision, positing that the officers did not engage in custodial interrogation within the meaning of *Miranda* nor deliberately elicit the confession within the meaning of *Massiah* insofar as the purpose of the interrogation was prison security rather than criminal prosecution. The court said nothing about the issue of voluntariness or coercion. (13 CT 5029-5033.)

After acknowledging case law defining "interrogation" to include, in addition to express questioning, all conduct that the police *should know* is reasonably likely to elicit an incriminating response (*Rhode Island v. Innis* (1980) 446 US 291) and a California case applying that doctrine and excluding a confession obtained by a jailer asking an inmate *who* he was accused of killing (*People v. Morris* (1987) 192 Cal.App.3d 380), the trial court explained its decision as follows:

> [T]he correctional officers here did not know nor should they have know[sic] that the questions they posed to defendant were reasonably likely to elicit incriminating statements. They had an immediate jail security problem in that defendant had volunteered that he had an enemy in the facility. That Lt. Reed knew that defendant had a detainer does not vitiate nor [sic] does the fact defendant was transferred to Sacramento State Prison, a higher security facility than San Quentin. There is no evidence that Lt. Reed or Officer White were informed of the reason for the transfer of defendant and thus on actual or constructive notice of the pending charges. Even when Sergio informed them of the possibility that defendant

was allegedly charged with two homicides did their questioning change in character [sic]. Their concern was first and foremost institutional security. Consistent with this task, the RR unit has no history of engaging in criminal investigation, with the exception of crimes committed at the particular institution. (13CT 5031.)

In addition, defendant's subjective condition and "personal characteristics" (Morris, supra, 192 Cal.App.3d at 389) at the time of the questioning were not such that they would put the officers on notice that their questioning might elicit an incriminating statement. Defendant did not communicate, for example, the veiled threat of Sergio. There is no evidence that he was crying, as in Morris, or emotionally distraught. What defendant did communicate was his fear for his present safety.

Finally, while defendant was "in custody" because he was in state prison, his placement at Sacramento State Prison cannot be viewed as custody for purposes of "custodial interrogation" as those terms are used in Miranda jurisprudence. Such custodial interrogation has reference to a pending criminal charge or a pending criminal investigation. The evidence here can only be interpreted to support a conclusion that the questioning was for purposes of determining present placement and institutional safety and not to investigate any pending criminal charge. To the extent defendant disagrees, he has not met his burden to the contrary. (13CT 5031-5032.)

Thus, the court finds that the questioning of defendant was not an interrogation, as defined by either Rhode Island v. Innis, supra, or Miranda, nor was it a deliberate or even an unartful [sic] attempt to elicit an incriminating statement within the meaning of Massiah v. U.S. (1964) 377 U.S. 201. Nor was defendant "in custody" as that expression is used in the Miranda context. Rather like the probation officer in People v. Claxton (1982) 129 Cal.App.3d 638, who had no investigative function when he engaged in conversation with the defendant therein to determine the proper placement for the juvenile accused as an adult, no Miranda warnings were required in the present case. (13CT 5031-32.)

C. Use of the evidence at trial

In his opening statement, the prosecutor told the jury that "the defendant has admitted killing" the victims in this case. (10RT 2559.) He offered the testimony of Officer White to support this assertion. Reed was called by the defense. Both testified as they had previously with respect to appellant's statements (11RT 3047-3088) and Reed added an assertion that he personally asked the question that prompted appellant's confession. (11RT 3047-3088.) In closing argument, the prosecutor called White's documentation of appellant's confession "the single most important exhibit in this trial." (13RT 3561.)

The trial court's decision to admit the confession evidence was revisited in a motion for new trial, to no avail. (15CT 5912-16; 14RT 3934.)

D. The prosecutor's burden on the voluntariness issue and its treatment in the court below

The burden of showing admissibility of any "custodial confession" challenged as involuntary rests, of course, on the prosecution. "The prosecution bears the burden of proving, at least by a preponderance of the evidence, the Miranda waiver [citation], and the voluntariness of the confession [citation.]" (*Missouri v. Seibert* (2004) 542 U.S. 600, 609; accord *People v. Williams* (1997) 16 Cal.4th 635, 659-660.) Challenging

voluntariness by in limine motion (13CT 4934) is sufficient to preserve the issue for appeal. *(People v. Morris* (1991) 53 Cal.3d 152, 187-190.)

The prosecutor's responsive papers dismissed the voluntariness issue as a "make weight argument." The prosecutor called no witnesses to the hearing, and made no effort to prove a disconnect between the coercive circumstances and questioning that purported to produce an immediate confession from a man who had insisted throughout prior police interrogations he had nothing to do with the Corrieo murders. In closing argument to the jury, however, the prosecutor emphasized the apparent seriousness of the threat Corrieo posed to appellant "in the new prison he just walked into" and the link between that threat and appellant's statements. (13RT 3480.) The prosecutor also acknowledged that White knew appellant had been threatened by Sergio Corrieo when he asked appellant "Why is it they're going to stab you?" (13RT 3562.)

Although the trial court incidentally made a finding supportive of the involuntariness claim in citing Corrieo's threat, the court expressed no conclusion or determination of the voluntariness issue. There was no "reliable and clear-cut determination that the confession was in fact voluntarily rendered." *(Lego v. Twomey*, (1972) 404 U.S. 477, 489.) Rather, the trial court's decision to admit the confession evidence focused entirely on the officers' lack of apparent intent to assist the prosecution of

the capital case.

That focus was incorrect. As shown in the discussion below, none of the constitutional exclusionary rules raised by appellant's claim requires a finding that the state actors who compelled an incriminating statement had any interest in supporting a criminal prosecution. Among cases decided under the Fourteenth Amendment due process clause, Fifth Amendment self-incrimination clause, and Sixth Amendment right to counsel are those in which incriminating statements were held inadmissible notwithstanding the evidence that the interrogators had other agendas.

E. Application of Constitutional Doctrines

1. The confession was involuntary

Recent United States Supreme Court decisions recognize two distinct constitutional bases for the requirement that a confession be voluntary to be admitted into evidence: the Fifth Amendment right against self-incrimination and the due process clause of the Fourteenth Amendment. (*Dickerson v. United States* (2000) 530 U.S. 428, 434.)

The Fourteenth Amendment due process clause precludes state court use of involuntary confessions, without regard to whether the procurement of such a confession violated the Fifth Amendment prohibition against compelled self-incrimination. "The due process clause requires `that state

action, whether through one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions." [Citation.] (*Brown v. Mississippi* (1936) 297 U.S. 278, 286.)

Ordinarily, courts determine the voluntariness of a confession by considering the "totality of circumstances" surrounding it. (*Schneckloth v. Bustamonte* (1963) 412 U.S. 218, 226.) Even subtle forms of coercion may render a confession involuntary under this approach. (*Haynes v. Washington* (1963) 373 U.S. 503 [confession obtained after refusing to let a suspect contact his wife was coerced and, therefore, unconstitutional]; *Lynumn v. Illinois* (1963) 372 U.S. 528, 9 L. Ed. 2d 922, 83 S. Ct. 917 [threatening a suspect with the loss of custody of her children was coercive and, therefore, unconstitutional]; *Ashcraft v. Tennessee* (1944) 322 U.S. 143 [prolonged interrogation without rest or contact with individuals other than law enforcement officers was coercive and, therefore, unconstitutional].) Otherwise proper interrogation techniques can produce an involuntary confession where, "in the particular circumstances of the case, the confession is unlikely to have been the product of a free and rational will." (*Miller v. Fenton* (1985) 474 U.S. 104, 110.)

When a confession closely follows a threat of violence by a custodian of a prisoner during detention, the confession is coerced and involuntary as a matter of

law. (*Payne v. Arkansas* (1958) 356 US 560 [confession coerced where interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door].) As the Court previously explained:

> Physical violence or threat of it by the custodian of a prisoner during detention serves no lawful purpose, invalidates confessions that otherwise would be convincing, and is universally condemned by the law. *When present, there is no need to weigh or measure its effects on the will of the individual victim.* The tendency of the innocent, as well as the guilty, to risk remote results of a false confession rather than suffer immediate pain is so strong that judges long ago found it necessary to guard against miscarriages of justice by treating any confession made concurrently with torture or threat of brutality as too untrustworthy to be received as evidence of guilt. (*Stein v. New York* (1953) 346 U.S. 156, 182; overruled on other grounds in *Jackson v. Denno* (1964) 378 U.S. 368, 391, emphasis added.)

In the present case, the threat of deadly violence was delivered to the defendant by a prison intake clerk (Sergio Corrieo) immediately before prison guards conducted the questioning. The threat was delivered by someone who knew appellant's name, knew the victims of the charged crime by name, and was allowed to move around freely while appellant remained handcuffed and caged. A reasonable person in appellant's position would believe that the unseen purveyor of his death warrant was either a guard or a prison trustee with access to government-compiled information. As it turned out, the voice of the prison equivalent of the

"angry mob" in *Payne* was a state prison inmate clerk working under the immediate supervision of correctional officers Reed and White.

Notably, Corrieo, Reed and White were all prison functionaries acting within the scope of their employment. Although only the latter two were "peace officers" and, as such, allied with fellow peace officers in the county prosecuting appellant for murder (*Minnesota v. Murphy* (1984) 465 U.S. 420, 432) all three men were exercising government power and had access to government information about appellant, their prisoner. Whether or not Sergio Corrieo is viewed as a "custodian" of appellant within the meaning of *Stein v. New York, supra,* he was a state actor. And the circumstances surrounding appellant's confession – i.e., the threat of criminal violence, and the state of mind apparent to the interrogators, are strikingly similar to those in *Arizona v. Fulminante* (1991) 499 US 279 and other cases finding confessions inadmissible under a totality of circumstances assessment. *(Lam v. Kelchner* (1st Cir. 2002) 304 F.3d 256, and *United States v. McCullah* (10th Cir 1996) 76 F. 3d 1087, 1139.)

In *Fulminante*, the defendant was an alleged child murderer serving time for an unrelated offense and in danger of violence from other inmates. Another inmate, who was an FBI informer, offered to protect the defendant from other inmates if the defendant gave him the full facts of the alleged crime. The defendant then made incriminating admissions which were used

against him at trial. The Supreme Court held that the defendant's statements were coerced. (Id., at p. 287.) The Court explained:

> Our cases have made clear that a finding of coercion need not depend upon actual violence by a government agent; [footnote omitted] a credible threat is sufficient. As we have said, "coercion can be mental as well as physical, and . . . the blood of the accused is not the only hallmark of an unconstitutional inquisition." [Citations] As in *Payne [v. Arkansas* (1958) 356 US 560], where the Court found that a confession was coerced because the interrogating police officer had promised that if the accused confessed, the officer would protect the accused from an angry mob outside the jailhouse door, 356 U.S., at 564-565, 567, so too here, the Arizona Supreme Court found that it was fear of physical violence, absent protection from his friend (and Government agent) Sarivola, which motivated Fulminante to confess. (*Arizona v. Fulminante*, *supra*, 499 U.S. 279, 288.)

Similarly, in *McCullah, supra*, 76 F. 3d 1087, 1139, the Tenth Circuit court found the defendant's statement involuntary because an FBI informer told the defendant his life was in danger and offered him protection from his former crime partners. In *Lam v. Kelchner*, *supra*, 304 F.3d 256, the First Circuit held that the state court had made an unreasonable determination in failing to exclude as involuntary statements the defendant made in response to undercover officers' threat to expose the defendant to gang violence unless she paid the balance due on a murder-for-hire contract.

Although appellant's research has uncovered no California decisions

on facts similar to those in the case at bar, two decisions of this court are worth noting here for their finding of due process violations in the use of confessions that were coerced by private parties. In *People v. Haydel* (1974) 12 Cal.3d 190, 197, this court held that use of a confession obtained and coerced by store security guards violated Fourteenth Amendment and state constitutional due process guarantees. In *People v. Berve* (1958) 51 Cal. 2d 286, overruled on other grounds in *People v. Cahill* (1994) 5 Cal. 4th 478, the use of a confession obtained by police after victim's husband beat defendant and threatened defendant with death was held to violate the due process guarantee. As Chief Justice Traynor observed the constitutional principles in *Berve:*

> The use of confessions in a criminal prosecution obtained by force, fear, promise of immunity or reward constitutes a denial of due process of law both under the federal and state Constitutions requiring a reversal of the conviction although other evidence may be consistent with guilt. [Citations.] "Use of involuntary verbal confessions in State criminal trials is constitutionally obnoxious not only because of their unreliability. They are inadmissible under the Due Process Clause even though statements contained in them may be independently established as true. Coerced confessions offend the community's sense of fair play and decency. . . . Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." [Citation.] (*People v. Berve, supra*, 51 Cal. 2d 286, 290.)

2. The confession was "compelled" in violation of the self incrimination clause

The Fifth Amendment guarantees that "no person . . . shall be compelled in any criminal case to be a witness against himself." (U.S. Const. Amend. V.) The privilege against self-incrimination "is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way from being compelled to incriminate themselves." (*Miranda v. Arizona*, supra, 384 U.S. 436, 467.)

If the government compels an incriminating statement from an individual, the Fifth Amendment guarantee must be implemented by precluding prosecutorial use of that statement against him in any criminal case. (*Garrity v. New Jersey* (1967) 385 U.S. 493, 498-499.) The same may be said when a confession from an individual in custody is coerced by a private citizen acting on his own initiative. (*People v. Whitt* (1984) 36 Cal. 3d 724, 736, 746 [use of confession obtained by cellmate through coercion would violate Fifth Amendment].) In deciding whether evidence must be excluded under the Fifth Amendment, "the constitutional inquiry is not whether the conduct of state officers in obtaining the confession was "'free and voluntary: that is, [it] must not be extracted by any sort of threats or violence, nor obtained by any

direct or implied promises, however slight, nor by the exertion of any improper influence or. . . . [Citations.]'" (*Malloy v. Hogan* (1964) 378 U.S. 1, 7.)

Compulsion to make incriminating statements rather than "take the Fifth" may be present in the most cordial official interviews of individuals in custody. "[T]he process of in-custody interrogation of persons suspected or accused of crime contains inherently compelling pressures which work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely." (*Miranda v. Arizona, supra*, 384 U.S. 436, 467.) "It is not just the subnormal or woefully ignorant who succumb to an interrogator's imprecations, whether implied or expressly stated, that the interrogation will continue until a confession is obtained...." (Id., at p. 468.)

All the inherent pressures of the interrogation atmosphere considered in *Miranda*, plus the threat of exposure to lawless violence presented in the voluntariness cases, bore down on appellant when he faced Reed and White's questioning.

Per standard procedure, appellant was brought to Lt. Reed's office in handcuffs. (3RT 610.) Handcuffing is a distinguishing feature of formal arrest and puts the individual "completely at the mercy of the police." (*People v. Pilster* (2006) 138 Cal. App. 4th 1395, 1405, citing and quoting

Berkemer v. McCarty (1984) 468 U.S. 420, 437–438; *Dunaway v. New York* (1979) 442 U.S. 200, 215 [handcuffs considered among the "trappings of a technical formal arrest"]; *United States v. Newton* (2d Cir. 2004) 369 F.3d 659, 676 [handcuffing "recognized as a hallmark of a formal arrest"].) This is no less so in a prison setting. (*United States v. Vasquez* (M.D. Pa. 1995) 889 F. Supp. 171, 175 (M.D. Pa. 1995) [applying *Miranda* to inmate in handcuffs].)

Like a newly arrested man brought to police headquarters for questioning, appellant was handcuffed in a prison to which he had just been transferred, and was isolated with the officers in an unfamiliar atmosphere during questioning. "[T]he compulsion to speak in the isolated setting of the police station may well be greater than in courts or other official investigations, where there are often impartial observers to guard against intimidation or trickery." (*Miranda v. Arizona, supra*, 384 U.S. 436, 461.)

Most importantly, the environment surrounding appellant was made to appear hostile and lawlessly violent by the behavior of the enraged crime victim serving as the officers' clerk. In showing his knowledge of appellant's name and the names of the victims in the capital murder for which appellant was indicted, Corrieo presented the power of the State to render a man physically helpless combined with the threat of brutal

prisoner-on-prisoner violence. "[T]he touchstone of the Fifth Amendment is compulsion." (*Lefkowitz v. Cunningham* (1977) 431 U.S. 801, 806.) Compulsion to answer the officers' questions was clearly evident.

3. The trial court erred in concluding that the officers did not engage in custodial interrogation

"The question whether defendant was in custody for *Miranda* purposes is a mixed question of law and fact. [Citation.] Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave. Once the scene is . . . reconstructed, the court must apply an objective test to resolve 'the ultimate inquiry': '[was] there a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.' [Citations.] The first inquiry, all agree, is distinctly factual. . . . The second inquiry, however, calls for application of the controlling legal standard to the historical facts. This ultimate determination . . . presents a 'mixed question of law and fact' . . . ." [Citation.] Accordingly, we apply a deferential substantial evidence standard [citation] to the trial court's conclusions regarding "' 'basic, primary, or historical facts: facts in the sense of recital of external events and the credibility of their narrators . . . .' " [Citation.] Having determined

the propriety of the court's findings under that standard, we independently decide whether "a reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave." (*People v. Ochoa* (1998) 19 Cal. 4th 353, 402.)

As previously noted, the trial court's written opinion concluded that what happened to appellant was not, technically, "custodial interrogation" per *Miranda*. In the trial court's words, "while defendant was `in custody' because he was in state prison, his placement at Sacramento State Prison cannot be viewed as custody for purposes of `custodial interrogation' as those terms are used in Miranda jurisprudence. Such custodial interrogation has reference to a pending criminal charge or a pending criminal investigation. The evidence here can only be interpreted to support a conclusion that the questioning was for purposes of determining present placement and institutional safety and not to investigate any pending criminal charge." (13CT 5031-32.)

To determine whether an individual was in custody, a court must, after examining all of the circumstances surrounding the interrogation, decide "whether there [was] a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest." *(Stansbury v. California* (1994) 511 U.S. 318, 322.) The proper inquiry focuses on the objective circumstances of the interrogation, not the subjective views of the

officers or the individual being questioned. (*Id.* at p. 323.) The trial court, however, focused on determining the subjective purpose of the officer who asked appellant why he had been threatened.

Contrary to the trial court's opinion, "custodial interrogation" for *Miranda* purposes is not limited to interrogation conducted with the intent to support a pending criminal charge or with "reference to a pending criminal charge or pending criminal investigation." (13CT 5031-32.) The trial court's thinking on that point was squarely rejected in *Mathis v. United States* (1968) 391 U.S. 1, and in *Smiley v. Thurmer* (7th Cir. 2008) 542 F.3d 574, and implicitly in *Estelle v. Smith* (1981) 451 U.S. 454, 467.

In *Mathis*, *supra,* 398 U.S. 1, an IRS agent interviewed a state prisoner with no pending criminal investigation to determine if he had prepared a particular tax return and to obtain his written consent to extend the statute of limitations. The high court rejected the federal government's position that in order for *Miranda* requirements to apply, the questioning must be commenced in aid of a pending criminal investigation and the prisoner had to be in custody for the same matter to which the questioning related. "These differences are too minor and shadowy to justify a departure from the well-considered conclusions of *Miranda* with reference to warnings to be given to a person held in custody." (*Id.*, at p. 4.)

In *Smiley v. Thurmer, supra*, 542 F.3d 574, the defendant was in custody for a minor offense when questioned by detectives investigating a homicide at the home where the defendant had resided as a tenant. No *Miranda* warnings were administered until after he made an incriminating statement. The state appellate court held that the initial questioning was not "an interrogation but simply an interview of a potential witness who police believed may have had pertinent background information to the investigation" and that police had no reason to know the defendant would make an incriminating statement, and ergo, no *Miranda* warnings were required under *Rhode Island v. Innis, supra,* 466 U.S. 291. The federal district court granted habeas relief, and the Seventh Circuit Court of Appeals affirmed, explaining:

> It is clear from the language, facts and context of *Innis*, that the Supreme Court defined interrogation as (1) express questioning; or (2) its functional equivalent; it defined the latter as any statements that "the police should know are reasonably likely to elicit an incriminating response from the suspect." Id. at 301. Thus, as the district court explained, *Innis* does nothing more than define when police practices, other than express questioning, constitute interrogation.
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> The Supreme Court of the United States has made it clear that, when an individual is subject to custodial interrogation, the fact that the custody was initiated for a reason other than the subject matter of the interrogation does not alter the necessity of warning the individual of his right to silence and to the assistance of counsel. As Justice Black wrote for the Court in *Mathis v. United States,* 391 U.S. 1, 4-5, 88 S. Ct. 1503, 20 L. Ed. 2d 381, 1968-2 C.B. 903 (1968): There is no substance to such a distinction, and in effect it goes against

> the whole purpose of the *Miranda* decision which was designed to give meaningful protection to Fifth Amendment rights. Indeed, *Miranda* itself specifically says that "[b]y custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody." *Miranda*, 384 U.S. at 444 (footnote omitted). Again in *Beckwith v. United States,* 425 U.S. 341, 96 S. Ct. 1612, 48 L. Ed. 2d 1 (1976), the Supreme Court stressed that it was the inherently coercive nature of the custodial setting, not the strength or content of the Government's suspicions, that triggered the need for *Miranda* warnings. *Id.* at 346-47. (*Smiley v. Thurmer, supra,* 542 F.3d 574, 582-583.)

In *Estelle v. Smith, supra,* 451 U.S. 454, 467, the Court found the Fifth Amendment privilege violated by the prosecutorial use of statements made by a jailed defendant during a court-ordered competency examination that did not include *Miranda* warnings. "The considerations calling for the accused to be warned prior to custodial interrogation apply with no less force to the pretrial psychiatric examination at issue here. Respondent was in custody at the Dallas County Jail when the examination was ordered and when it was conducted." (*Ibid.*) Further:

> "That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, governmental informant, or prosecuting attorney, is immaterial. *When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.* During the psychiatric evaluation, respondent assuredly was "faced with a phase of the adversary system" and was "not in the presence of [a]

> [person] acting solely in his interest." *Id.*, at p. 469. Yet he was given no indication that the compulsory examination would be used to gather evidence necessary to decide whether, if convicted, he should be sentenced to death. He was not informed that, accordingly, he had a constitutional right not to answer the questions put to him. (*Estelle v. Smith*, supra, 451 U.S. 454, 467, emphasis added.)

Here, the trial court's erroneous analysis began, but did not end, with a focus on the officers' *motivation* rather than on the nature of the questioning and the circumstances under which the questioning was conducted. Like the state courts in *Smiley*, the trial court also misapplied *Innis* to a scenario in which the defendant was in custody and faced express questioning about a crime. Moreover, in the present case the officers conducting the questioning knew or should have known, from the statements previously made by Mr. Corrieo and from appellant's records, that questioning appellant about his "crime" and the reason why he feared being put in the general population was reasonably likely to elicit an incriminating response. They knew he was suspected of killing another inmate's mother and sister. They knew that he had a capital case "hold" but had not yet been convicted of any murder charge. Asking appellant "what his crime was" and "why anyone would stab him", Reed and White knew or should have known that they were likely to get a response directly

related to the pending murder charge.[12]

On the application of *Innis,* the trial court's decision cited, but failed to follow, *People v. Morris, supra,* 192 Cal.App.3d 380, 389-390. There, a police officer who had booked the defendant into the jail and placed him in a holding cell remembered that he had forgotten to place an identifying wrist bracelet on the defendant. Consequently the officer removed the defendant from the holding cell and noted that defendant, who had been upset, nervous, and crying during the booking process, was somewhat calmed down. The officer then asked the defendant, "if we should anticipate any type of problem with his being there in jail." When the defendant replied, "I don't think so," the officer went on and asked

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[12] The *Innis* test does not demand proof that the police had reason to know that the defendant's response was likely to be a confession or other inculpatory statement. In *Innis,* the Court explained that "by 'incriminating response' we refer to any response - whether inculpatory or exculpatory - that the prosecution may seek to introduce at trial." (*Rhode Island v. Innis, supra,* 446 U.S. 291, 301 fn. 5.) The Court pointed to its discussion in *Miranda* of incriminating statements:

> "No distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.' If a statement made were in fact truly exculpatory it would, of course, never be used by the prosecution. In fact, statements merely intended to be exculpatory by the defendant are often used to impeach his testimony at trial or to demonstrate untruths in the statement given under interrogation and thus to prove guilt by implication. These statements are incriminating in any meaningful sense of the word and may not be used without the full warnings and effective waiver required for any other statement." (*Ibid.)*

defendant, "Who are you accused of killing?" The defendant "cried a little bit and stated, `My brother, Randy Morris, was in last October for it.' And 'I never did anything like this before -- I killed my sister-in-law.'" The defendant was "still very shaken up, very nervous."

The officer in *Morris* was unequivocal in his testimony that these questions were asked of defendant solely for the purpose of jail security and not to elicit information from defendant that might be used against him. The officer defined jail security as his suspicion that "there might be some problem with the person that he was accused of killing having relatives or close friends in the jail or could be some type of retaliation." He testified this is a procedure normally conducted when someone is about to be jailed for a serious offense such as murder or violent assault.

The appellate court rejected the trial court's reading of the law to hold that "questions asked during the booking process and not done for interrogation which elicit gratuitous type answers, are not considered to be interrogation and can be admissible in spite of their failure of a *Miranda* warning or defendant requesting his rights under *Miranda*." (*Id.*, at p. 388-89.) The appellate court explained:

> We believe the trial court's conclusion is erroneous under the standard announced by the United States Supreme Court in *Rhode Island v. Innis, supra*. Even the first question asked by Officer Wilkerson, i.e., whether jail personnel should anticipate any "trouble" in connection with defendant's

> incarceration, given the context of possible retaliation by members of the victim's family or the victim's friends, goes well beyond the type of neutral questioning permissible in a booking interview. Moreover, when defendant answered equivocally and Wilkerson pursued the matter, asking defendant who defendant had been accused of killing, it seems obvious that this is the type of police conduct which "the police should know [is] reasonably likely to elicit an incriminating response from the suspect." (*Rhode Island v. Innis, supra*, 466 U.S. at p. 301 [64 L.Ed.2d at p. 308].)
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> The standard here is not what the police absolutely know; it is what they should know is reasonably likely to elicit an incriminating response from a suspect. As the court in *Rhode Island v. Innis* made clear, the focus in this inquiry is not on objective proof that the police were intending to elicit an incriminating response; rather the focus is on the subjective perceptions of the suspect. It is much too narrow a reading of *Rhode Island v. Innis* to conclude that simply phrasing a question addressed to a criminal suspect in terms of "accusation" removes the question from the realm of those which the police should reasonably expect to produce an incriminating response.
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> The focus of our analysis is *not* what the police may lawfully ask a criminal suspect to ensure jail security. The police may ask whatever the needs of jail security dictate. However, when the police know or should know that such an inquiry is reasonably likely to elicit an incriminating response from the suspect, the suspect's responses are not admissible against him in a subsequent criminal proceeding unless the initial inquiry has been preceded by *Miranda* admonishments. (*People v. Morris, supra,* 192 Cal. App. 3d 389-390.)

The final question Lieutenant Reed recalled asking appellant, i.e., what his crime *was*, is even more likely to elicit an incriminating response than the question about the identity of the person defendant Morris stood accused of killing. Whether it is construed to call for a description of the

crime for which appellant was sentenced to prison or of the charge for which his file showed a Contra Costa County hold, a description of past criminal activity is plainly among the predictable responses to the lieutenant's query.

Likewise, the final question Officer White recalled asking appellant, i.e., *why* are they going to stab you, is similar to, but broader than, the question recalled by Reed. In essence, it asked appellant what he thought he had done to provoke violent attack. Officer White already knew that inmate/clerk Corrieo believed that appellant had killed Corrieo's mother and sister as a result of his private talk with Corrieo. With that information already in hand, Officer White knew or should have known that his question was likely to produce an exculpatory if not inculpatory response about the Corrieo family murders.

The trial court's opinion posits no different view of the accusatory quality of the questions Reed and White asked appellant. Rather, the trial court's opinion talks about the state of mind with which the officers conducted the questioning and the distinction between appellant's condition and "personal characteristics" and those of the defendant in *Morris*. In so doing, the trial court misread or misconstrued *Morris*, which also involved a claim that the questioning was undertaken solely for jail security reasons, and correctly cites *Innis* in condemning the trial court's analysis. As stated

in *Morris:*

> *As the court in Rhode Island v. Innis made clear, the focus in this inquiry is not on objective proof that the police were intending to elicit an incriminating response; rather the focus is on the subjective perceptions of the suspect.* It is much too narrow a reading of *Rhode Island v. Innis* to conclude that simply phrasing a question addressed to a criminal suspect in terms of "accusation" removes the question from the realm of those which the police should reasonably expect to produce an incriminating response. This conclusion is certainly amplified when personal characteristics of the suspect are taken into consideration; a suspect who is visibly upset and, in fact, crying, as was defendant in the instant case, is less likely to appreciate the subtlety in a question such as the one here under consideration. [Citations.] (*People v. Morris, supra*, 192 Cal.App.3d at p. 389, emphasis added.)

As the quoted text from *Morris* makes clear, consideration of the emotional condition of the defendant simply amplified the conclusion that the booking officer erred in asking the defendant who he was accused of killing. Furthermore, the fact that appellant was not seen to cry in the presence of the officers does not mean he was not especially vulnerable. As the trial opinion acknowledges, appellant showed the officers "his fear for his present safety. (13CT 5031.) Like the "emotionally distraught" defendant in *Morris*, a man in fear of his life is "less likely to appreciate the subtlety in a question such as the one here under consideration." (*People v. Morris*, 192 Cal. App. 3d 380, 389.)

Also instructive is *People v. Webster* (1971) 14 Cal.App.3d 739, wherein the appellate court declared that a defendant's voluntary but

unwarned response to questions about his conviction offense asked by a California state prison "corrections counselor" was not admissible in a subsequent prosecution because correctional counselors are, like probation officers,[13] "state officers" conducting post-conviction interviews for rehabilitative purposes. (Id., at pp. 742-743.) "Neither the individual defendant nor the state gains by a subversion of rehabilitation procedures to the evidentiary requirements of the prosecution." (*Id.,* at p. 743.)

Although the trial court's ruling in the present case relies heavily on the theory that prison correctional officers need to identify a new prisoner's enemies within the institution, it does not discuss *Webster.*

The trial court relied entirely on *People v. Claxton* (1982) 129 Cal.App.3d 638, a case which the trial court mistakenly read as allowing use of an unwarned custodial confession to a "probation officer who had no investigative function when he engaged in conversation with the defendant therein to determine the proper placement for the juvenile accused as an adult." (13 CT 5032.)

Claxton did not involve questioning by a probation officer, or by any other form of "officer" as the appellate court made clear in distinguishing

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[13] A line of California authorities, beginning with *People v. Quinn* (1964) 61 Cal.2d 551, held that statements made to probation officers under various circumstances were inadmissible in any subsequent proceedings.

that case from *Webster* and others involving official questioning. The employee who elicited a confession from Mr. Claxton was a "group supervisor . . . responsible for making sure the juveniles were where they were supposed to be" in their custodial unit. (*Id.*, at p. 647.) Young Mr. Claxton knew this employee from a prior commitment, sought the employee out, and initiated the conversation. The employee asked him "what did you get yourself into?" The employee did not report the conversation to police, and testified as a reluctant witness.

The appellate court noted that "[t]he strong policy considerations present in . . . *Webster* are not controlling here. In each of those cases the defendant was encouraged to discuss his offense with candor for some governmental purpose not present in the instant case." *(People v. Claxton, supra,* 129 Cal. App.3d 638, 652.)

As to situations in which an officer questions a person in custody for any investigative purpose, the *Claxton* court observed:

> From the cases reviewed, we can extract a general rule that in all instances in which a statement is given by a defendant in a custodial setting, in response to interrogation by law enforcement agents who are acting in an investigative function, *Miranda* requirements must be satisfied or the statement cannot be used at trial. There do not appear to be any reported California cases requiring *Miranda* admonitions from nonpeace officers except where they attempt to elicit information for some governmental purpose. *(Ibid.)*

Here, there can be no doubt that appellant was interrogated by law enforcement agents acting in an *"investigative function"*, one which the trial court believed was motivated by institutional security concerns.

Furthermore, the situation in which appellant's statements were obtained bears no resemblance to that in *Claxton*. Appellant was threatened with death by an unseen inmate clerk who knew his name, knew the names of the victims, and declared appellant to be "a dead man." Appellant was bound in handcuffs, and questioned by officers with whom he had no prior relationship. These officers were not reluctant witnesses. Indeed, White congratulated himself in the highlighted, antepenultimate sentence of his report with these words: "During the new arrival interview, Williams *admitted* that he had *in fact* killed two Hispanic people." White told Corrieo of his acquisition of this evidence. Corrieo quickly brought county prosecuting authorities into the scene, whereupon they obtained the officers full cooperation. Corrieo, the officers, and the county prosecutor were, in the end if not by original design, a tag team. Together, they obtained evidence of a confession from a man who had resisted all county-prosecution attempts to secure his confession. Their evidence should have been suppressed under *Miranda* if not on the grounds of coercion *per se*.

4. The interrogation and the use of the confession at trial violated the Sixth Amendment *Massiah* rule

Because appellant was under indictment at the time of the interrogation, that interrogation and the use of its fruits at appellant's trial violated the Sixth Amendment right to counsel.

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense." U.S. Const., Amend. VI. "The Sixth Amendment guarantees the accused, at least after initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." (*Maine v. Moulton* (1985) 474 U.S. 159, 176.) The government violates the Sixth Amendment when it deliberately elicits incriminating information from a defendant outside the presence of counsel. (*Massiah v. United States* (1964) 377 U.S. 201 [government violated Sixth Amendment by using post-indictment statements defendant made to codefendant who was secretly cooperating with narcotics agents]; *United States v. Henry* (1980) 447 U.S. 264 [government violated Sixth Amendment by seeking to use defendant's confession to jailhouse informant placed in cell with defendant].)

Knowing *exploitation* by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the

intentional creation of such an opportunity. (*Maine v. Moulton*, *supra*, 474 U.S. at 176.)

Because a defendant will seldom be able to prove through direct evidence that the government knowingly interposed itself between him and counsel, "proof that the State 'must have known' that its agent was likely to obtain incriminating statements from the accused in the absence of counsel suffices to establish a Sixth Amendment violation." (*Maine v. Moulton*, *supra,* 474 U.S. at 176 n.12.)

The fact that no state actor gathered evidence against the defendant on instructions from prosecuting authorities is not dispositive of whether such evidence was deliberately elicited. The Supreme Court made this clear in *Estelle v. Smith, supra*, 451 U.S. 454, 466-467 where the Supreme Court held that a capital defendant's Sixth Amendment right to counsel was violated when prosecutors introduced at the penalty phase of his trial testimony as to defendant's future dangerousness offered by a psychiatrist who had conducted a court-ordered competency examination.: "That respondent was questioned by a psychiatrist designated by the trial court to conduct a neutral competency examination, rather than by a police officer, government informant, or prosecuting attorney, is immaterial. When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the

crucial issue of respondent's future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." (*Id.*, at p. 467.)

In *United States v. Henry, supra*, 447 U.S. 264, 274, the Supreme Court interpreted Massiah as holding that a Sixth Amendment violation occurs when the government "intentionally creat[es] a situation likely to induce [the defendant] to make incriminating statements without the assistance of counsel." Thus *Henry* establishes that the determinative issue is not the informant's subjective intentions, but rather whether the federal law enforcement officials *created a situation* which would likely cause the defendant to make incriminating statements. (*United States v. Harris* (9th Cir 1984) 738 F.2d 1068, 1071.)

The Supreme Court has also rejected reliance on evidence that the government was not seeking evidence to support a pending charge. "[T]o allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in Massiah." *(Maine v. Moulton, supra*, 474 U.S. at p. 180.)

United States v. Furrow (2000 U.S. Dist. LEXIS 21771 (C.D. Cal.

Aug. 19, 2000) is particularly on point here. In *Furrow*, the trial court accepted the government claim that institutional safety and security were the sole purpose of a prison psychologist's custodial questioning of a pretrial detainee. Relying on *Bey v. Morton* (3rd Cir. 1997) 124 F.3d 524, the government argued that no Sixth Amendment violation occurred because prison staff were not working in concert with prosecutors to acquire evidence for use at trial. In *Bey*, the defendant admitted his guilt in several casual conversations with Pearson, a prison guard, prior to reversal of his conviction. The Third Circuit affirmed the trial court's decision to allow the prison guard to testify on retrial, finding no Sixth Amendment violation. The *Bey* court relied on two factors: 1) the guard was not responsible for collecting information for use in the prosecution of defendant's case and was not cooperating with anyone who had that responsibility; 2) the guard's conduct did not suggest deliberate elicitation. 124 F.3d at 531. Distinguishing *Massiah* and *Estelle,* the *Bey* court noted that the guard "was not a state actor deliberately engaged in trying to secure information from the defendant for use in connection with the prosecution that was the subject matter of counsel's representation." (*Bey v. Morton,* supra, 124 F.3d at 531.)

The court found *Massiah* and *Estelle* controlling, and *Bey* distinguishable, for reasons equally applicable to the case at bar:

First, the fact that an individual did not gather evidence against the defendant on instructions from prosecuting authorities is not dispositive of whether such evidence is deliberately elicited. The Supreme Court made this clear in Estelle . . . .Although Dr. Burris did not "deliberately set out to secure information for use in a pending prosecution," [14] "the determinative issue is not the informant's subjective intentions, but rather whether the federal law enforcement officials created a situation which would likely cause the defendant to make incriminating statements." [15] Dr. Burris may have initiated contact with Defendant for the sole purpose of assessing the threat he posed to MDC security; however, the government's subsequent attempt to use the contents of their discussions as evidence of Defendant's future dangerousness renders those sessions the functional equivalent of a custodial interrogation conducted outside the presence of counsel.

Second, the factual circumstances of this case distinguish it from *Bey*. Significantly, the prison guard in *Bey* neither initiated contact with the defendant nor asked him questions designed to induce incriminating utterances. Nor did he take notes or compile any reports of his conversations with the defendant. Lastly, he only disclosed the confession five years later, when questioned by the prosecution. *Bey*, 124 F.3d at 531 . . . .

By contrast, Dr. Burris contacted Defendant for the express purpose of evaluating his future dangerousness, a factor that looms large in the sentencing phase of his trial.

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[14] "*Bey*, 124 F.3d at 530."

[15] "*United States v. Harris*, 738 F.2d 1068, 1071 (9th Cir. 1984). Moreover, "to allow the admission of evidence obtained from the accused in violation of his Sixth Amendment rights whenever the police assert an alternative, legitimate reason for their surveillance invites abuse by law enforcement personnel in the form of fabricated investigations and risks the evisceration of the Sixth Amendment right recognized in *Massiah*." *Maine v. Moulton*, 474 U.S. at 180."

> Thus, it was not by mere "luck or happenstance" that the government obtained these incriminating statements. *Maine v. Moulton*, 474 U.S. at 176. [Footnote.] By engaging Defendant in conversation about his violent intentions toward Lopez and unit staff, Dr. Burris was certain to elicit statements relevant to a jury's determination of his future dangerousness. Unlike the guard in *Bey*, Dr. Burris prepared written summaries of the two sessions in which Defendant threatened to kill Lopez and MDC guards, and those reports were promptly provided, at prosecutors' request, a mere two months after they were created." *(United States v. Furrow* (C.D. Cal. 2000) 2000 U.S. Dist. LEXIS 21771, 19-22.)

Like Dr. Burris, Officers Reed and White deliberately elicited from defendant statements about his criminal history, albeit for reasons other than criminal prosecution. They did so in asking appellant about his "crime" and reasons for fearing attack within a prison which Reed and White already knew housed Sergio Corrieo, the son and brother of the victims in the homicide with which appellant was charged. These questions were "certain to elicit statements" relevant to the determination of appellant's guilt, which White documented at Reed's direction. The report was promptly provided at the request of prosecuting authorities a few days later. Thus, it was not by mere "luck or happenstance" that the government obtained these incriminating statements. *(Maine v. Moulton, supra,* 474 U.S. at p. 176.)

Finally, it must be noted that the "deliberate elicitation" issue and other claims presented in this appeal are limited by the appellate record.

That record leaves unanswered many questions that could enhance those claims.

Some of the questions that arise from the limits of the appellate record are suggested in warrant affidavits that the prosecutor lodged with the trial court, under seal. The prosecutor lodged the compilation of affidavits presented to the court by the prosecutor 16 months earlier, in connection with appellant's confidential informant disclosure motion. (CT 1037, 1052, 6 SCT 1962-2179, RT 287-289.) This compilation was kept under seal until appellant's post-judgment motion to complete the appellate record brought about the court's order to unseal that compilation. (2/9/06 RT 20-41, 51-52, 137-138.)

Although the sealed documents do not complete the picture of the governmental actions causing appellant to be delivered into the hands of the murder victims' family at New Folsom prison, they do reveal prosecutorial involvement in motivating cooperation and assistance like that provided by Reed and White. The Deputy District Attorney who prosecuted this case controlled a $50,000.00 reward fund to be disbursed for information and assistance in the trial process. (6SCT 2165.) Publication of that $50,000.00 reward offer brought Ross's friend (and fence) Clemus West from Las Vegas to report that he had information about the Corrieo murders. (6SCT 2093, 2165.) Although West was given money in

payment for his information, it did not come from or otherwise reduce the available reward fund. (6SCT 2165.) Newspapers reported that the $50,000.00 reward offer remained open after the arrest of Ross and Lolohea and the identification of appellant as the shooter based upon statements made by West and Ross. (See *San Francisco Chronicle*, January 12, 1996, "2 Held in Slayings of Orinda Women; *Contra Costa Sun*, January 17, 1996, "Two Men Charged in Orinda Slayings".)

Defense counsel did not cite the reward offer in moving to suppress the correctional officer statements, or adduce evidence that the correctional officers knew of the reward through publication or through communications with Sergio Corrieo. If this court does not find that the trial court erred in failing to suppress the correctional officer statements based on the evidence presented at the suppression hearing, further development of the claims will be sought in habeas corpus proceedings.

F. Why reversal of all convictions is required

It has long been recognized that confessions are the highest order of proof. (*Arizona v. Fulminante, supra,* 499 U.S. at p. 296.) "A confession is like no other evidence. Indeed, 'the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him. . . . The admissions of a defendant come from the actor himself, the most knowledgeable and unimpeachable source of information

about his past conduct. Certainly, confessions have profound impact on the jury, so much so that we may justifiably doubt its ability to put them out of mind even if told to do so.' [Citation.]." (*Ibid.*)

This Court has noted in a similar vein, "'the confession operates as a kind of evidentiary bombshell which shatters the defense.' [Citation.]" (*People v. Cahill* (1993) 5 Cal.4th 478, 497.)

In *Fulminante*, the Court held that admission of an illegally obtained confession was not harmless, relying primarily on two factors: 1) the prosecutor had manifested his belief that the confession was important for conviction; and 2) the evidence was such that the jury could have relied in part on the confession to convict. (*Arizona v. Fulminante, supra*, 499 U.S. at pp. 297-300.)

Both factors are present in this case, too. This is not a case in which the prosecution presented other evidence of the defendant's guilt sufficient to dwarf the importance of the confession evidence. No physical evidence or neutral eyewitness tied appellant to the crime. The only witness who claimed to know that appellant was present at the scene and participating in the crime was David Ross, a known participant who had more than the usual reasons to falsely accuse an innocent man, as well as a demonstrated propensity to tell stories to exculpate himself and the "best friend" with whom he was known to have committed the robbery. Accordingly, the

prosecutor emphasized the confession evidence before venturing to discuss Mr. Ross, and downplayed the importance of Ross in light of the confession. (13 RT4292.)

The prosecutor's initial argument to the jury respecting the confession evidence spans three pages. (13RT 3479-81.) After characterizing the circumstances of its production as "karma" and "fate stepping in," he began emphasizing the words written by Officer White: "'Williams admitted that he had in fact killed two Hispanic people.' Not was alleged for [sic] doing, not was threatened for doing, not maybe had done. 'He admitted that he had in fact killed two Hispanic people.' The question, ladies and gentlemen: which two Hispanic people? And I know, because this is a rhetorical question, there's no doubt in your minds which two Hispanic people it was [sic]. It was a Hispanic mother . . . , and her daughter . . .". (13RT 3481.)

When he ventured to discuss his chief witness, he again emphasized the overarching importance of the confession, to wit:

> Now, I wouldn't expect you to accept David Ross's word all by itself that it was Corey Williams who did the killing. I've not for many years been so naive. I would not expect you to come to such a belief. But bear in mind that David Ross was not brought here to persuade you of that fact. *The defendant has admitted doing the killings.* What David Ross is here to tell you is how those killings came about. (13 RT 3492.)

The prosecutor again emphasized the central importance of the confession evidence, just two pages later in his argument, after saying what he could in defense of Ross' credibility: "[T]he purpose for his being here was so you would know how and why it was Corey Williams actually in fact murdered two Hispanic people. And now you know. He didn't want to be identified." (13RT 3494.)

Before the end of the opening part of his summation, the prosecutor cited the confession evidence again in asking the jury to reject defense currency expert's testimony indicating that all the currency found in appellant's former girlfriend's possession was old, and devoid of bills of the printing in circulation at the time of the robbery. "Put it in simple analysis, ladies and gentlemen. Put it to simple analysis, the defendant in fact killed. He admitted he in fact killed two Hispanic people." (13RT 3500.)

Defense counsel was then reduced to arguing that "the statement that Mr. Williams allegedly made . . . up at Folsom" was not, as the prosecutor had claimed, a confession. (13 RT 3506.) He argued that the testimony of White and Reed should be viewed with caution, pursuant to the standard jury instruction, and because White's highlighted statement that appellant admitted he had in fact killed two Hispanics and White's testimony showed White to have an "incriminatory or accusatory bias toward prisoners." (13RT 3515, 3548-51.) He noted that White and Reed disagreed as to

which one of them asked the question that produced the confession, and neither one of them could say precisely what the answer was. (13RT 3553-54.)

The final portion of the prosecutor's closing posited that all the issues argued by the defense "brings us to – it boils down to the single most important exhibit in this trial, and that's People's Exhibit No. 19, documenting the defendant right after he's been threatened." (13RT 3561.) The prosecutor then went over the sequences of events recalled by White, and all the factors supporting White's credibility and the reliability of his written report. (13 RT 1362-64.) After discussing the other evidence and its weaknesses, the prosecutor returned to the confession, his central theme: "He's admitted killing two Hispanic people. In context, having been threatened about Maria Elena Corrieo only moments before, those are the Hispanic people we're talking about. Just if you look at that all by it self." (13RT 3569.)

Finally, the prosecutor used the confession evidence to argue that David Ross was not, as the defense had claimed, fabricating appellant's involvement. "David Ross would have been the luckiest sole [sic] on the face of the earth. . . . David Ross just picked a guy who coincidentally months later in prison admitted killing two Hispanic people, one of whom in context has to be his mother [sic]." (13RT 3570.)

An error is harmless only when it is "unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on another ground in *Estelle v. McGuire* (1991) 502 U.S. 62, 73, fn. 4.) "There is no reason why the reviewing court should treat this evidence as any less crucial than the prosecutor -- and so presumably the jury -- treated it." *(People v. Cruz* (1964) 61 Cal.2d 861, 868; accord, *People v. Holt* (1984) 37 Cal.3d 436, 459; *People v. Powell* (1967) 67 Cal.2d 32, 56-57.) The error in admitting the confession evidence cannot be proved harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

II. THE TRIAL COURT'S DECISION TO ALLOW THE PROSECUTOR TO ASK DAVID ROSS A SERIES OF LEADING AND ARGUMENTATIVE QUESTIONS FALSELY SUGGESTING THAT THE STATE GUARANTEED ROSS' TRUTHFULNESS MADE IT APPEAR FUTILE FOR THE DEFENSE TO OBJECT TO SUCH IMPROPER PROSECUTORIAL VOUCHING AND VIOLATED APPELLANT'S RIGHT TO DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS AND STATE CONSTITUTIONAL COROLLARIES

On direct examination, after having David Ross authenticate a copy of his plea agreement (3SCT 909), the prosecutor had Ross confirm his understanding of his exposure to the death penalty if he breached that

agreement. The prosecutor then began a litany of leading questions calling Ross to affirm that the agreement effectively ensured that his testimony against appellant would be pure truth, to wit:

> Q. Now, if you tell the truth here, Mr. Ross, you expect to get a benefit, don't you?
>
> A. Yes, sir.
>
> Q. And what is that benefit?
>
> A. Not to get the death penalty.
>
> Q. And if you tell the truth here, Mr. Ross, how much actual time will you spend in jail or prison before you're released?
>
> A. Twenty years.
>
> Q. Twenty actual years in prison?
>
> A. Yes. Yes, sir.
>
> Q. Mr. Ross, what happens to you if you minimize your involvement in these crimes?
>
> A. I get my deal taken away from me.
>
> Q. What happens to you, Mr. Ross, if you maximize anybody else's involvement in these crimes?
>
> A. Well, it's taken away from me, my deal.
>
> Q. You understand that there is one thing and one thing only you are required to do in order to get the benefit of this agreement and spend 20 actual years in prison?
>
> DEFENSE COUNSEL: Objection. It's leading and argumentative.

THE COURT: Well, it's somewhat leading but for this purpose, overruled.

PROSECUTOR: It's foundational. Thank you.

Q. Answer the question. What one thing are you required to do in order to get the benefit of this agreement and serve 20 actual years in prison?

A. To tell the truth.

Q. If telling the truth makes you look bad, do you still get the benefit of your agreement?

A. Yes, sir.

Q. If telling the truth shows that you injured either or both of those women, do you still get the benefit of your agreement?

A. Yes, sir.

Q. If telling the truth shows that you murdered one or both of those women, do you still get the benefit of your agreement?

A. Yes, sir.

Q. And what happens if you lie and falsely cast blame on anybody else?

A. My deal gets taken away.

Q. You understand that quite clearly?

A. Yes, sir. (10RT 2677-79.)

The objection entered by defense counsel should have been sustained. First, the question was not only "leading" but improperly so.

This court recently summarized the applicable law as follows:

> Evidence Code section 767, subdivision (a)(1), provides that leading questions 'may not be asked of a witness on direct or redirect examination' except in "special circumstances where the interests of justice otherwise require." Trial courts have broad discretion to decide when such special circumstances are present. [Citations.]
>
> A question is "leading" if it "suggests to the witness the answer the examining party requires." [Citations.]
>
> One treatise on evidence offers this explanation on leading questions: "A question may be leading because of its form, but often the mere form of a question does not indicate whether it is leading. The question which contains a phrase like 'did he not?' is obviously and invariably leading, but almost any other type of question may be leading or not, dependent upon the content and context. . . . *The whole issue is whether an ordinary man would get the impression that the questioner desired one answer rather than another.* The form of a question, or previous questioning, may indicate the desire, but *the most important circumstance for consideration is the extent of the particularity of the question itself.*" [Citation.] Another treatise says that *a question is leading if it "'instructs the witness how to answer on material points, or puts into his mouth words to be echoed back, . . . or plainly suggests the answer which the party wishes to get from him.*'" [Citations.] And in his treatise, Justice Bernard Jefferson states that "A question calling for a 'yes' or 'no' answer is a leading question only if, under the circumstances, it is obvious that the examiner is suggesting that the witness answer the question one way only, whether it be 'yes' or 'no.' " (1 Jefferson, Cal. Evidence Benchbook (2d ed. 1982) § 27.8, p. 762.) Justice Jefferson adds this caution, however: *"When the danger [of false suggestion] is present, leading questions should be prohibited*; when it is absent, leading questions should be allowed." (Ibid.) (*People v. Williams, supra,* 16 Cal.4th 635, 672, emphasis added, ellipsis and bracketed material in original.)

Here, the "danger of false suggestion" was plainly present. Ross' admitted participation in the capital crime made him vulnerable to prosecution by the very individual posing the leading questions, and he had already shown himself to be as open to suggestion as any man in his position would likely be. The only proper purpose of the entire line of inquiry was to put before the jury evidence that Ross believed that obtaining his plea bargain required that he testify truthfully. The prosecutor should not have been permitted to present Ross with questions so specific as to "instruct" Ross "how to answer on material points" nor "put[] into his mouth words to be echoed back." (*People v. Williams, supra,* 16 Cal.3d. at p. 672.)

The defense objection that the questioning was argumentative was also well-taken. A question is argumentative and thus improper when it seeks no new information, but rather seeks only assent to the inference suggested by the questioner. (3 Witkin, Cal. Evidence (4th ed. 2000) Presentation at Trial, § 168, p. 232; Jefferson, Cal. Evidence Benchbook (2d ed. 1982) Examination of Witnesses § 27.9, p. 764.) The trial court's statutory obligation to "exercise reasonable control over the mode of interrogation of a witness so as to make such interrogation . . . as effective for the ascertainment of truth, as may be, and to protect the witness from undue harassment . . ." (Evid. Code, § 765) means nothing if it does not

include an obligation to sustain objection to argumentative, leading questioning of a criminal informant's understanding of a plea agreement as providing only strong encouragement to tell the truth.

In addition to improperly influencing the testimony of the witness, the prosecutor's leading and argumentative question about Ross's understanding of the plea bargain's requirements presented the jury with the prosecutor's personal opinion that the agreement actually ensured the truthfulness of the testimony the jury heard. By leading Ross to affirm that he believed the agreement protected him so long as he told the truth, the prosecutor implied that he himself believed that Ross was so persuaded. This was an improper expression of prosecutorial opinion and diminished the jury's ability to make its own determination of what Ross believed he had to do to protect himself under the agreement. It denied appellant a fair trial and due process of law. (U.S. Const., amends. 5, 6, 8, 14.; *United States v. Young* (1985) 470 U.S. 1, 18-19; *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1147-1148.)

The question also improperly implied that "the prosecutor can verify the witness's testimony and thereby enforce the truthfulness condition of its plea agreement." (*United States v. Brooks* (9th Cir 2007) 508 F.3d 1208, 1211; *United States v. Wallace* (9th Cir. 1988) 848 F.2d 1464, 1474.) In the view of the United States Court of Appeals for our circuit:

> "[P]rosecutorial remarks implying that the government is motivating the witness to testify truthfully . . . inevitably give jurors the impression that the prosecutor is carefully monitoring the testimony of the cooperating witness to make sure that the latter is not stretching the facts – something the prosecutor usually is quite unable to do; . . . The prosecution may not portray itself as a guarantor of truthfulness." (*United States v. Roberts* (9th Cir. 1980) 618 F.2d 530, 536, quoting Judge Friendly's concurrence in *United States v. Arroyo-Angulo* (2nd Cir. 1978) 580 F.2d 1137, 1150; see also *People v. Bonilla* (2007) 41 Cal.4th 313, 336-337.)

The harm of overruling the defense objection to the prosecutor's improper direct examination of Ross was compounded by the prosecutor's repetition of the same suggestions in his formal closing argument to the jury. After arguing that the confession evidence allowed the jury to conclude that appellant was guilty of the charged murders, the prosecutor declared that Ross "is here to tell you how those killings came about." (13RT 3492.) He immediately claimed that Ross' plea agreement guaranteed his truthfulness, to wit:

> David understands quite well, as he testified here and as part of the agreement under which he is testifying, that if he minimizes his role before the jury, he doesn't get his deal. If he casts false blame on any of the other participants he doesn't get his deal. He knows and has testified here before you. It's evident also in his agreement, it's a term of it, that he's required to tell the truth. And if that means that he was the actual killer, he's entirely free to say so and he still gets his deal of an actual 20 years in prison. . . .
>
> He would like to know that in 20 years from January of 1996 that he will be considered for parole and he understood, I think, quite clearly. I think his testimony was perfectly clear

> on this and I think you saw it. He understands. He wants that deal. He knows the only way to get the deal is to tell the truth. And he freely admitted on the stand he's led a life of lies. He's led a life of violence. He's not the kind of guy, as Mr. Egan said, who out on the street you'd want to buy a car from or even let mow your lawn, let alone come in and invite to dinner. Yet, under these circumstances where he has an enormous incentive to tell the truth and understands that and knows that if he can accept responsibility for anything up to and including personally murdering both of these people to get 20 years, that all he has to do is tell the truth. (13RT 3492-93.)

The trial court's ruling on the improper questioning that produced the underlying evidence made further objection to the prosecutor's closing argument futile. The error in allowing the prosecutor to lead Ross to say that the plea agreement ensured his truthfulness thus allowed the prosecutor to argue that Ross had "an enormous incentive to tell the truth and understands that" in his summation to the jury as well as in his improper questioning of Ross. Appellant's federal constitutional rights to due process of law, a jury determination of the facts, and reliability in proceedings to determine the facts supporting a death sentence were violated. (U.S. Const., amends, 5, 6, 8, 14.) Because the verdict of guilt and the ensuing death judgment rest heavily on the credibility of the testimony of Mr. Ross respecting appellant's involvement in the crime, and the prosecutor argued that the plea agreement insured that he was reliable, the error in permitting this form of vouching cannot be deemed harmless.

III. THE PENALTY JUDGMENT MUST BE REVERSED UNDER *WITHERSPOON/WITT* AND *GRAY v. MISSISSIPPI*

A. The Relevant Facts

Mr. W.M.'s responses to the prospective juror questionnaire expressed support for the death penalty coupled with reservations about becoming "partially responsible for putting a person to death." (24JQCT 9798, 9829-9833.) Where asked to indicate whether the State should impose death for killings including killing more than one person during the commission of robbery or burglary "always, sometimes, or never", he consistently checked "sometimes." (24JQCT 9831.) Where asked about his general feelings regarding the death penalty, he wrote, "I believe the death penalty is right. I personally would have a difficult time living with the fact I was partially responsible for putting a person to death." (24JQCT 9829.) The prosecutor initially passed him for cause. (8RT 2147.)

Under questioning by defense counsel, W.M. spoke further about his death penalty scruples. He said, "I have feelings about what should happen . . . my own religious convictions, I don't know whether I could actually bring myself to bring to the right conclusions that should be brought." (8RT 2154.) He said he felt that "everyone" – the defendant as well as the victims -- have "a right to life." (8RT 2154-55.)

The prosecutor successfully asked for permission to "reopen" his examination of the panel for cause and questioned W.M.'s ability to impose the death penalty, to wit:

Q. Mr. M_____, I don't think I understood your views on the death penalty. Were you telling the lawyer here a moment ago that you would be unable to impose the death penalty personally?

A. When weighing the evidence, probably I could, yes, if it's in such – but I – my own subconscious, I just don't know. I just don't believe it. Even though I voted for it, I just – my own personal – my own personal being I think it's right, but my own personal being I'd have to pass.

Q. Okay. So listen, just because you voted for it and agree that it's okay in principle, doesn't mean that's something you want to do yourself?

A. Right.

Q. To use an example, I am pleased to see that the Oakland Raiders got a decent offensive line, but it's not something I could do myself. So that's my question for you, are you telling us that theoretically you're for the death penalty --

A. Right.

Q. And you think it ought to be carried out in appropriate cases, but you're not personally going to be the guy to do it? Is that where you stand on the issue?

A. I'd have a rough time doing it, yes.

Q. If you were actually put into a position where you had to make that decision, would your views make it difficult, or maybe even impossible, for you to actually, personally vote to execute someone?

A. Would make it difficult. It would make it difficult. Have to be very careful about that, you know, it was really did [sic] deserve it before I could vote for it. (8RT 2159.)

The prosecutor challenged W.M. for cause. (8RT 2164.) The prosecutor stated no grounds or justification for his motion. He had previously asked the defense to stipulate to removing W.M. because W.M. "doesn't like defense attorneys."[16] But when the defense declined the stipulation, the prosecutor made a for-cause challenge, with no grounds other than the W.M.'s expressed reluctance to impose death.

The trial court granted the challenge without finding that W.M.'s reluctance to impose death constituted any bias or substantial impairment. Indeed, the trial court found no merit in the prosecutor's challenge, but resolved to grant it anyway because defense counsel had brought a challenge against another prospective juror without what the trial court considered good grounds. In the trial court's words:

"Well, both of you have kind of – you're running jurors through a very fine screen now, which is not really what the

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[16] In his questionnaire, Mr. W.M. said he did not understand why anyone would wish to be criminal defense attorney. (8RT 2153.) While undergoing voir dire by defense counsel W.M. explained that he thought defense counsel have to prove that they have the client's interest in mind and that he did not like defense counsel "as a profession." (8RT 2153-54.)

scope of voir dire should be. *Neither one of these challenges, in my judgment, are meritorious.* I'm either going to grant them both or deny them both. I'll let you know when you get back there." (8RT 2166, emphasis added.)

Next, in the presence of the panel of prospective jurors, the trial court announced that W.M. and the veniremember challenged by the defense were "subjected to a long amount of questions" and had answered the questions very well, "but I think on balance I am going to excuse both of you." (8RT 2166.)

B. The removal of WM was unlawful

A "prospective juror may be challenged for cause based upon his or her views regarding capital punishment *only if* those views would prevent or substantially impair the performance of the juror's duties as defined by *the court's instructions and the juror's oath.*" (*People v. Heard* (2004) 31 Cal.4th 946, 958 [emphasis added], quoting and citing *Wainwright v. Witt* (1985) 469 U.S. 412, 424 and *Adams v. Texas* (1980) 448 U.S. 38, 45.)

The *Witherspoon-Witt* line of cases defines "a *limitation* on the State's power to exclude" prospective jurors opposed to the death penalty.

(*Adams v. Texas, supra,* 448 U.S. at pp. 47-48; *Wainwright v. Witt, supra,* 469 U.S. at p. 423; emphasis added.) That limitation is dictated, *inter alia*, by the defendant's Sixth Amendment right to an impartial jury *not* "organized to return a verdict of death." (*Witherspoon v. Illinois* (1968) 391 U.S. 510, 521.)

The prosecutor, as the moving party, had "the burden of demonstrating to the trial court" a basis to believe that W.M. would be substantially impaired in the performance of his duties as a juror. (*Wainwright v. Witt, supra,* 469 U.S. 412, 423 ["As with any other trial situation where an adversary wishes to exclude a juror because of bias, ... it is the adversary seeking exclusion who must demonstrate, through questioning, that the potential juror lacks impartiality .... It is then the trial judge's duty to determine whether the challenge is proper"]; *People v. Stewart* (2004) 33 Cal.4th 425, 445.)

Where, as here, the trial court finds that the prosecutor has *not* demonstrated the requisite impairment, the challenge must be denied, even if the trial court believes it should have ruled in the prosecutor's favor on other challenges. (*Gray v. Mississippi* (1987) 481 U.S. 648, 663.) "Our reasons are embraced by that well-worn adage that `two wrongs do not make a right.' . . . [W]e cannot condone the "correction" of one error by the commitment of another." *(Ibid.)* Attempting to correct jury selection

errors by excluding for cause "other prospective jurors based on their views of the death penalty unnecessarily narrows the cross section of venire members. It 'stacks the deck against the petitioner. To execute [such a] death sentence would deprive him of his life without due process of law.' [Citation.]." *(Id.,* at pp. 658-659.)[17]

Furthermore, had the trial court made a finding that W.M. was substantially impaired, that finding would not be sustainable on this record, even under the deferential standard applied to trial court findings. The record shows no grounds for removal, other than reluctance to impose death, and reluctance to impose death is not a proper ground for discharge of a death-scrupled juror. (*Adams v. Texas, supra,* 448 U.S. 38, 45; *Witherspoon v. Illinois* (1968) 391 U.S. 510; *People v. Stewart* , *supra,* 33 Cal.4th 425, 447.)

In *Adams v. Texas*, the Court held that the Constitution does not

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[17]In *Gray*, the trial court granted the prosecutor's challenge for cause to remove a death scrupled prospective juror whom the court described as indecisive without finding that she was disqualified under *Witherspoon/Witt.* The reasoning of the trial court in *Gray* was as unique as that of the trial court in the present case. Essentially, the trial court believed it had previously erred in denying five of the challenges for cause the prosecutor had made against people opposed to the death penalty, and had thereby "cheated" him out of peremptory challenges. (*Id.,* at p.656, fn. 7.) The state appellate courts held that the removed juror was not properly subject to a challenge for cause, yet declared the error harmless. *(Id.*, at p. 657.) The United States Supreme Court reversed.

permit removal of a juror because his "views about the death penalty might influence the manner in which he performs ... his role," "invest his ... deliberations with greater seriousness," or "involve ... him emotionally." (*Adams v. Texas, supra*, 448 U.S. at pp. 46-47.) The Court went further, holding that a prospective juror could not be dismissed because his antipathy for the death penalty might influence her judgment on *factual* issues: "Nor ... would the Constitution permit the exclusion of jurors ... who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. Such assessments and judgments by jurors are inherent in the jury system...." (Id., at p. 50.)

Previously, in *Witherspoon*, the Court examined the presumed unfitness of a prospective juror who, like W.M., expressed reluctance to become responsible for a decision to impose the ultimate penalty. There, a venire member who admitted to "a religious or conscientious scruple against the infliction of the death penalty in a proper case" was examined at length. "She was asked: 'You don't believe in the death penalty?' She replied: 'No. It's just I wouldn't want to be responsible.' The judge admonished her not to forget her 'duty as a citizen' and again asked her whether she had 'a religious or conscientious scruple' against capital punishment. This time, she replied in the negative. Moments later,

however, she repeated that she would not 'like to be responsible for . . . deciding somebody should be put to death.' Evidently satisfied that this elaboration of the prospective juror's views disqualified her under the Illinois statute, the judge told her to 'step aside.'" (*Witherspoon v. Illinois, supra*, 391 U.S. at 515, ellipsis in original.) Exclusion of the juror, the court held, violated the Sixth Amendment. (*Id.* at pp. 519-523.)

This court's recent decisions on qualifying capital jurors are in accord as to the inappropriateness of excluding prospective jurors who express the feelings expressed by W.M.. "In light of the gravity of [capital] punishment, for many members of society their personal and conscientious views concerning the death penalty would make it "very difficult" ever to vote to impose the death penalty. As explained below, however, a prospective juror who simply would find it "very difficult" ever to impose the death penalty, is entitled—indeed, duty bound—to sit on a capital jury, unless his or her personal views actually would prevent or substantially impair the performance of his or her duties as a juror. (*People v. Stewart* (2004) 33 Cal. 4th 425, 446.)

California law "contemplates that jurors will take into account their own values in" making the determinations regarding aggravation and mitigation that the law requires. Such "values" include "opposition toward the death penalty." Such values "may predispose [the juror] to assign

greater than average weight to the mitigating factors," affect his determination "whether aggravating factors outweigh mitigating factors such that the death penalty is warranted," lead him "to impose a higher threshold before concluding that the death penalty is appropriate," and "make it very difficult for the juror *ever* to impose the death penalty." Since California law contemplates that a juror will have views that will directly affect his or her penalty determination, however, such views are not incompatible with the juror's "duties." The fact that such views emerge during voir dire, accordingly, "is not equivalent to a determination that such beliefs will 'substantially impair the performance of his [or her] duties as a juror' under *Witt*...." (*People v. Stewart, supra*, 33 Cal.4th 425, 446-447.)

Contrary to the position the trial court expressed in this case, the merits of the defense challenge against R.H. (prospective juror 360) had no proper place in the analysis of the prosecutor's challenge to W.M. Granting an unmeritorious prosecution challenge to a death-scrupled juror is not an appropriate response to a defense motion to remove a death-prone juror for cause, no matter how poorly grounded the defense motion might be.

Furthermore, appellant's challenge to R.H. was meritorious, and had to be granted. Unlike W.M., R.H. expressed fixed ideas and prejudices against life sentencing and capital mitigation evidence which plainly

disqualified him under *Morgan v. Illinois* (1992) 504 U.S. 719, 729.

When R.H. was asked if he believed life in prison without the possibility of parole is a legitimate punishment for special circumstance murder, R.H. wrote "no" and "It would seem that if the murder was committed in a cold and calculated manner, perhaps the death penalty is more reasonable or justifiable." (8RT 2147.) After voir dire by court and counsel, he confirmed that he still did not believe life without parole was a legitimate punishment for special circumstance murder. (8RT 2152.) R.H. wrote that he considered psychiatrists "quacks" (25JQCT 10181) and their opinions unworthy of consideration. "A solid pattern of behavioral deficiency would have to be exhibited beyond a reasonable doubt in order for me to consider the claim valid." (25JQCT 10173.) Under questioning by defense counsel, he agreed that he would not judge evidence produced from psychiatrists and psychologists by the same standards as he would judge evidence from other witnesses. (8RT 2163.)

Where R.H. was asked if he would "listen to the background information regarding the defendant (as the law requires)" before deciding on the appropriate punishment, he wrote, "The choice to commit the crime is the individual's. Background information would seem to have little influence on the sentence." (25JQCT 10198.) Where asked if he believed the State should impose the death penalty upon someone who kills

more than one human being during the commission of a robbery or burglary "always, sometimes or never", he checked "always" and wrote: "One murder may have circumstances, multiple murders would not." (25JQCT 10199.) He had checked "sometimes" in response to the same question respecting killing one person generally and during the commission of robbery or burglary, and wrote "What was the motivation? Self-defense? . . . What are the circumstances? Did the gun go off accidentally, or was the murder an `execution.'" (25JQCT 10199.) When pressed to say that he would not *automatically* impose death upon conviction, he said, "I honestly don't know. It would depend upon the circumstances and whether the individual was found guilty or not." (8RT 2161.) For R.H., there was only one mitigating factor worth listening to: the circumstances of the offense. R.H. was destined to "fail in good faith to consider the evidence of . . . mitigating circumstances as the instructions require him to do" (*Morgan v. Illinois*, *supra,* 504 U.S. 719, 729) and had to be removed to protect appellant's due process rights. (*Ibid.*)

The trial court's expressed belief that the defense challenge to R.H. was not well-founded is nowhere explained. The trial court expressed chagrin at the inefficiency of both prosecution and defense counsel's questioning of R.H. ("Both of you wasted am awful lot of time on that juror for not getting very much."– 8RT 2165) The prosecutor was the first

to respond defensively to the trial court's critique of the voir dire, but he offered no defense or mitigating interpretation of R.H.'s belief that death should be imposed automatically in a case of double murder with special circumstances, nor R.H.'s belief that the defendant's background was irrelevant. The prosecutor boldly argued that R.H.'s attitude toward mental health professionals was not a ground for disqualification under California law and noted that "R.H. doesn't want to be here, but I don't think that jurors can self select themselves in or out of what cases they want." (8RT 2165.) But he offered no rationale under which R.H.'s statements supporting *automatic* imposition of death for double felony murder and rejection of all background mitigating evidence did not disqualify R.H. from serving as a penalty juror under *Morgan.*

C. The Error Requires Automatic Reversal

The erroneous removal of a qualified, death-scrupled prospective juror is not subject to harmless-error analysis, even (and especially) where the trial court removed the juror in an effort to strike a balance or otherwise correct a jury selection decision that benefitted the defense. (*Gray v. Mississippi, supra*, 81 U.S. 648, 664–666, 668.) The judgment imposing death must be reversed.

IV. THE TRIAL COURT ERRED IN ALLOWING APPELLANT TO PROCEED IN PRO PER AT THE PENALTY PHASE WITHOUT MAKING THE INQUIRIES AND EXERCISING THE JUDICIAL DISCRETION APPROPRIATE FOR AN UNTIMELY, PENALTY-PHASE-ONLY *FARETTA* MOTION

After the guilt phase verdicts were recorded, appellant sent the trial court a preprinted motion "to act as counsel in pro per" along with a letter asserting that he had a Sixth Amendment right to discharge counsel and proceed in pro per at that juncture. (14CT 5614-19.) The trial court set a special hearing and inquired as to appellant's understanding of the risks of waiving counsel. The prosecutor followed up with what appeared to be a standard colloquy to establish appellant's knowledge and acceptance of the risks of proceeding in pro per. (13RT 3655-3665.)

No one expressed any recognition of the law rendering appellant's motion untimely in that it was made long after the commencement of the guilt phase of the trial. (*People v. Kirkpatrick* (1994) 7 Cal. 4th 988, 1007.) No one made the inquiries "*into the specific factors underlying the request*" which must be made *sua sponte* when a defendant makes an untimely motion to represent himself. (*People v. Windham* (1977) 19 Cal.3d 121, 128-129.) The reasons for appellant's request were sought only in the following exchange with the prosecutor:

> PROSECUTOR: Please, briefly, if you would, explain to the court why it is you wish to represent yourself.
>
> APPELLANT: It's just a belief. I've had it from day

one. I've always wanted to represent myself. That's basically it. It's simple.

You know, I'm happy with my lawyers but it's a belief that I had. And I told them from day one that if it comes to a penalty phase time, I would like to represent myself. That's basically it.

PROSECUTOR: So you are telling the Court that this is a decision that you have considered and held for some period of months?

APPELLANT: Four years. I've held this decision for four years.

PROSECUTOR: In the course of arriving at your desire expressed formally here to represent yourself, have you spoken with your attorneys about the wisdom and lack of wisdom of so proceeding?

APPELLANT: Yes, I have.

PROSECUTOR: Have they advised you of the consequences and the potential downsides of representing yourself in this matter?

APPELLANT: They have advised me, but there's no need because I know what can happen. And they might not agree with me self-representing myself but they will agree that I'm competent enough. (13RT 3657-58.)

As this court is well-aware, appellant's motion was untimely. "For the purpose of assessing the timeliness of a motion for self-representation, the guilt and penalty phases in a capital prosecution are not separate trials but parts of a single trial. [Citations.] Accordingly, when a defendant seeks self-representation for the penalty phase, the trial court has discretion to

grant or deny the motion if not made a reasonable time before the guilt phase has begun. [Citations.] Defendant's motion, made after the guilt verdicts were returned, was addressed to the trial court's sound discretion." (*People v. Kirkpatrick, supra,* 7 Cal. 4th 988, 1007.) Once a capital defendant has chosen to proceed to the guilt phase of the trial represented by counsel, there is no "constitutional basis" for him to assert a right to self representation. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1220.)

Where, as here, a trial court receives a defendant's untimely demand "that he be permitted to discharge his attorney and assume the defense himself . . . *the trial court shall inquire sua sponte into the specific factors underlying the request* thereby ensuring a meaningful record in the event that appellate review is later required." (*People v. Windham* (1977) 19 Cal. 3d 121, 128-129, emphasis added, accord *People v. Hardy* (1992) 2 Cal.4th 86, 195 [the trial court should inquire into the defendant's reasons for requesting to proceed in pro per if untimely].) The trial court must consider, inter alia, "the *reasons for the request*" and, "[h]aving established a record based on such relevant considerations, the court should then exercise its discretion and rule on the defendant's request." [Ibid.]

As previously noted, the trial court and the prosecutor made no inquiry, beyond that quoted above, as to why appellant had decided to represent himself. Appellant's responses to the prosecutor's request for a

statement of his reasons for moving to discharge counsel – saying "it was just a belief" and that his decision was made four years ago – provided no account of his reasons, and begged the question of why he wished to proceed without counsel at the penalty phase only.

No doubt, if the trial court had been aware that it had discretion to deny appellant's request, the court would have complied with this court's directive to "*inquire sua sponte into the specific factors underlying the request.*" *(People v. Windham, supra*, 19 Cal. 3d 121, 128-129, emphasis added.)

Because the trial court failed to inquire into the specific factors underlying the request, the trial court saw only too late that appellant was unwilling to present any kind of coherent case in mitigation or any other form of evidentiary resistance to the prosecutor's case for death. For the first time, in appellant's penalty phase opening statement, the court heard appellant deny that he would make "a last ditch effort to save myself" and beg the jury, "Please don't think that." (14RT 3715-16.) In the evidentiary phase, the court heard appellant repeatedly decline to cross examine the People's witnesses. When the trial court pushed appellant to cross examine the young woman who claimed he shot her in a gang attack, appellant responded by asking the woman if she thought he was sorry she was shot. She answered affirmatively. He responded, "I'm not" and politely thanked

the court. (14RT 3752.) Appellant's closing argument to the jury spoke openly of his fear of being pitied:

> Now that you've heard the aggravating circumstances against me, it's your time to decide if I receive life or death. I'm not going to stand up here and cry or ask you for any sympathy. I know you've noticed that I don't seem to care what happened to DeBonneville. It's because I actually don't. That is a side of me you'll never understand. But at the same time I regret having assaulted Alicia Todd. She was honestly an innocent victim. I also regret leaving my daughter fatherless. I want to make it clear that I do feel sorry for certain things.
>
> Either today or tomorrow you will decide my punishment for a crime in which I still claim my innocence. No matter what you decide, I will always be me. You the jury have found me guilty of all counts in this case, and have heard aggravating circumstances. You will notice that I did not put on a defense to show mitigating circumstances of people testifying on my behalf. That's because I don't blame my lifestyle on other people. My actions are my actions and mine alone. I chose the life I lead. It might seem outrageous to you people, but it's a lifestyle that I understand. I would like for you 12 people to have the heart to look me in the eye when you've decided my punishment. At least try to. I want you 12 people to try and realize that our frame of mind is not that much different. It's just that I am willing to do whatever needs to be done. I understand there are consequences and repercussions for everything I do in life, and I'm willing to take the chance and deal with the outcome later. So in your deliberations, do what you deem necessary.
>
> Thank you.
>
> That's it. (14RT 3861-3862.)

In *Bloom*, this court held that "a capital defendant's announced

intention to seek the death penalty does not compel denial of a motion for self-representation." (*People v. Bloom, supra,* 48 Cal.3d 1194, 1224.) But this court has never held that a trial court may not exercise its discretion to deny a motion to proceed in pro per because the defendant reveals intent to seek death or otherwise threatens the reliability of the proceedings at a time when discretion to deny the motion exists.

The doctrine of invited error estops an appellant who has induced the commission of error from asserting it as a ground for reversal. (*People v. Lang* (1989) 49 Cal.3d 991, 1031-1032; 9 Witkin, Cal. Proc. (4th ed. 1997) Appeal, § 383, p. 434.) It does not apply here. The question of whether the trial court had discretion to deny appellant's motion, and the scope of information a trial court must seek and consider before granting an untimely motion to proceed in pro per, were questions of law. Although appellant argued that he had a constitutional right to proceed in pro per at that juncture, he did not claim to be learned in the law or otherwise qualified to advise the court on legal procedure. (Compare, *People v. Brownlee* (1977) 74 Cal.App.3d 921, 934 [appointed counsel argued that Faretta was controlling at motion hearing held prior to the decision in *Windham*].) Furthermore, appellant's motion cited *Windham* and noted that the trial court was obliged to make a "sua spononte [sic] inquiry into the specific facts underlying the request." (14CT 5616-17.) Accordingly, it cannot be

said that appellant's motion or claim of having a constitutional right to represent himself "induced" the trial court to accept that view.

The trial court's failure to seek and obtain all of the information demanded by *Windham*, its failure to recognize its discretion to deny the motion, and failure to exercise that discretion, compels reversal of the penalty judgment. The deferential abuse of discretion standard of review does not apply when the record or the findings of the trial court suggest a lack of consideration of the essential circumstances to be evaluated in exercising discretion. "To exercise the power of judicial discretion all the material facts in evidence must be both known and considered, together also with the legal principles essential to an informed, intelligent and just decision. (*In re Cortez* (1971) 6 Cal.3d 78, 85-86.)

"`[A] ruling otherwise within the trial court's power will nonetheless be set aside where it appears from the record that in issuing the ruling the court failed to exercise the discretion vested in it by law.' (*People v. Penoli* (1996) 46 Cal.App.4th 298, 302, [53 Cal.Rptr.2d 825].) `Failure to exercise a discretion conferred and compelled by law constitutes a denial of a fair hearing and a deprivation of fundamental procedural rights, and thus requires reversal.' (*Id.* at p. 306; *People v. Downey* (2000) 82 Cal.App.4th 899, 912, [98 Cal. Rptr. 2d 627].)" (*Fletcher v. Superior Court* (2002) 100 Cal. App. 4th 386, 392, accord *People v. Melony* (2003) 30 Cal.4th 1145,

1165.)

The same result follows from federal constitutional principles as well. In addition to violating Fourteenth Amendment Due Process Clause protection against arbitrary deprivation of state procedural rights established by *Windham,* the trial court's error led to an unfair and unreliable penalty trial in which only one side was represented by counsel. (U.S. Const., amends. 6, 8, 14.) The trial court's error was structural, and affected the composition of the record, making harmless error analysis impossible. Reversal is required.

V. THE TRIAL COURT ERRED IN ADMITTING, AND IN REFUSING TO STRIKE, VICTIM IMPACT TESTIMONY RENDERED BY SERGIO CORRIEO WITHOUT NOTICE AND WITHOUT THE REQUESTED OFFER OF PROOF

A. The Relevant Facts

After appellant relieved his appointed counsel and began his effort at self-representation, the prosecutor informed the court and appellant that he might "call one or two family members ... on the matter of victim impact" in addition to evidence of two felony assault crimes and unspecified statements appellant made to a fellow inmate in custody. (13RT 3683-87.)

Appellant objected to the victim impact evidence "because he may be trying to prove through them something that's too vague. He needs to be more specific about it. Like can I know who's coming? You know ...". (13RT 3687.) The court interjected, "It would be helpful for him to know – I assume you're talking about family members?" The prosecutor said he was considering Sergio Corrieo and his sister, Lili Williams. (RT 3687.) The court asked if either had testified in the penalty phase of the co-defendant's trial. The prosecutor said no. (13RT 3687-88.)

Appellant said he would like to know what areas the family members are "going to be testifying in." (13RT 3688.) The District Attorney declared: "Well, the defendant is not entitled to that information. I'm not required to give discovery or any sort of victim impact testimony. I don't

know exactly what they're going to say and we'll see that when they testify." (13RT 3688.) Appellant reiterated: "I'd like an offer of proof because some areas can't be gone into." (13RT 3688.) The trial court refused, and declared:

> "Well, you'll have to be on your toes, Mr. Williams, to object appropriately. And you can rest assured that I will scrutinize this testimony of victim impact very, very closely. But in fairness to both the District Attorney and to you here, I suggest that you may want to talk to your lawyer – not your lawyer but your advisory counsel generally about what type of evidence comes in under victim impact.
>
> "I'm not going to conduct a lecture on that, but as you probably know, the United States Supreme Court – I'm sure your former lawyers have told you a little bit about this – outlined in the *Tennessee* case that there's certain types of evidence that can come in. And the District Attorney is going to have to live within the bounds of what comes in under those cases.
>
> "And if at any time you are concerned about it, about a question that's asked, or you have some concern about what you should do, I suggest that you just hold up your hand for a moment. I'll stop the proceedings. You can meet and confer with your advisory counsel, then make appropriate objections you deem applicable to you, and I will rule on them.
>
> "Do you understand that?"

Appellant answered affirmatively. (13RT 3688-89.) He did not, however, make objections or consult with his advisory counsel while victim impact testimony was being rendered. Before any penalty phase evidence was introduced, he told the court that he was disgusted with his legal

counsel, did not want them in the courtroom, and would ask the court for permission to call them on the telephone if he needed them. (14RT 3703-04.) The record shows no such communication.

The prosecutor's opening statement provided no description of the victim impact evidence he would offer. Yet immediately after opening statements, the prosecutor presented testimony from Sergio Corrieo.

Sergio Corrieo testified that he had nine brothers and sisters prior to the murders, six of whom lived in the Bay Area. Their mother was the one that kept everybody together. They all congregated together during holidays "mainly because of her." Their mother was also the caretaker of his sister Gina, who had "some learning disabilities." (14RT 3717.) She was also grandmother to "at least 37" children. (14 RT 3718.)

All of the surviving siblings helped clean their mother's house after the killing. (14RT 3717-18.) The house was then sold to keep the restaurant open and to pay bills. (14 RT 3717.) No one in the family replaced their mother as someone who kept the family together and provided a place for holiday and birthday gatherings. (14RT 3718.)

Sergio Corrieo and his sisters kept their mother's restaurant open for a few months after her death. To do so, Sergio Corrieo "worked ten, 12 hours a day" at his own job before going to the restaurant to help clean up, tend bar or wait tables. "Basically, I was putting in probably 17 to 18 hours

a day just to keep it going long enough for us to sell it" and pay related bills. (14RT 3719.) The family later found it impossible to keep the restaurant open. (14RT 3719.)

Finally, the prosecutor noted Mr. Corrieo's guilt phase testimony about his feelings about appellant when he encountered him at Folsom Prison. He asked Mr. Corrieo, "do your feelings remain the same?" Corrieo answered affirmatively. Appellant declined to cross-examine Corrieo in front of the jury. (14 RT 3720.)

After the close of evidence appellant moved to strike Corrieo's testimony and restated his objection to Corrieo's testimony on federal and state constitutional grounds, citing the Sixth Amendment right to a fair trial, the Eighth Amendment right to a reliable verdict, and the right to due process under the Fifth and Fourteenth Amendments and specific state constitution provisions. (14 RT 3794-95.) He noted that other states have limited victim impact evidence to that respecting the impact of the death upon family members present at the crime scene. (14RT 3794.) He argued that Corrieo's testimony was outside the scope of permissible victim impact testimony and also specifically objected to "the testimony of Mr. Corrieo regarding his desires as to the punishment." (14RT 3795.)

The prosecutor argued that Mr. Corrieo's testimony "was well-within

the boundaries provided for such testimony." He denied that Mr. Corrieo gave an opinion as to the appropriate penalty. "He testified as to motive and bias regarding the defendant, which is entirely appropriate so that the jury will recognize that, be reminded that they have a biased witness here speaking, and be reminded of his bias that was evident in the guilt phase, but he made no opinion regarding punishment, nor did I elicit one." (14RT 3797-98 .)

The prosecutor did not say why he felt it appropriate to ensure that the jury recognize and be reminded that Mr. Corrieo, his own witness, had a "bias" against appellant, let alone why he wished to remind the jury that his witness evinced "bias" previously.

Nevertheless, the trial court declared itself "satisfied' that Mr. Corrieo's testimony "does not fall outside the scope of the appropriate testimony." (14RT 3804.)

Appellant later asked the trial court to give a special instruction limiting the use of victim impact evidence in capital sentencing.[18] This request brought the trial court to acknowledge its present inability to determine the proper scope of victim impact testimony. To quote:

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[18] Appellant's requested instruction is discussed in detail in Argument VI, *infra.*

> It's clear that we don't have a heck of a lot of law, you know, on impact witness statements. The cases that are coming out, by and large, from our Supreme Court, are older than the Payne vs. Tennessee case, which was in 1991. I may be off a little, but most of the dog gone cases that we have rulings on are beginning to mid to late eighties, and we don't have a lot of help on that that the Court's [sic] can give anybody on that. ¶ But it seems to me on balance here that the proposed instruction Number 1 is faulty in many particulars, number 1, it is clearly argumentative. ¶ Number 2, I am not at all certain that it doesn't misstate at least some of the indications that – as to the victim impact statement as defined by the United States Supreme Court. And, therefore, it will remain on the denial." (14RT 3808.)

B. The law: only limited quantities and types of victim impact evidence and arguments are expressly authorized by *Payne* and Penal Code section 1191.1

The United States Supreme Court majority opinion in *Payne* summarizes the holding as follows:

> We thus hold that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar. A State may legitimately conclude that *evidence about the victim and about the impact of the murder on the victim's family* is relevant to the jury's decision as to whether or not the death penalty should be imposed. There is no reason to treat such evidence differently than other relevant evidence is treated. (*Payne v. Tennessee* (1991) 501 U.S. 808, 827, emphasis added.)

In so holding, the United States Supreme Court overruled its decisions in *Booth v. Maryland* (1987) 482 U.S. 49, which created a per se bar to victim impact evidence, and *South Carolina v. Gathers* (1989) 490

U.S. 805, which prohibited prosecution argument on the subject.

In *Payne*, a mother and her three-year-old daughter were killed with a butcher knife in the presence of the mother's two-year-old son, who survived critical injuries suffered in the defendant's attack. The prosecution presented the testimony of the boy's grandmother that the boy missed his mother and sister, and argued, among other things, that he will never have his "mother there to kiss him at night. His mother will never kiss him good night or pat him as he goes off to bed, or hold him and sing him a lullaby." (*Payne*, *supra*, 501 U.S. 808, 816.)

The *Payne* court warned there are limits to victim impact evidence, and observed that it would violate the federal constitutional guarantee to due process of law to introduce victim impact evidence "that is so unduly prejudicial that it renders the trial fundamentally unfair." (*Payne*, *supra*, 501 U.S. at p. 825.)

As made clear by Justice O'Connor in a concurring opinion joined by Justices Kennedy and White, the absence of any due process violation in *Payne* was established by the distinctly limited quantity of otherwise irrelevant victim impact evidence presented in that case:

> We do not hold today that victim impact evidence must be admitted, or even that it should be admitted. We hold merely that if a State decides to permit consideration of this evidence, "the Eighth Amendment erects no per se bar." Ante, at 827. *If, in a particular case, a witness' testimony or a prosecutor's remark so infects the sentencing proceeding as to render it*

> *fundamentally unfair, the defendant may seek appropriate relief under the Due Process Clause of the Fourteenth Amendment.*
>
> That line was not crossed in this case. The State called as a witness Mary Zvolanek, Nicholas' grandmother. Her testimony was brief. She explained that Nicholas cried for his mother and baby sister and could not understand why they did not come home. I do not doubt that the jurors were moved by this testimony — who would not have been? But surely this brief statement did not inflame their passions more than did the facts of the crime: Charisse Christopher was stabbed 41 times with a butcher knife and bled to death; her 2-year-old daughter Lacie was killed by repeated thrusts of that same knife; and 3-year-old Nicholas, despite stab wounds that penetrated completely through his body from front to back, survived — only to witness the brutal murders of his mother and baby sister. In light of the jury's unavoidable familiarity with the facts of Payne's vicious attack, I cannot conclude that the additional information provided by Mary Zvolanek's testimony deprived petitioner of due process. (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 831-832, emphasis added.)

Justice Souter's concurrence, joined by Justice Kennedy, added the following warning to that written by Justice O'Connor: "Evidence about the victim and survivors, and any jury argument predicated on it, can of course be so inflammatory as to risk a verdict impermissibly based on passion, not deliberation. [Citations.] With the command of due process before us, this Court and the other courts of the state and federal systems will perform the "duty to search for constitutional error with painstaking care," an obligation "never more exacting than it is in a capital case." [Citation.] (*Payne v. Tennessee*, *supra*, 501 U.S. at pp. 836-837.)

Most notably, the only type of victim impact evidence addressed in *Payne* was one witness's evidence describing the impact of the capital crimes on a family member who was personally present during, and immediately affected by, the capital murders.

California Penal Code section 1191.1 is consistent with *Payne*. It provides in pertinent part that "the next of kin of the victim if the victim has died" may appear and testify "at the sentencing proceeding. . . ." While the statute was clearly enacted, inter alia, to assist victims in obtaining restitution and not merely to assist the court in assessing the proper punishment, it should be noted that the statutory limitation on the type of witness — that is, to "the next of kin of the victim" — applies to the penalty phase of a capital trial because, after all, the penalty phase is a "sentencing proceeding" and the statute does not exclude capital trials from its reach.[19]

Further, the statute's description of a singular victim impact witness, "or up to two of the victim's parents or guardians if the victim is a minor," appears to limit the prosecution to a single victim impact witness at penalty phase, just as the Illinois Supreme Court interpreted the similar provisions of the Illinois statute in *People v. Hope* (Ill. 1998) 702 N.E.2d 1282. To be

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[19] Cf., *State v. Hill* (S.C. 1998) 501 S.E.2d 122, 128, which concluded that the South Carolina statute authorizing victim impact statements at sentencing did not limit the scope of victim impact evidence in capital cases because the statute expressly "exclud[ed] any crime for which a sentence of death is sought. . . ."

sure, *People v. Mockel* (1990) 226 Cal.App.3d 581, 585-587, holds the statute does not limit the number of persons who may send letters to the court for consideration at sentencing, but letters to a judge in a noncapital case are not comparable to the emotionally laden testimony of victim impact witnesses at the penalty phase of a death penalty trial.

Other courts accept similar limitations as necessary to avoid fundamental unfairness. As observed by the New Jersey Supreme Court in *New Jersey v. Muhammad* (N.J. 1996) 145 N.J. 23, 54 [678 A.2d 164, 180]:

> The greater the number of survivors who are permitted to present victim impact evidence, the greater the potential for the victim impact evidence to unduly prejudice the jury against the defendant. Thus, absent special circumstances, we expect that the victim impact testimony of one survivor will be adequate to provide the jury with a glimpse of each victim's uniqueness as a human being and to help the jurors make an informed assessment of the defendant's moral culpability and blameworthiness.

In *People v. Hope*, *supra*, 702 N.E.2d 1282, the Illinois Supreme Court interpreted the provisions of The Illinois Rights of Crime Victims and Witnesses Act to limit victim impact testimony to "a single representative who may be the spouse, parent, child or sibling of a person killed as a result of a violent crime."

In *State v. Mosley* (Tex. 1998) 983 S.W.2d 249, the Court of Criminal Appeals of Texas called upon trial courts to exercise discretion "in permitting some evidence about the victim's character and the impact on

others' lives while limiting the amount and scope of such testimony" (*id.* at p. 262) and cautioned "that victim impact and character evidence may become unfairly prejudicial through sheer volume." (*Id.* at p. 263.)

Similarly, in *State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872, the Tennessee Supreme Court held:

> Generally, victim impact evidence should be limited to information designed to show those unique characteristics which provide a brief glimpse into the life of the individual who has been killed, the contemporaneous and prospective circumstances surrounding the individual's death, and how those circumstances financially, emotionally, psychologically or physically impacted upon members of the victim's immediate family. Of these types of proof, evidence regarding the emotional impact of the murder on the victim's family should be most closely scrutinized because it poses the greatest threat to due process and risk of undue prejudice, particularly if no proof is offered on the other types of victim impact. (Citations and footnote omitted.)

In *State v. McKinney* (Tenn. Crim. App. 2001) 2001 Tenn. Crim. App. Lexis 230, a case involving the capital murder of a police officer in which another officer testified as a victim impact witness, the Tennessee Court of Criminal Appeals upheld such testimony despite the fact that the testifying officer was not related to the victim, expressing its belief that the Tennessee "statutory scheme [did not] limit[] or restrict[] the source of the information about the personal characteristics of the victim to solely family members or representatives . . ." and that "the statutory amendment is

permissive, not restrictive, in nature and does not ban co-workers or employers, for instance, from offering testimony that provides a brief 'glimpse' of the victim's life."

In Louisiana, the prosecution is permitted to introduce victim impact testimony in the form of general statements describing the victim's qualities, but "detailed descriptions" and "specific examples" are discouraged. (*State v. Taylor* (La. 1996) 669 So.2d 364, 372.) Even family members are limited to general statements describing the impact of the victim's death on their lives, and are not permitted to provide "detailed responses" or testify to "particular aspects of their grief. . . ." (*Ibid.*) Noting that the Louisiana statute limits victim impact evidence to the "impact that the death of the victim has had on family members . . . ," the Louisiana Supreme Court has held that no victim impact evidence is admissible concerning neighbors, friends or other non-family members. (*State v. Frost* (La. 1998) 727 So.2d 417, 429-430; *State v. Wessinger* (La. 1999) 736 So.2d 162.)

United States v. Glover (D. Kan. 1999) 43 F.Supp.2d 1217, 1235-1236, ruled that victim impact witnesses would be limited to presenting "a quick glimpse of the [victim's] life . . . ," including "a general factual profile of the victim, [and] information about the victim's family, employment, education and interests . . . ;" it must "be factual, not

emotional, and free of inflammatory comments or references." The court further held that no victim impact witness may be permitted to testify "if the witness is unable to control his or her emotions." (*Id.*, at p. 1236.)

Some forms of family member testimony have been recognized as unduly prejudicial under the Due Process Clause. "Comments about the victim as a baby, his growing up and his parents' hopes for his future in no way provide insight into the contemporaneous and prospective circumstances surrounding his death; . . . [but] address only the emotional impact of the victim's death . . . [and increase] the risk a defendant will be deprived of Due Process." (*Conover v. State* (Okla.Cr. 1997) 933 P.2d 904, 921.)

In *Cargle v. State* (Okl.Cr.1995) 909 P.2d 806, 829-830, the Oklahoma court also held it was error to admit testimony "portraying [the decedent] as a cute child at age four . . . ;" and "that he dressed up as Santa Claus, saved the county thousands of dollars by a personal fundraising effort, was a talented athlete and artist, and was thoughtful and considerate to his family. . . ."

This court has not, as of the time of this writing, articulated similar limits or guidelines on the admission and use of victim impact evidence. It has construed Penal Code section 190.3, factor (a) ("circumstances of the crime") to permit all that may be permitted under *Payne*. (*People v. Fierro*

(1991) 1 Cal.4th 173, 235 [majority], 264 [Kennard, J. dissent]), and has yet to find a violation of federal constitutional limits on the use of victim impact evidence in any California capital case, although many have included evidence more extensive than that which passed muster in *Payne*. (See, e.g., *People v. Taylor* (2001) 26 Cal.4th 1155, 1171-1172.)

C. The trial court denied appellant due process, a fair trial and reliability in the determination of his penalty, when it refused appellant's request for an offer of proof

Like other evidence that may be offered in favor of a death sentence, victim impact evidence is subject to the notice requirement under section 190.3: "Except for evidence in proof of the offense or special circumstances which subject a defendant to the death penalty, no evidence may be presented by the prosecution in aggravation unless notice of the evidence to be introduced has been given to the defendant within a reasonable period of time as determined by the court, prior to trial." (§ 190.3, 4th par.; see *People* v. *Roldan* (2005) 35 Cal.4th 646, 733.) This provision requires that the defendant be given notice of the prosecution's intended aggravating evidence before the cause is called for trial *or as soon thereafter as the prosecution learns of the existence of the evidence*. (*People v. Roldan*, supra, 35 Cal.4th at p. 733.)

Appellant's request for a specific offer of proof at the outset of the penalty phase sought reasonable notice. In order to prepare to enter appropriate objections and otherwise meet the evidence that was ultimately adduced, he needed to know that Sergio Corrieo would be the victim-impact witness and the topics on which he would be asked to testify. Telling the defendant only that one or two members of the victims' family would testify at the penalty phase is not, as a practical matter, sufficient to enable the defendant to research the law as necessary to make appropriate objections, let alone prepare to expose the factual issues such testimony may raise.

In light of the fact that the penalty phase trial was about to begin when appellant made his objection, appellant's request for a specific offer of proof was appropriate and should have been granted. (Cf. *People v. Benavidas* (2005) 35 Cal.4th 69, 107 [defendant not entitled to "summation" of evidence to be offered by victim impact witnesses] .)

This court has required hearings outside the presence of the jury when other types of potentially prejudicial evidence are challenged by the defense. When the defendant objects to a prior conviction on constitutional grounds, a hearing outside the presence of the jury is required by *People v. Coffey* (1967) 67 Cal.2d 204, 217. (See *Curl v. Superior Court* (1990) 51 Cal.3d 1292, 1296, mandating use of the procedures outlined in *Coffey*.) When the issue is the voluntariness of a confession, a hearing outside the

presence of the jury is required by *People v. Jimenez* (1978) 21 Cal.3d 595, 604,overruled on other grounds in *People v. Cahill, supra,* 5 Cal.4th 478, 509.

In this case, the trial court observed the complexity and novelty of the victim impact evidence in explaining its inability to accept appellant's proposed jury instruction, to wit:

> "It's clear that we don't have a heck of a lot of law, you know, on impact witness statements. The cases that are coming out, by and large, are from our Supreme Court, are older than the Payne vs. Tennessee case, which was in 1991. I may be off a little, but most of the dog gone cases that we have rulings on are beginning to mid to late eighties, and we don't have a lot of help on that that the Court's [sic] can give anybody on that." (14RT 3808.)

In other states, the admissibility of the particular victim impact evidence the prosecution wishes to offer is appropriately settled outside the presence of the jury, so the defense cannot be prejudiced by improper evidence and all counsel can address the legal issues in whatever depth may be required. In Tennessee, Georgia, and Oklahoma, the prosecution is required to notify the trial court of its intention to introduce victim impact evidence, and the trial court is then required to hold a hearing on its own motion to determine if that evidence is admissible. (*State v. Nesbit* (Tenn. 1998) 798 S.W.2d 872, 891; *Turner v. State* (Ga. 1997) 486 S.E.2d 839, 841-842, adopting the procedures outlined in *Livingston v. State* (Ga. 1994)

444 S.E.2d 748, 752; *Cargle v. State* (Okla.Crim.App. 1995) 909 P.2d 806, 828.)

Other states likewise require pretrial disclosure, pretrial hearings, or both, either on the court's own motion or on request, to give the defense at least some advance notice of the proposed evidence.

In New Jersey, the prosecution must provide the defense with the names of the proposed victim impact witnesses it plans to call, and trial courts are directed to "conduct a hearing, outside the presence of the jury, to make a preliminary determination of the State's proffered victim impact evidence" before a family member is allowed to make a victim impact statement for the jury. (*State v. Muhammad* (N.J. 1996) 678 A.2d 164, 180.) "At the hearing, the court should also inform the witnesses that they will not be allowed to testify if they cannot control their emotions and remind them that the court will not permit them to testify about their opinions of the crime, the defendant, or the appropriate punishment." (*Ibid.*)

In Louisiana, "the defense, upon request, is entitled to notice of the particular victim impact evidence sought to be introduced by the prosecutor and to a pretrial determination of the admissibility of' that evidence." (*State v. Bernard* (La. 1992) 608 So.2d 966, 973.) In Pennsylvania, the prosecution is required to give the defense "pretrial notice limited to a list of potential witnesses and a brief outline of their proffered testimony."

(*Commonwealth v. Natividad* (Pa. 2001) 773 A.2d 167, 178, 180.)

One Oklahoma case involved inadequate pretrial disclosure nearly identical to that which occurred in this case. In *Ledbetter v. State* (Okla.Crim.App. 1997) 933 P.2d 880, 894, the only indication that a victim impact statement would be introduced was the statement of the victim's brother that he would testify about "the impact her death has had on him and her family." The court declined to establish a bright-line rule for how much specificity must be contained within a victim impact statement, noting only that, "It is sufficient to observe that the notice in the case *sub judice* did not provide adequate detail."

Many federal courts trying cases under the federal death penalty law have directed the prosecution to make disclosures like those requested by appellant here. See, e.g., *United States v. Cheever* (D. Kan. 2006) 2006 U.S. Dist. LEXIS 14107, 22-23; *United States v. Taylor* (N.D. Ind. 2004) 316 F. Supp. 2d 730, 743 [directing government to provide additional notice regarding "who will offer victim impact evidence, the relation the witness is to the victim, the form of testimony (i.e., written or oral statement) and a summary of the anticipated testimony"]; *United States v. Llera Plaza* (E.D. Pa. 2001) 179 F. Supp. 2d 464, 475[ordering government to submit an outline of its proposed victim impact testimony]; *United States v. Cooper* (D.D.C. 2000) 91 F. Supp. 2d 90, 111 [ordering government to amend

notice "to include more specific information concerning the extent and scope of the injuries and loss suffered by each victim, his or her family members, and other relevant individuals, and as to each victim's personal characteristics' that the government intends to prove."].)

"[T]hese cases represent a reasonable accommodation of the defendant's right to prepare his defense and the government's right not to be subjected to broad discovery in a criminal case. *United States v. Cheever*, *supra,* 2006 U.S. Dist. LEXIS 14107, 23.) Detailed pretrial disclosure and a pretrial hearing to determine the admissibility of victim impact evidence is necessary to protect the defendant's due process right to adequate notice (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15; *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 313 [94 L.Ed.2d 865, 70 S.Ct. 652]; see *Commonwealth v. Natividad*, *supra*, 773 A.2d at p. 178), his due process right to a fair trial (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15; *In re Murchison* (1955) 349 U.S. 133,136 [99 L.Ed. 942, 75 S.Ct. 623]; see *State* v. M*uhammad*, *supra*, 678 A.2d at p. 179), and his Eighth Amendment right to a fair and reliable capital penalty trial (*Johnson v. Mississippi* (1988) 486 U.S. 578, 584 [100 L.Ed.2d 575, 108 S.Ct. 1981].)

D. The trial court should have granted appellant's motion to strike Mr. Corrieo's testimony due to the lack of appropriate notice of the facts asserted, the inadmissibility of the opinion testimony he offered, and the prosecutor's explanation for eliciting inadmissible opinion

In *Booth v. Maryland* , *supra,* 482 U.S. 496, 502-503,508-509, the United States Supreme Court held that it was error to admit evidence of the opinions held by murder victim's relatives on three topics - the crime, the defendant, and the appropriate sentence. The admission of such opinions, the Court held, is clearly inconsistent with the reasoned decision-making required in capital cases and hence violates the Eighth Amendment to the Constitution of the United States. This portion of *Booth* was not overruled by *Payne* and remains good law today. (*Payne v. Tennessee*, supra, 501 U.S. at p. 830, fn. 2; *Hain v. Gibson* (10th Cir. 2002) 287 F.3d 1224, 1238-1239; *State v. Bjorklund* (Neb. 2000) 604 N.W.2d 169, 214; *State v. Bernard* (La. 1992) 608 So.2d 966, 971-972.)

Admission of Sergio Corrieo's improper opinion evidence also invaded the province of the jury (*Summers v. A.L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1182-1183; *People v. Tortes* (1995) 33 Cal.App.4th 37, 46-48), the entity charged with the responsibility of determining the appropriate sentence, thereby depriving appellant of his state and federal constitutional right to trial by jury (U.S. Const., Amends. 6 and 14; Cal. Const., art. I, §16; *State v. Huertas* (Ohio 1990) 553 N.E.2d 1058, 1065,

[expressions of opinion by a witness as to the appropriateness of a particular sentence in a capital case violate the defendant's constitutional right to have the sentencing decision made by the jury and judge].)

In addition, because his opinions were irrelevant (*State v. Bernard*, supra, 608 So.2d at pp. 971-972; *State v. Huertas*, supra, 553 N.E.2d at p. 1065), their admission violated Evidence Code section 350 and appellant's due process right to a fair trial (U.S. Const., Amend. 14; Cal. Const., art. I, §§ 7 and 15; cf. *Bruton v. United States* (1968) 391 U.S. 123, 131, fn. 6; *People v. Castro* (1985) 38 Cal.3d 301, 313) and arbitrarily deprived appellant of a state statutory right in violation of due process of law (U.S. Const., Amend. 14; *Hicks v. Oklahoma* (1980) 447 U.S. 343, 346 [65 L.Ed.2d 175, 100 S.Ct. 2227]; *Vitek v. Jones* (1980) 445 U.S. 480, 488 [63 L.Ed.2d 552, 100 S.Ct. 1254]).

E. Reversal is required

In addition to counting the children to whom Maria Elena Corrieo was a grandmother, Sergio Corrieo described a series of hardships and losses experienced by the survivors after the family matriarch's death. If appellant had been given advance notice and access to the prosecution's compilation of background information on the family, he could have shown the jury a rather different picture of the family dynamics. As shown in the warrant affidavits disclosed to appellant after trial, the Corrieo family had

members with drug problems, gang affiliations, and a proclivity to steal from other members of the family *before* the robbery murders were committed. If properly investigated in advance, Mr. Corrieo's testimony might have been impeached and its impact altered to appellant's benefit.

Moreover, the prosecutor would most likely have been precluded from undertaking his final line of inquiry respecting Sergio Corrieo's feelings about appellant had he given the trial court and appellant advance notice of his intentions. Appellant needed only reasonable notice of that plan to find the authority he needed, in *Payne,* where the Court made clear its intent to preserve the prohibition against prosecutorial use of the surviving family's feelings about the defendant in making the case for death.

The violations of appellant's federal constitutional rights in admitting and failing to strike Sergio Corrieo's testimony require reversal unless they are shown harmless beyond a reasonable doubt. *(Chapman v. California, supra,* 381 U.S. 18, 24.) The violations of appellant's state law rights require reversal if there is any reasonable possibility that the errors affected the penalty verdict. (*People v. Brown* (1988) 46 Cal.3d 432, 447-448.) A reasonable possibility of such an effect is apparent here.

VI. THE TRIAL COURT SHOULD HAVE GIVEN THE JURY A LIMITING INSTRUCTION ON VICTIM IMPACT EVIDENCE IN LIGHT OF APPELLANT'S REQUEST AND THE DUTY TO INSTRUCT ON THE PRINCIPLES OF LAW RAISED BY THE EVIDENCE

Under well-settled California law, the trial court is responsible for ensuring that the jury is correctly instructed on the law. *(People v. Murtishaw* (1989) 48 Cal.4th 1001, 1022.) "In criminal cases, even absent a request, the trial court must instruct on general principles of law relevant to the issues raised by the evidence." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1085.) The court must instruct *sua sponte* on the principles which are openly and closely connected with the evidence presented and are necessary for the jury's proper understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.)

Additionally, trial courts must instruct juries to restrict their use of evidence to the proper purpose for which it was admitted when a party so requests and the subject evidence is admissible for one purpose and inadmissible for another purpose. (Evid. Code, § 355.)

Appellant made a timely request for a limiting instruction. Appellant presented the following text and authorities, punctuated and cited exactly as shown, for a jury instruction headed "Defendant's Special #1". (15CT 5714.)

"The prosecution has introduced what is known as victim impact evidence." (*Nesbit.*) "Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance." (*Nesbit.*) Rather, victim impact evidence may be considered, if at all, only to the extent you find it is part of the circumstances of the special circumstances murder conviction for which you are now determining whether to sentence defendant to death or life imprisonment without possibility of parole. In assessing to what extent, if any, you should consider the victim impact evidence in your deliberations, you may not consider any victim impact evidence unless it was foreseeably related to "personal characteristics of the victim that were [actually] [] known to the defendant at the time of the crime." (*Fierro; Gathers.*) "Your consideration of the victim impact evidence must be limited to a rational inquiry into the culpability of the defendant, not an emotional response to the evidence." (*Nesbit.*)

Article I sections 15 and 24, of the California Constitution; Fifth and Fourteenth Amendments to the United States Constitution), and the constitutional requirement of a reliable death penalty determination (Fifth, Eighth and Fourteenth Amendments to the United States Constitution).

Victim Impact evidence is not a factor in aggravation but can only be considered, if at all, as part of the circumstances of the crime; that jurors must exercise great care not to attach any emotional response to victim impact evidence (*State v. Nesbit* (Tenn. 1998) 978 S.W.2d 872); and that the jury cannot consider any victim impact evidence other than "personal characteristics of the victim that were [] known to the defendant at the time of the crime" (*People v. Fierro*, 1 Cal.4th 173, 260 (conc. and dis. opn. Kennard J.); in *South Carolina v. Gathers*, 490 U.S. 805, 811-812 [104 L.Ed.2d 876, 883]. See *State v. Nesbit*, (Tenn. 1998) 978 S.W.2d 872, *New Jersey v. Muhammad*, *supra,* (N.J. 1996) 145 N.J. 23, [678 A.2d 164].)

The trial court declined to instruct the jury on the limited use of victim impact evidence, appellant's request notwithstanding, because the

court found fault with some unspecified aspects of appellant's requested special instruction, and the court was uncertain whether it correctly stated the law. In the trial court's words,

> "[I]t seems to me on balance here that the proposed instruction Number 1 is faulty in many particulars, number 1, it is clearly argumentative. ¶ Number 2, I am not at all certain that it doesn't misstate at least some of the indications that – as to the victim impact statement as defined by the United States Supreme Court. And, therefore, it will remain on the denial." (14RT 3808.)

A request for a special instruction that appears faulty in some particulars or that states principles of law about which the trial court is "not at all certain" is nevertheless a request for instruction on the law worthy of the trial court's careful attention. If the principles of law addressed by the instruction are openly and closely associated with the facts before the court, necessary for an understanding of the issues, and not covered by any other instruction, the trial court is obliged to examine the relevant law as necessary to render an appropriate instruction. (*People v. Stewart* (1976) 16 Cal.3d 133, 139-141.)

"To the extent that the proposed instruction was argumentative, the trial court should have tailored the instruction to conform to the requirements of [*People*] *v. Wright* [1988] 45 Cal.3d 1126, rather than deny the instruction outright. (*People v. Hall* (1980) 28 Cal.3d 143, 159 [167 Cal.Rptr. 844, 616 P.2d 826].)" (*People v. Fudge* (1994) 7 Cal. 4th 1075,

1110.) To the extent that the proposed instruction's stated limitations on the use of victim impact evidence were inconsistent with the law, the mandate of Evidence Code 355 called upon the trial court to "tailor it to give the jury some guidance . . . rather than denying the instruction outright. (*People v. Falsetta* (1999) 21 Cal. 4th 903, 924.)

Two closely-related statements in the first paragraph of appellant's proposed instruction on victim impact evidence were determinably correct and not adequately covered by any other instruction: "Victim impact evidence is not the same as an aggravating circumstance. Proof of an adverse impact on the victim's family is not proof of an aggravating circumstance." (15CT 5714.)

In *Payne v. Tennessee, supra,* 501 U.S. 808, 827, the court held "that if the State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." The Court did not, however, declare that any adverse impact on a capital murder victim's family constitutes an "aggravating circumstance" or that states were now free to label such evidence so.

On the contrary, the Court's Eighth Amendment doctrine prohibits states from labeling as "aggravating" any factor common to all murders or applicable to every defendant eligible for the death penalty. (*Arave v. Creech* (1993) 507 U.S. 463, 474 ["If the sentencer fairly could conclude that an

aggravating circumstance applies to *every* defendant eligible for the death penalty, the circumstance is constitutionally infirm."] citing, et. al., *Maynard v. Cartwright* (1988) 486 U.S. 356, 364 [invalidating aggravating circumstance that appeared to describe "every murder"].)

Every murder presumably has an adverse impact on the victim's family. As observed in Justice Souter's concurrence in *Payne*, "When [murder] happens, it is always to distinct individuals, and, after it happens, other victims are left behind.... [H]arm to some group of survivors is a consequence of a successful homicidal act so foreseeable as to be virtually inevitable." (*Payne v. Tennessee*, supra, 501 US at p. 838.)

Furthermore, adverse impact on a victim's family that was neither foreseen nor foreseeable to the defendant at the time of the crime has no logical bearing on his blameworthiness, and does not easily fit within the definition of any statutory factor in aggravation. (*People v. Fierro*, *supra*, 1 Cal.4th 172, 264, Kennard, J. Conc. and dis.) Although the *Payne* court appears to have rejected a foreseeability test for determining the *admissibility* of victim impact evidence, it did not consider or reject the use of that test for determining whether a particular impact could constitute an "aggravating circumstance." Appellant's proposed instruction clearly raised this issue in suggesting that the jury's consideration of victim impact be restricted to that impact which was foreseeably related to "personal characteristics of the

victim that were actually known to the defendant at the time of the crime." (15CT 5714.)

The trial court's failure to render a limiting instruction was not harmless beyond a reasonable doubt. (*Chapman v. California*, *supra,* 381 U.S. 18, 24.) The jury received no argument limiting the use of Mr. Corrieo's testimony from counsel or from appellant. The proper proof of aggravating circumstances submitted by the prosecution was not overwhelming. Although the crimes involved in the present case were capital, the case does not present the type of unusually heinous crime the court often sees giving rise to a death sentence. (See, e.g., *In re Carpenter* (1995) 9 Cal.4th 634 [defendant sentenced to death for murdering five people]; *People v. Bittaker* (1989) 48 Cal.3d 1046 [defendant sentenced to death for kidnapping, raping, sodomizing and murdering five teenage girls]; *People v. Bonin* (1989) 47 Cal.3d 808 [defendant sentenced to death after murdering ten people].)

Nor does this case involve a defendant with the heinous criminal history this court often sees in death penalty cases. (See, e.g., *People v. Ray* (1996) 13 Cal.4th 313, 330-331 [defendant had two prior murder convictions]; *People v. Nicolaus* (1991) 54 Cal.3d 551, 567 [defendant convicted of murder in 1985 had killed his three children in 1964 and had been on death row for these prior homicides]; *People v. Hendricks* (1987) 43

Cal.3d 584, 588-589 [defendant had two prior murder convictions].)

Here, there is at least a reasonable possibility that the errors affected the penalty verdict. (*People v. Brown, supra,* 46 Cal.3d 432, 447-448.) Reversal is required.

VII. THE TRIAL COURT DENIED APPELLANT DUE PROCESS OF LAW WHEN IT INSTRUCTED THE JURY THAT THE IMPACT OF AN EXECUTION ON THE DEFENDANT'S FAMILY MEMBERS SHOULD BE DISREGARDED UNLESS IT ILLUMINATES SOME POSITIVE QUALITY OF THE DEFENDANT'S BACKGROUND OR CHARACTER

Introduction

At the prosecutor's request, the trial court rendered a version of CALJIC No. 8.85 which stated, inter alia:

> Sympathy for the family of the defendant is not a matter you can consider in mitigation. Evidence, if any, of the impact of an execution on family members should be disregarded unless it illuminates some positive quality of the defendant's background or character. (15CT 5661, 5715-5717; 14RT 3829.)

This instruction appears to be based on *People v. Ochoa , supra,* 19 Cal.4th 353, 456, a case tried before *Payne*[20] permitted the use of victim impact evidence in the penalty phase of a capital trial. There, the defendant asked that the jury be instructed to consider sympathy for his family as a circumstance in mitigation. This court rejected Mr. Ochoa's claim, and has

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[20] *Payne v. Tennessee, supra,* 501 U.S. 808.

since rejected similar claims on similar grounds. (See *People v. Smithey* (1999) 20 Cal.4th 936, 999-1000 [holding there was no Eighth Amendment violation in telling jury that sympathy for the defendant's family was not to be considered]; *People v. Bemore* (2000) 22 Cal.4th 809, 855-856 [same].) As stated in *Bemore*, "the foregoing cases make clear that while so-called victim impact considerations show the specific harm caused by the defendant and his moral culpability for purposes of determining whether he deserves to die, the impact of a death sentence on the defendant's family and friends has no similar bearing on the individualized nature of the penalty decision. Sympathy for defendant's loved ones, as such, and their reaction to a death verdict, as such, do not relate to either the circumstances of the capital crime or the character and background of the accused." (Id at p. 856.)

As will be shown, the very broad conclusions expressed in those cases were not well-founded and should be rejected where, as here, the defendant is the parent of a dependent child. Neither California law nor Eighth Amendment doctrine demands or authorizes disregard of an innocent child's interest in sentencing the parent to death.

A. California's Death Penalty Statute literally permits the sentencer to consider the potential impact of a death sentence as well as factors bearing on whether the defendant deserves that penalty

Writing for the court in *Ochoa*, Justice Mosk fairly summarized the important elements of our statutory scheme, to wit:

> State law requires the jury to take into account matters relevant to the penalty determination. "[S]ection 190.3 provides that, with narrow exceptions, 'evidence may be presented by both the people and the defendant as to *any matter* relevant to aggravation, mitigation, *and sentence* including, but not limited

> to' the circumstances of the current offense, prior felony convictions or violent crimes, 'and the defendant's character, background, history, mental condition and physical condition.' (Italics added.) In deciding whether the aggravating circumstances outweigh the mitigating, the jury must consider, among other things, 'all of the evidence' and 'the arguments of counsel.' " (*People v. Brown* (1985) 40 Cal. 3d 512, 542 [230 Cal. Rptr. 834, 726 P.2d 516], rev'd. on other grounds sub nom. *California v. Brown* (1987) 479 U.S. 538 [107 S. Ct. 837, 93 L. Ed. 2d 934].) (*People v. Ochoa, supra*, 19 Cal. 4th 353, 455, italics in original.)

Thus, under the plain terms of this statute, the defense may introduce, and have the jury consider, "any matter relevant" not only to mitigation, but to "the sentence" as well. Under the express language of section 190.3, the former "includ[es] but [is] not limited to" a number of areas, including "the defendant's character, background, history, mental condition and physical condition." As *Ochoa* noted, state law permits "an individualized assessment of the defendant's background, record and character, and the nature of the crimes committed . . . ." (19 Cal.4th at p. 456.)

But, as *Ochoa* failed to note, the statute does not limit the considerations to be weighed in favor of life to those factors, or to "mitigation" alone. Evidence "as to any matter relevant to . . . sentence," may be adduced and considered. Rules of statutory construction militate against treating this language as mere surplusage. *(State Farm Mut. Auto Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1046.) If the impact of a sentence is not a matter directly relevant to the sentence, there is a legitimate question as to what else could be. This court has held that the manner in which the sentence is carried out does not come within the phrase "any matter relevant to .. .sentence." (See, e.g., *People v. Grant* (1988) 45 Cal.3d 829, 860; *People v. Harris* (1981) 28 Cal.3d 935, 962.) This court has held that

evidence about the conditions of confinement, or the nature and quality of life under a life without parole term is likewise inadmissible. (See, e.g., *People v. Fudge* (1994) 7 Cal.4th 1075, 1117; *People v. Daniels* (1991) 52 Cal.3d 815, 876-877.) This court has also held that evidence of the sentence given to a co-defendant for the same crime is not within the phrase "any matter relevant to .. .sentence." (See, e.g., *People v. Mincey* (1992) 2 Cal.4th 408, 480.)

At the time section 190.3 was enacted, the impact of a sentence on a defendant's family was (and still is) a regular and proper matter for the sentencer's consideration. Indeed, courts were (and still are) required to consider the impact of a sentence on any dependent members of the defendant's family in considering a grant of probation. (See former Rule 414, now Rule 4.414 (b)(5), Cal. Rules of Court.) In deciding the intent of the voters in authorizing the capital sentencer to consider "any matter relevant to . . . sentence," it is certainly reasonable to infer that the electorate intended to permit consideration of a factor that courts have said is relevant to the sentencing decision even if it is not, strictly speaking, a mitigating or aggravating circumstance. When a criminal statute is susceptible of two reasonable interpretations, the appellate court should ordinarily adopt that interpretation more favorable to the defendant. (See e.g., *People v. Garcia* (1999) 21 Cal.4th 1, 10.) An appellate court should be especially hesitant to adopt an interpretation of the statute that creates conflict with federal constitutional doctrine, as discussed below.

B. Precluding the sentencer from considering the impact of a defendant's death sentence on a defendant's family violates the Eighth Amendment

Eighth Amendment doctrine does not allow states to preclude the sentencer in a capital case from considering, as mitigation, any relevant

evidence in support of a sentence less than death. (*Skipper v. South Carolina* (1986) 476 U.S. 1; *Eddings v. Oklahoma* (1982) 455 U.S. 104, 114; *Lockett v. Ohio* (1978) 438 U.S. 586, 604.

"Relevant evidence" is not limited to that which bears upon the defendant's moral guilt or blameworthiness. Evidence is deemed mitigating, accordingly, as long as it is capable of giving rise to an "inference . . . that . . . might serve as a basis for a sentence less than death." (*Skipper v. South Carolina*, supra, 476 U.S. at 4-5.) What matters is whether the evidence "would be 'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.' *Lockett, supra*, at 604, 57 L. Ed. 2d 973, 98 S. Ct. 2954." Id., at 4-5, 90 L. Ed. 2d 1, 106 S. Ct. 1669 (citation omitted)." (*Tennard v. Dretke* (2004) 542 U.S. 274, 285.)

Moreover, it is not appropriate to "'screen[] mitigating evidence for constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment. [Citation.] Rather, we held that the jury must be given an effective vehicle with which to weigh mitigating evidence so long as the defendant has met a "low threshold for relevance," which is satisfied by ""'evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value.'" [Citations.]" (*Smith v. Texas* (2004) 543 U.S. 37, 43-44.) The principle assumed in *Ochoa* and its progeny – "that the imposition of capital punishment is to be determined solely on the basis of moral guilt -- does not exist in the text of the Constitution, nor in the historic practices of our society, nor even in the opinions of [the United States Supreme] Court" preceding the now-overruled majority opinion in *Booth*. (*Booth v. Maryland supra*, 482 U.S. 496, 520 Scalia, J., dissent.)

Thus, while the *Ochoa* court was correct in observing that Eighth Amendment doctrine "requires an individualized assessment of the

defendant's background, record, and character, and the nature of the crimes committed" it does not follow that a sentencer cannot or should not consider the welfare of his dependent family members before choosing a sentence of death. On the contrary, considering the impact on defendant's family along with all of the other factors that militate against a death sentence is essential to produce the "reasoned moral response" *(Penry v. Lynaugh* (1989) 492 U.S. 302, 328) that Eighth Amendment doctrine demands.

Moreover, although the United States Supreme Court has not yet considered the precise question presented here, the groundwork is well-laid. In *Payne* the "court rejected the more fundamental premises of its earlier decisions about what the Eighth Amendment permitted as penalty considerations in a capital case." (*People v. Fierro, supra,* 1 Cal.4th 173, 260, Kennard, J., conc. and dissenting.) It "expanded from two to three the number of considerations permissible for capital sentencing under the Eighth Amendment. Previously a death sentence might be based only on the defendant's character and background and the circumstances of the crime, but after Payne it might be based also on the specific harm caused by the crime." (*Id.*, at p. 261.) Logically, it cannot be said that the Eighth Amendment allows the sentencer to consider factors beyond "the defendant's character and background and the circumstances of the crime" in favor of death while limiting the sentencer to that list of factors in favor of life.

C. Because the trial court permitted the jury to make unlimited use of the evidence that the Corrieo family was hurt by the crime, the trial court's instruction to disregard any injury to appellant's family was unreasonable and unfair

As previously discussed, the trial court overruled appellant's objections and allowed appellant's jury to hear and consider – as an

aggravating circumstance – the harm suffered by the victims' family without regard to whether the harm was foreseen or foreseeable. Thus, consideration of *prosecution* evidence that was not relevant to the defendant's moral guilt, background or character was allowed to enter into the weighing process. The jury was invited to consider that evidence in deciding whether death was the appropriate punishment. Under these circumstances, it was not only unreasonable, but fundamentally unfair, to preclude the jury from considering the effect of a death sentence on appellant's family. Such unfairness violates the Fourteenth Amendment Due Process Clause. (*Wardius v. Oregon* (1973) 412 U.S. 470, 473.)

D. The error was not harmless

The impact of a death sentence on appellant's family, including the daughter born while appellant was in custody (1RT 123, 130, 133, 11RT 2979-80), was removed from the jury's consideration by a trial court instruction based upon decisions of this court. In his closing statement to the jury, appellant sought no mercy, and proclaimed his innocence of the capital offense, but expressed two regrets: assaulting his former girlfriend, who he said was not at fault in the situation, and leaving his daughter fatherless. (14RT 3861.) If appellant had been permitted to develop the facts and encourage consideration of his mother's and daughter's interests, appellant's life might well have been spared.

As the trial court knew from reading the grand jury testimony of Wendy Beach, the child's mother, appellant gave over possession of his money to the child's mother and asked her to spend it on food, clothes, and things for the baby when she was expecting and he was in custody. The trial court heard and granted appellant's requests for judicial assistance in making

telephone contact with the grandparents who were caring for the child while he was awaiting trial. (2RT 313-315, 3RT 651, 13RT 3610.) On this record, one cannot say there is no possibility that the preclusion of consideration of the interests of appellant's daughter influenced the jury's decision. It was surely not harmless beyond a reasonable doubt.

VIII. THE TRIAL COURT'S INSTRUCTION TO WEIGH IN FAVOR OF DEATH FACTS THAT NOT ALL JURORS AGREED WERE PROVED BEYOND A REASONABLE DOUBT VIOLATED APPELLANT'S RIGHTS UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES, AND REQUIRES REVERSAL OF THE PENALTY JUDGMENT UNDER THE UNITED STATES SUPREME COURT'S DECISIONS IN *APPRENDI, RING, CUNNINGHAM* AND *BLAKELY.*

Introduction

Appellant's penalty jury was instructed that "an aggravating factor related to the circumstances of the crime of which the defendant was convicted in the present proceeding does not have to be proved beyond a reasonable doubt." (15CT 5668, 5760; 14RT 3831.) Accordingly, the trial court limited the instruction on the reasonable doubt standard to the Alicia Todd and Danielle DeBonneville crimes. (15CT 5816-5817, 5849-5850; 14RT 3836.) As to those crimes, appellant's jury was instructed that it was "not necessary for all jurors to agree that those crimes were proved beyond a

reasonable doubt. If any juror is convinced that the criminal activity occurred, that juror may consider that activity as a fact in aggravation." (14RT 3836.)

Although these instructions were consistent with California law as defined by this court's precedents, the United States Supreme Court has yet to determine whether that law, as so construed, violates the United States Constitution as construed in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [hereinafter *Apprendi*]; *Ring v. Arizona* (2002) 536 U.S. 584 [hereinafter *Ring*]; and *Blakely v. Washington* (2004) 542 U.S. 296, 124 S.Ct. 2531 [hereinafter *Blakely*]. For the reasons to be stated, the trial court may be deemed to have erred.

A. The Reasonable Doubt Standard and the Unanimity Requirement should now be applied in making all of the factual findings essential to the determination that a defendant should be put to death

In *Apprendi*, the high court held that a state may not impose a sentence greater than that authorized by the jury's simple verdict of guilt unless the facts supporting an increased sentence (other than a prior conviction) are also submitted to the jury and proved beyond a reasonable doubt. (*Apprendi*, *supra*, 530 U.S. at p. 478.)

In *Ring*, the high court struck down Arizona's death penalty scheme, which authorized a judge sitting without a jury to sentence a defendant to

death if there was at least one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency. (*Ring*, *supra*, 536 U.S. at p. 593.) The court acknowledged that in a prior case reviewing Arizona's capital sentencing law (*Walton v. Arizona* (1990) 497 U.S. 639) it had held that aggravating factors were sentencing considerations guiding the choice between life and death, and not elements of the offense. (*Ring*, *supra*, 536 U.S. at p. 598.) The court found that in light of *Apprendi*, *Walton* no longer controlled. Any factual finding which can increase the penalty is the functional equivalent of an element of the offence, regardless of when it must be found or what nomenclature is attached; the Sixth and Fourteenth Amendments require that it be found by a jury beyond a reasonable doubt.

In *Blakely*, the high court considered the effect of *Apprendi* and *Ring* in a case where the sentencing judge was allowed to impose an "exceptional" sentence outside the normal range upon the finding of "substantial and compelling reasons." The State of Washington set forth illustrative factors that included both aggravating and mitigating circumstances; one of the former was whether the defendant's conduct manifested "deliberate cruelty" to the victim. The Supreme Court ruled that Washington's procedure was invalid because it did not comply with the right to a jury trial. To quote:

> This case requires us to apply the rule we expressed in *Apprendi v. New Jersey*, 530 U.S. 466, 490, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000): "Other than the fact of a prior conviction, any fact that increases the penalty for a crime

> beyond the prescribed statutory maximum must be submitted to a jury, *and proved beyond a reasonable doubt.*" This rule reflects two longstanding tenets of common-law criminal jurisprudence: that the "truth of every accusation" against a defendant "should afterwards be confirmed by the *unanimous* suffrage of twelve of his equals and neighbours," 4 W. Blackstone, Commentaries on the Laws of England 343 (1769), and that "an accusation which lacks any particular fact which the law makes essential to the punishment is . . . no accusation within the requirements of the common law, and it is no accusation in reason," [citation]. (*Blakely v. Washington, supra,* 542 U.S. 296, 301, emphasis added.)

In reaching this holding, the Supreme Court stated that the governing rule since *Apprendi* is that *any* fact (other than a prior conviction) that increases the penalty of the crime beyond the statutory maximum must be submitted to the jury and found beyond a reasonable doubt; "the relevant 'statutory maximum' is not the maximum sentence a judge may impose after finding additional facts, but the maximum he may impose *without* any additional findings." (*Blakely v. Washington, supra,* 124 S.Ct. 2531, 2537, emphasis in original.) "As *Apprendi* held, every defendant has the *right* to insist that the prosecutor prove to the jury all facts legally essential to the punishment." (*Id.* at p. 2543, emphasis in original.)

Finally, in *Cunningham v. California* (2007) 549 U.S. 270, the Court declared unconstitutional California's Determinate Sentencing Law [DSL]. Mr. Cunningham had been sentenced in state court to an upper term of 16 years for an offense punishable by a lower term sentence of 6 years, a middle

term sentence of 12 years, or an upper term sentence of 16 years. In *Cunningham*, the upper term was imposed based on circumstances in aggravation found by the sentencing judge by a preponderance of the evidence. The U.S. Supreme Court held that by placing sentence-elevating factfinding within the judge's province, the DSL violated the defendant's right to trial by jury safeguarded by the Sixth and Fourteenth Amendments. "Factfinding to elevate a sentence from [the midterm to the upper term] . . . falls within the province of the jury employing a beyond-a-reasonable-doubt standard. . . ." (*Cunningham v. California* (2007) 549 U.S. 270, 292.)

B. The failure of appellant to object or to request the instructions required to impart the rules established by *Apprendi, Ring, Cunningham* and *Blakely* does not justify denying relief on direct appeal

This court has held that "[a] defendant is not precluded from raising for the first time on appeal a claim asserting the deprivation of certain fundamental, constitutional rights." (*People v. Vera* (1997) 15 Cal.4th 269, 276-277 [citing *People v. Saunders* (1993) 5 Cal.4th 580, 592 [plea of once in jeopardy]; *People v. Holmes* (1960) 54 Cal.2d 442, 443-444 [constitutional right to jury trial].)

Because appellant complains of a the denial of his Sixth, Eighth, and Fourteenth Amendment rights to a unanimous jury determination and proof

beyond a reasonable doubt on the aggravating factors, his lack of an objection in the superior court does not forfeit appellant review.

Furthermore, waiver cannot be premised on a failure to take action in the court below when such action would have been futile. (See, e.g. *People v. Hill* (1998) 17 Cal.4th 800, 820; *People v. Abbaszadeh* (2003) 106 Cal.App.4th 642, 648-649; see also *People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by higher court on issue].) At the time of appellant's trial, the United States Supreme Court had not yet decided *Apprendi, Ring, Cunningham* or *Blakely*. This court's determinations on the inapplicability of jury trial rights to aggravating circumstances would have required that the trial court reject appellant's claims at trial.

Finally, this Court has discretionary power to review the issue. "The fact that a party, by failing to raise an issue below, may forfeit the right to raise the issue on appeal does not mean that an appellate court is precluded from considering the issue. (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, § 36, p. 497.) An appellate court is generally not prohibited from reaching a question that has not been preserved for review by a party. . . . Whether or not it should do so is entrusted to its discretion. (*People v. Williams*, *supra*, 17 Cal.4th 148, 161-162, fn. 8.)

Violation of the federal constitutional right to a jury trial and proof beyond a reasonable doubt constitutes an egregious violation of appellant's

rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution, and thus affects his substantial rights. And it constitutes a pure question of law. Accordingly, the issue is properly preserved.

C. Reversal is required

The failure to apply the reasonable doubt standard when its use is demanded by the Constitution is reversible per se. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 281-282.) Moreover, even applying the harmless error standard enunciated in *Chapman*, respondent would be unable to prove the constitutional violations harmless beyond a reasonable doubt.

Reversal is required.

IX. THE PROSECUTOR'S MISLEADING ARGUMENTS RESPECTING STATUTORY MITIGATION FACTORS AND THE TRIAL COURT'S FAILURE TO CORRECT THOSE ARGUMENTS WITH APPROPRIATELY SPECIFIC JURY INSTRUCTIONS PRECLUDED THE PENALTY JURY FROM GIVING MEANINGFUL CONSIDERATION AND MITIGATING EFFECT TO MITIGATING FACTS, DENIED APPELLANT'S RIGHTS UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION AND UNDER STATE CONSTITUTIONAL COROLLARIES, AND REQUIRE REVERSAL OF THE PENALTY JUDGMENT

In penalty phase closing argument, while appellant was in *pro per*, the prosecutor told the jury that he did not "believe" that the "potential factors in mitigation" set out in the court's instructions were applicable in the present case. (14RT 3850.) He promised to "explain why that is true" as he went "through them." (14RT 3850.) He began:

> The first potential factor in mitigation is *whether the defendant at the time he committed these murders was operating under an extreme mental or emotional disturbance.*
>
> *What that brings to mind is someone who kills for religious purposes, for mistaken moral purposes as a result of mental disease; those who, because of brain defects and the like, aren't able to understand the consequences of their acts.* Yet, what we see is that the defendant suffers from none of this. He suffers from no extreme mental or emotional disturbance. He suffers from no mental illness or no organic brain disease. He knew what he was doing when he committed the murders. He knew what he was doing and why he wanted it; in short, for greed and to kill women to leave no surviving witnesses.
>
> *So unlike those who believe that they are commanded by God mistakenly to kill or to maim people* , the defendant did this for the most venal of reasons, and, as a consequence,

> this factor in mitigation, *although it might apply to some criminal defendants, does not apply to Corey Williams.* (14RT 3852.)

The prosecutor's statement of the parameters of "extreme mental or emotional disturbance" was false. As this court is well-aware, a capital crime "committed while the defendant was under the influence of an extreme mental or emotional disturbance" is mitigated under subdivision (d) of California Penal Code section 190.3, even if the defendant did not believe the crime was commanded by God or served a moral purpose. The prosecutor erred in suggesting otherwise. (*People v. Hill, supra*, 17 Cal.4th 800, 829-830 [improper for a prosecutor to misstate the law].) The error was prejudicial insofar as it prevented the jury from considering the mental disturbance evident in appellant's behavior and attributable to having been raised by a drug-addicted prostitute.

The prosecutor went on to misrepresent the applicability of a mitigating factor that the jury would have otherwise found applicable to any crime committed by a 19-year old: youth. After acknowledging that the age of the defendant should be considered, the prosecutor declared that courts consider age a "metonym" and:

> What this means to me is there could be an individual who, having lived 30 or 40 or 50 or 60 years, a law abiding life, then commits two murders and you might take into account that law abiding pattern over those period of years and consider that age in that capacity.

> What this really means to my mind is: Does the defendant know the difference between right and wrong? Does he know the harm he causes?
>
> And all the evidence in this case suggests that he does. . . . He knows all those things, ladies and gentlemen.
>
> And so for those who might not be able to – this might be a factor in mitigation, *but in Corey Leigh Williams's case, it simply does not apply.* (14RT 3854.)

Appellant did not object to the prosecutor's argument or take any other corrective action. In his own closing argument, he proclaimed his innocence but declined to ask the jury to spare his life. Appellant had previously entered appropriate objections to evidence and requested appropriate jury instructions, but he remained silent throughout the prosecutor's argument.

The trial judge had previously stated that he would "interject" to admonish the prosecutor without waiting for an objection if and when he perceived a prosecutor's argument to be improper. (13RT 3576.) But the trial judge said nothing and gave no corrective instruction on the statutory mitigators that the prosecutor misrepresented.

After hearing the prosecutor's argument against treating youth andsevere mental and emotional disturbance per se as factors in mitigation, the trial court should have given a corrective instruction, i.e., one advising the jury that it could consider such facts as mitigation even in the absence of

evidence that defendant had the additional mental characteristics the prosecutor specified. (*Brown v. Payton* (2005) 544 U.S. 133, 146 [trial judge should have advised jury that it could consider defendant's religious conversion under factor K after prosecutor argued to the contrary].)

Depriving a jury of a "'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence," may occur "not only as a result of the instructions it is given, but also as a result of prosecutorial argument dictating that such consideration is forbidden." (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 259, fn. 21.) "The prosecuting attorneys are government officials and clothed with the dignity and prestige of their office. What they say to the jury is necessarily weighted with that prestige." (*People v. Brophy* (1954) 122 Cal.App.2d 638, 652 citing *People v.Talle* (1952) 111 Cal.App.2d 650, 677.)

In particular, the defendant's youth (the crime underlying this case occurred when appellant was 19) is a factor in mitigation as a matter of federal constitutional law if not by force of Penal Code section 190.3, subdivision (i). "A sentencer in a capital case must be allowed to consider the mitigating qualities of youth in the course of its deliberations over the appropriate sentence." (*Johnson v. Texas* (1993) 509 U.S. 350, 367.)

The mitigating qualities of youth which the sentencer must be allowed to consider as a matter of federal constitutional law are in no way

limited to that identified by the prosecutor, i.e., an inability to know right from wrong. Rather, the Eighth Amendment requires that capital juries be allowed to consider as mitigating the "lack of maturity and an underdeveloped sense of responsibility [that] are found in youth more often than in adults and are more understandable among the young" and the fact that "[t]hese qualities often result in impetuous and ill-considered actions and decisions." (*Johnson v. Texas, supra,* 509 U.S. 350, 367.)

Those mitigating qualities of youth were clearly evident in the present case, despite appellant's refusal to put forth any evidence in his own defense. The defendant's age, the nature of the crime, and his very refusal to seek a life sentence evince the "lack of maturity and an underdeveloped sense of responsibility [that] are found in youth more often than in adults and are more understandable among the young." (Ibid.)

Mental or emotional disturbance was also evident. Appellant's mother's guilt phase testimony disclosed that she raised appellant while working as a prostitute. She was, until shortly before appellant's trial, a regular user of illicit drugs and alcohol. When not in jail or "on the streets" she and appellant lived with appellant's father and other men who physically abused her in appellant's presence, and abused appellant in her in appellant's presence. (12RT 3132.) She and appellant were frequently forced to seek refuge in the home of appellant's great grandmother, who

expressed a dislike for African Americans, the race of appellant's biological father. (12RT 3134.)

After waiving his right to counsel for the penalty phase, appellant declined to offer any evidence. When the trial judge pressed him to cross examine the woman who testified that appellant shot her in the head at the conclusion of a gang assault, appellant simply asked her if she thought he was sorry she was shot, obtained an affirmative response, and then declared himself to be not sorry. Citing appellant's crimes against women, the prosecutor's penalty phase closing argument posited that appellant was cruel and sadistic. (14RT 3858.) Appellant's own closing argument made no plea for mercy, and told the jurors to do what they deem necessary in their deliberations. (14 RT 3862.)

Where a jury instruction defining a statutory mitigator is worded so as to permit the jury to give mitigating effect to all of the mitigating evidence, but the prosecutor's argument is to the contrary, the reviewing court must determine whether it is reasonably probable that the jury accepted the prosecutor's narrow view of what the law deemed potentially mitigating. (*Brown v. Payton, supra,* 544 U.S. 133, 142.) On this record, there is surely a reasonable probability that the jury took the prosecutor at his word. The error cannot be deemed harmless beyond a reasonable doubt.

X. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL AND A DEATH JUDGMENT THAT MUST BE REVERSED UNDER THE 6TH, 8TH, AND 14TH AMENDMENTS TO THE U.S. CONSTITUTION, AND UNDER STATE CONSTITUTIONAL COROLLARIES

Where no single error appears to warrant reversal, the cumulative effect of all the errors may require reversal in accordance with the due process guarantee. (*Chambers v. Mississippi* (1973) 410 U.S. 284, 298, 302-03 [combined effect of individual errors "denied [Chambers] a trial in accord with traditional and fundamental standards of due process" and "deprived Chambers of a fair trial"]; *Montana v. Egelhoff* (1996) 518 U.S. 37, 53 [stating that *Chambers* held that "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation"]; *Taylor v. Kentucky* (1978) 436 U.S. 478, 487 n.15, ["[T]he cumulative effect of the potentially damaging circumstances of this case violated the due process guarantee of fundamental fairness . . . ."].)

In determining whether the combined effect of multiple errors rendered a criminal defense "far less persuasive" the overall strength of the prosecution's case must be considered because "a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." *(Strickland v. Washington* (1984) 466 U.S. 668, 696.)

Here, the guilt phase errors – the admission of a coerced confession

and other errors giving David Ross a false aura of veracity – formed the single, shaky pillar on which the guilt phase verdicts rest. While appellant's possession of a large amount of cash and his association with the known robbers might have corroborated Ross enough to support a finding that appellant was involved in the crime, the guilt phase errors were pivotal on the question of whether appellant was the actual killer of two women. The finding that appellant was the actual killer of two women was essential to the case for death.

This is a felony murder case involving minimal if any gratuitous violence. A jury chose to sentence the codefendant who instigated the crime to life without parole. (12CT 4645.) The former defendant who blamed appellant for the killings was offered, and presumably obtained, a sentence limited to twenty years. (10RT 2677-78.) This is obviously not a case that everyone would agree warrants a death sentence.

Additionally, appellant's youth, and his extremely disadvantaged background as recounted in his mother's guilt phase testimony, presented ample grounds for a jury to reject a death sentence. Appellant, who was born June 21, 1976 (14RT 3946) was barely old enough to be eligible for the death penalty at the time of the crime, and only a little older when he faced a prosecutor who falsely proclaimed that youth, per se, is not a mitigating factor. (14RT 3854.)

Penalty phase error is prejudicial under state law if there is a "reasonable possibility" the error affected the verdict. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 961.) It is similarly reversible under federal law unless proved harmless beyond a reasonable doubt. (*Chapman v. California, supra,* 386 U.S. 18, 24.) One cannot conclude with the requisite degree of certainty that none of the errors, singly or together, contributed to the verdict. Reversal should ensue.

XI. BECAUSE THE CALIFORNIA CAPITAL SENTENCING SCHEME IS UNCONSTITUTIONAL, PARTICULARLY AS APPLIED TO APPELLANT, THE JUDGMENT MUST BE REVERSED

Introduction

In the capital case of *People v. Schmeck* (2005) 37 Cal.3d 240, the defendant presented a number of attacks on the California capital sentencing scheme that had been raised and rejected in prior cases. As this court recognized, a major purpose in presenting such arguments is to preserve them for further review. (*Id.*, at p. 303.) This court acknowledged that in dealing with these systemic attacks in past cases, it had given conflicting signals on the detail needed in order for a defendant to preserve these attacks for subsequent review. (*Id.*, at p. 303, n.22.) In order to avoid detailed briefing on such claims in future cases, the court held that a defendant could preserve these claims by "(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 p. 304.)

Appellant has no wish to unnecessarily lengthen this brief. Accordingly, this brief will simply identify the systemic (and previously rejected) claims relating to the California death penalty scheme that appear to be potential grounds for reversal in the context of this case, cite this court's prior rejection of the issue if it has been rejected, and (hereby) request reconsideration of the cited decisions.

A. California's capital punishment scheme, as construed by this Court in *People v. Bacigalupo* (1993) 6 Cal.4th 457, 475-477, and as applied, violates the Eighth Amendment and fails to provide a meaningful and principled way to distinguish the defendants who are sentenced to death from the vast majority who are not

This court has already rejected this argument. (*People v. Schmeck*, *supra,* 37 Cal.4th at p. 304.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, that rejection should be reconsidered.

B. Penal Code section 190.3, subdivision (a) -- which permits a jury to sentence a defendant to death based on the "circumstances of the crime" -- is being applied in a manner that institutionalizes the arbitrary and capricious imposition of death

This court has rejected this argument on numerous occasions. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305.) The jury in this case was instructed in accordance with this provision. (14CT 5752.) For the same reasons set forth by appellant in *People v. Schmeck*, *supra*, however, the rejection should be reconsidered.

C. The Lack of Instruction on the Need for a Unanimous Determination That Aggravating Facts Were Proved Beyond a Reasonable Doubt Violates the Sixth, Eighth and Fourteenth Amendments

During the penalty phase, the state introduced evidence that appellant had committed other criminal activity which involved the use of force or violence. This evidence was admitted pursuant to Penal Code section 190.3, subdivision (b). The jurors were instructed that the other crimes must be proved beyond a reasonable doubt, but that they need not unanimously agree that such facts were so proved before any juror could weigh them in aggravation. (14RT 3836.) In light of the Supreme Court decision in *Ring v. Arizona, supra,* 536 U.S. 584, the trial court's failure violated Mr. Williams's Sixth Amendment right to a jury trial on the "aggravating circumstance[s] necessary for imposition of the death penalty." (*Ring*, 536 U.S. at p. 609.) In the absence of a requirement of jury unanimity, defendant was also deprived of his Eighth Amendment right to a

reliable penalty phase determination. This Court has already rejected both these arguments. (*People v. Lewis* (2006) 39 Cal.4th 970, 1068; *People v. Schmeck, supra*, 37 Cal.4th at p. 304.) That rejection should be reconsidered.

D. The Failure to Instruct on the Burden of Proof to Be Applied in Determining Whether Aggravation Outweighs Mitigation Violates the Sixth, Eighth and Fourteenth Amendments

Under California law, a defendant convicted of first degree murder cannot receive a death sentence unless a jury (1) finds true one or more special circumstance allegations which render the defendant death eligible and (2) finds that aggravating circumstances outweigh mitigating circumstances. The jury in this case was never told that the second of these decisions had to be made beyond a reasonable doubt. This violated appellant's rights under the Sixth, Eighth and Fourteenth Amendments. This Court has already rejected this argument. (*People v. Schmeck, supra*, 37 Cal.4th at p. 304.) For the same reasons set forth by the appellant in *People v. Schmeck, supra*, however, the court's decision should be reconsidered.

E. Use of a Flawed Standard Instruction on Aggravating And Mitigating Factors Violated Mr. Williams's Sixth, Eighth and Fourteenth Amendment Rights

At the penalty phase, the trial court instructed the jury in accord with

CALJIC No. 8.85. (14CT 5752.) This instruction was constitutionally flawed in five ways: (1) it failed to delete inapplicable sentencing factors, (2) it failed to delineate between aggravating and mitigating factors, (3) it contained vague and ill-defined factors, (4) some mitigating factors were limited by adjectives such as "extreme" or "substantial," and (5) failed to specify a burden of proof as to either mitigation or aggravation. (14CT 5752.) These errors, taken singly or in combination, violated Mr. Williams's Sixth, Eighth and Fourteenth Amendment rights. This court has already rejected these arguments. (*People v. Schmeck*, *supra*, 37 Cal.4th at pp. 304-305; *People v. Ray*, *supra*, 13 Cal.4th at pp. 358-359.) That rejection should be reconsidered.

F. Because the California death penalty scheme violates international law --including the International Covenant of Civil and Political Rights -- appellant's death sentence must be reversed.

This court has already rejected this argument. (*People v. Schmeck*, *supra*, 37 Cal.4th at p. 305.) For the same reasons set forth by the appellant in *People v. Schmeck*, *supra*, and in light of the evolving standards of decency defining cruel and unusual punishment (U.S. Const., Amend. 8), this court's decision should be reconsidered.

G. Use of Facts Underlying a Prior Conviction to Obtain a Death Sentence Violates the Double Jeopardy Clause

At the penalty phase, the prosecution introduced evidence that appellant had committed an aggravated assault on Danielle DeBonneville, an offense for which appellant had already been convicted and served a sentence pursuant to a no contest plea. At the penalty phase, the jury was told it could consider this evidence in deciding whether petitioner should live or die. (14CT 5752.) The trial court's introduction of the facts on which prior assault conviction was premised put defendant in jeopardy a second time for that offense in violation of the Double Jeopardy clause of the state and federal constitutions. This Court has already rejected this argument. (*People v. Bacigalupo* , *supra*, 1 Cal.4th 103, 134-135.) For the reasons set forth by the appellant in *Bacigalupo*, *supra*, however, the Court's decision should be reconsidered.

H. Allowing a Jury That Has Already Convicted the Defendant of First Degree Murder to Decide If the Defendant Has Committed Other Criminal Activity Violated Defendant's Sixth, Eighth and Fourteenth Amendment Rights to an Unbiased Decisionmaker

At the penalty phase, the same jury that had determined that appellant was guilty of capital murder in the guilt phase was asked to

determine whether appellant had assaulted Danielle DeBonneville and Alicia Todd. Allowing a jury which has already convicted the defendant of first degree murder to decide if the defendant has committed other criminal activity violated defendant's Sixth, Eighth and Fourteenth Amendment rights to an unbiased decisionmaker. This Court has already rejected this argument. (*People v. Hawthorne* (1992) 4 Cal.4th 43, 77.) The Court's decision in *Hawthorne* should be reconsidered.

I. Allowing the Jury to Condemn Appellant Without Making Specific Written Findings Deprived Appellant of His Federal Due Process and Eighth Amendment Rights to Meaningful Appellate Review

Appellant's jury was not required to make written findings regarding aggravating factors. The failure to require specific written findings by the jury regarding aggravating factors deprived appellant of his federal due process and Eighth Amendment rights to meaningful appellate review. (*California v. Brown* (1987) 479 U.S. 538, 543; *Gregg v. Georgia* (1976) 428 U.S. 153, 195.) This Court has held that the absence of written findings by the sentencer does not render the 1978 death penalty scheme unconstitutional. (*People v. Fauber* (1992) 2 Cal.4th 792, 859; *People v. Rogers* (2006) 39 Cal.4th 826, 893.) These decisions should be reconsidered.

J. California's failure to *timely* provide condemned defendants with the means to develop and present evidence of their innocence requires reversal of appellant's capital conviction and sentence

Appellant has been on Death Row since 2000 for a crime committed in 1995. Appellant has no habeas counsel, and no reason to believe he will be given habeas counsel as soon as this brief is filed.

Last year, before the current fiscal crisis was upon us, the California Commission on the Fair Administration of Justice reported that "[t]he average wait to have habeas counsel appointed [by the California Supreme Court] is eight to ten years after the imposition of [a death] sentence." (Report and Recommendations on the Administration of the Death Penalty in California, June 30, 2008, pp. 50-51.) The Commission's report ably explained the role of inadequate funding of public agency and private habeas counsel in delaying appointment of counsel, and the risk that failure to appoint habeas counsel while direct appeal proceedings are pending can foreclose presentation of meritorious claims in state and federal courts. (Id., at pp. 47-55.) Yet the State legislature has not yet seen fit to provide that funding, and is unlikely to do so in the present fiscal climate.

The lack of funding for habeas counsel and other prerequisites for developing a successful habeas claim is particularly troubling in the present case because of the reasonable possibility that the defendant was not

involved in the capital crime at all, and the high probability that he was falsely identified as the actual killer.

The only unambiguous evidence linking appellant to the Corrieo robberies and murders is the testimony of David Ross. The appellate record reveals that Ross was not only guilty of the crimes, but also an inveterate liar. He admitted participating in a series of violent crimes, including those against the Corrieos, only when cornered, and only to the extent necessitated by the demands of his police interrogators, who revealed readiness to believe his denial of participation in the shooting of the Corrieos but insisted that he pinpoint another participant as the shooter, and stop telling them that he could not do so because both Lolohea and appellant were in the house when Ross heard shots fired. (CT 803-804, 997-1002, 3344-46; 12RT 2830-33.) Ross had either to turn on his good friend Lolohea and point to him as the shooter, or follow his interrogators' urging to identify appellant as the shooter. Ross was allowed to meet privately with Lolohea and encouraged to tell him that he "knew" that Lolohea was not the shooter and had so informed the police. (CT 3344-36; 11 RT 2841-42, 12RT 3223-29.) Accomplice testimony is always questionable, but rarely is it more obviously contrived.

The confession evidence is ambiguous and unreliable as well. It was purveyed by men who contradicted each other as to the words spoken, and

who had apparently forgotten the contemporaneous report of the dialogue prepared by Lieutenant Reed that contradicted their claim of having heard appellant ask for protective custody because he had killed two Hispanics. (13CT 4962; AOB 41, fn. 11.) If appellant had habeas counsel and access to court process soon after trial, he could well have developed evidence that the purveyors of the confession testimony gave false evidence because they liked Sergio Corrieo, or because they were seeking, or were in fact paid, some or all of the money the Corrieo family offered as a reward for testimony leading to appellant's conviction.

Now, and by the time appellant receives habeas counsel and the means to develop such facts, memories of neutral witness will be faded at best, and records will be long gone.

Threatened or actual execution of a defendant who has been held five years or more awaiting appointment of a lawyer empowered to investigate and present claims based on facts dehors the record violates the right to counsel, confrontation, and to appear and defend, guaranteed by the Sixth Amendment. It also constitutes cruel and unusual punishment in violation of the Eighth amendment, and exemplifies violation of the rights to procedural and substantive due process. (U.S. Const., Amend. 14.)

Particularly where, as here, the defendant has proclaimed his innocence of the crimes for which he was convicted and condemned, and

the evidence of his guilt is questionable at best, justice delayed is justice denied.

CONCLUSION

Based on the foregoing, appellant submits that his convictions and sentence should be reversed on direct appeal.

DATED: 7/15/09

Respectfully submitted,

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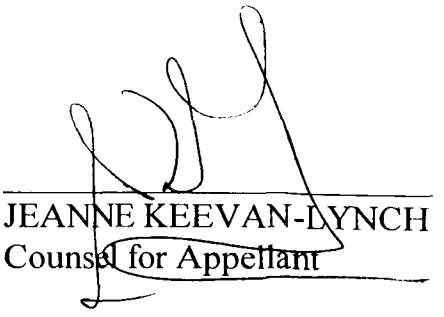
CERTIFICATE OF COUNSEL

The foregoing opening brief on appeal was produced in 13 point proportional Times Roman typeface and contains 40,908 words as counted by WordPerfect version 12.



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PROOF OF SERVICE BY MAIL

RE: People v. Corey Leigh Williams, Supreme Court No. S093756, Superior Court No. 5-961903-2.

I, Jeanne Keevan-Lynch, declare under penalty of perjury as follows: I am over the age of 18 years, and I am not a party to the within action. My business address is PO Box 2433, Mendocino, California, 95460. On the date indicated below, I served a copy of the attached appellant's opening brief by placing same in a sealed envelope addressed as indicated below, and depositing same in the mail with postage thereon fully prepaid.

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