IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

APPELLANT'S REPLY 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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INTRODUCTION

Preliminarily, appellant offers a few caveats on respondent's presentation of those facts that are not part of any argument, but may be important nonetheless.

Respondent's Statement of Facts does not distinguish the assertions of former co-defendant David Ross from those made by witnesses who did not have an obvious motive to lie or a known history of lying about the

crimes underlying this case. This presentation does not enable the reader to see how much of the case rested on Mr. Ross, nor help the reader discern how the errors appellant cites most likely affected the verdict. Appellant's Statement of Facts identifies the witnesses who provided the cited testimony, and notes any impeachment. (See AOB 3-29.)

Further on, respondent's statement of the "relevant background" to appellant's motion to suppress the confession testimony is misleading in two potentially significant respects.

First, respondent states that the prison records appended to the motion to suppress appellant's statements to correctional officers were "reviewed" by the trial court. (RB 19.) Actually, those records were accepted into evidence at the hearing before the trial court pursuant to stipulation of the parties. (3RT 622-623, 701-702, 712.)

Second, respondent's attempt to explain the conflict in those records – a conflict that was apparently overlooked by appellant's counsel in the court below – is misleading. The Order and Hearing for Placement in Segregated Housing (hereafter, the "order") completed and signed by Lieutenant Reed on December 19, 1996, the date appellant was said to have confessed, is not reconcilable with the confession evidence as respondent claims. (RB 24, fn. 4.)

Contrary to respondent's argument (RB 24, fn. 4) the problem is not simply that the order says nothing about appellant confessing to having killed anyone. The problem, which respondent does not acknowledge or address, is that the order contains statements that are obviously inconsistent with appellant having spoken to the officers as the officers later claimed. The order states that Reed placed appellant in Administrative Segregation and deemed appellant "a threat to the safety and security of the institution" not because of any asserted enemy activity but 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.) 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.) He was released from the Ad-Seg unit a few days later with a finding that he had no enemies in the institution. (13CT 4963.)

For reasons not disclosed in the record or explained by respondent, neither Reed nor White was forced to testify about the inconsistency between this report of the intake interview and their testimony about it. As stated in appellant's opening brief, the significance of this report is among the questions awaiting appointment of habeas counsel. (AOB 169.)

I. THE TRIAL COURT'S DECISION TO ADMIT EVIDENCE THAT APPELLANT CONFESSED TO CORRECTIONAL OFFICERS AFTER BEING THREATENED BY THEIR CLERK REQUIRES REVERSAL

A. Respondent's forfeiture argument is inapposite

Respondent first contends that appellant forfeited the coercion claim "by failing to secure a ruling below on the voluntariness issue." (RB 27.)

Respondent relies on forfeiture cases in which the defendant either failed to object to the admission of a confession on the basis urged on appeal[1] or never obtained a ruling on the admission of evidence or the propriety of a suggested jury instruction.[2]

Appellant's coercion claim was clearly presented below. His written motion to exclude the testimony claimed the confession was coerced and involuntary in that the correctional officer's questioning "followed right on the heels of the threat [expressed by Mr. Corrieo] . . ." and, from the defendant's perspective, "the benefit of safety was being withheld, contingent upon the defendant answering the questions." (13CT 4936-37.) Counsel briefly reminded the court of the coercion issue at oral argument on the motion (3RT 640-641.)

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[1] *People v. Kelly* (1992) 1 Cal.4th 495, 519.

[2] *People v. Rowland* (1992) 4 Cal.4th 238, 259 and *People v. Jacobs* (1987) 195 Cal.App.3d 1636, 1650.

The prosecutor responded to the claim in his opposition papers and again in oral argument. (13CT 4986; 3RT 634.) Defense counsel was then "free to focus his oral argument on one aspect of his motion and not another" without fear of this Court holding that he was conceding claims if he failed to state them orally. (*People v. Williams* (1999) 20 Cal.4th 119, 137-138 [per Chin, J., for a unanimous court, on the adequacy of a written 1538.5 motion to suppress as a means to preserve appellate issues].)

The trial court issued a final ruling. (13 CT 5029-5033.) Under state law, that ruling implied a finding that the confession was not legally involuntary. (Evid. Code, § 402, subd. (c) ["[a] ruling on the admissibility of evidence implies whatever finding of fact is prerequisite thereto; a separate or formal finding is unnecessary unless required by statute"]; *People v. Maury* (2003) 30 Cal.4th 342, 406 [citing *People v. Daniels* (1969) 1 Cal. App. 3d 367, 374, and invoking quoted language from Evidence Code section 402 (c) where capital appellant complained of trial court failure to rule on voluntariness of confession].) "An express finding on the record on [voluntariness and *Miranda* issues] need not be made; such findings will be implied from the court's order admitting the confession into evidence." (*People v. Daniels, supra,* 1 Cal. App. 3d 367, 374.)

Having secured a ruling that implied the necessary finding under

state law, appellant was not obliged to take further action in the trial court to preserve his claims for appellate review. "[W]e are aware of no authority—and the Attorney General cites none—that requires a party to continue to object to the court's ruling after a contested hearing to preserve the issue for appeal." (*People v. Memory* (2010) 182 Cal. App.4th 835, 857 (Cantil-Sakauye, J., for a unanimous panel of the Court of Appeal.)

Accordingly, respondent errs in alleging that the new trial motion – which focused on the trial court's misstatements of fact and law in the written opinion -- forfeited the coercion claim insofar it failed to note the trial court's failure to address it expressly. (15CT 5912-5915.) The new trial motion noted that all other issues respecting the admissibility of the confession had been addressed in previous filings. That motion argued that the trial court's confusion of the facts, *inter alia*, "goes to the heart of the Defendant's *Miranda, Massiah* and voluntariness claims." (15CT 5915.) Respondent offers no authority for the proposition that filing a new trial motion, let alone one which references prior briefing of implicitly rejected claims, can waive or forfeit appellate review of those claims.

It is settled that "'the ultimate issue of `voluntariness' is a legal question . . . .'" (*Arizona v. Fulminante* (1991) 499 U.S. 279, 287, quoting *Miller v. Fenton* (1985) 474 U.S. 104, 110.) This court must "review

independently a trial court's determinations as to whether coercive police activity was present and whether the statement was voluntary." (*People v. Jones* (1998) 17 Cal.4th 279, 296.)

When a motion to suppress a confession alleges that police questioning or other government "conduct was a factor that rendered his statements involuntary under the totality of the circumstances ... he may rely on all of the circumstances ... as they relate to the voluntariness issue" in presenting the coercion claim on appeal. (*People v. Guerra* (2006) 37 Cal. 4th 1067, 1094, disapproved on other grounds in *People v. Rundle* (2008) 43 Cal. 4th 76, 151.)

Accordingly, appellant relies on all the circumstances surrounding the confession to correctional officer, including the death threat, appellant's inability to discern the identity of the person who delivered it, his expressed terror of prisoners unknown to him as a result of that threat, the superior governmental status that an inmate clerk appeared to wield when he delivered the death threat, the handcuffs, appellant's isolation, the facts known to the correctional officers when they questioned appellant, the nature of the questions the officers asked, their explanation for persisting as they did, and the way they described the confession in their report.

B. Respondent's arguments on the merits fail

1. Appellant was subjected to a "credible threat" of violence

"Physical violence or threat of it by the custodian of a prisoner during detention ... is universally condemned by the law. . . . 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.)

Upon arrival at New Folsom Prison, appellant was threatened with death by a man who knew who him by name, knew the victims of the charged capital crime by name, and was allowed to move around while appellant remained handcuffed and caged. The man delivering the threat was Mr. Sergio Corrieo, the son and brother of the victims – and an inmate assigned to work as a clerk in the receiving area of the prison. Because of his assignment, he received a list of the prisoners who had just arrived, saw appellant arrive, and recognized him as the man recently indicted for

murdering his mother and sister. (3RT 592-603.)

Moments after Corrieo delivered his prison-gang-styled death warrant from the other side of a locked door, appellant was brought by Correctional Officer White to the room where he and Lieutenant Reed conducted intake interviews with newly arrived prisoners. Appellant was alone with the officers, and remained handcuffed while they questioned him. As soon as appellant said "he needed to lock up"[3] and something to the effect of "they're going to stab me," the officers asked appellant "who's going to stab you?" Appellant said he could not or would not say who was going to do so. (3RT 612-614.) White could not recall "exactly what other questions were asked" before 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.)

2. Mr. Corrieo's attack on appellant was "state action"

Respondent submits that the coercion claim should be rejected because Mr. Corrieo because was "not a state actor" when he assailed appellant. The prosecutor made the same argument in the court below,

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

averring that the only compulsion to confess was not state action, but rather "an angry man facing the individual who killed his mother and his sister, . . . operating on his own interests." (3RT 633.) He claimed that there was "no state action anywhere here for voluntariness purposes." (3RT 634.)

The trial court's decision is consistent with the court having accepted that prosecutorial argument. This is one of a couple of arguments with which the State led the trial court to make critical errors of fact and law.

Prison administration is a state function. Individuals who carry out any part of that function, whether as employees of the state or as volunteers or independent contractors, are "state actors." (*West v. Atkins* (1988) 487 U.S. 42 [private physician providing medical care to prisoners is state actor]; *Florer v. Congregation Pidyon Shevuyim, N.A.* (9th Cir. Wash. 2010) 603 F.3d 1118, 1122-1127 [surveying case law on state action by prison religious and administrative service providers]; *Montano v. Hedgepeth* (8th Cir. Iowa 1997) 120 F.3d 844, 851 [administrative and managerial tasks performed by minister in state prison fairly attributable to state]; *Street v. Corrections Corporation of America* (6th Cir. 1996) 102 F.3d 810, 814 [warden, corrections officer and detention facility run by publicly-held corporation were acting under color of state law because operating prison is "traditional state function"];*Conner v. Donnelly* (4th Cir 1994) 42 F.3d 220, 225 [private

physician treating prisoner under referral from prison physician is state actor]; *Phelps v. Dunn* (6th Cir. 1992) 965 F.2d 93, 102 [volunteer minister serving as prison chaplain].)

This is so even where the employee or other functionary is, as the prosecutor said of Mr. Corrieo, "operating on his own interests" rather than pursuing his proper assignment. If the government gave him the access he utilized in committing his misconduct, his action was "state action" as a matter of law. *(McDade v. West* (9th Cir. Cal. 2000) 223 F.3d 1135, 1138-1141 [clerk used access to data]; *United States v. Christian* (7th Cir. 2003) 342 F.3d 744, 750-752 [officer insulted by racist remarks of prisoner had access to receiving area of jail]; *Walker v. Taylorville Correctional Center* (7th Cir. 1997) 129 F.3d 410, 413 [prison counselor sexual harassment of prisoner "possible only because [counselor] had access to [prisoner] in his cell and in the shower area as a result of her official position."].)

Like the individual defendants in those cases, Mr. Corrieo was employed to carry out a state function. If not for that employment, he could not have done what he did and put appellant in deadly fear upon arrival at the prison. As in the court below, respondent offers no citations to any body of law defining state action or actors or saying that Corrieo's personal

motivation or circumstances makes his action unattributable to the state. Respondent cites cases in which a co-defendant or a jailhouse informant who was not employed or asked to carry out any state function elicited a confession (RB 31) but offers no authority discussing elicitation of a confession by the coercive action of a prison functionary.

Finally, respondent argues:

> Although Mr. Corrieo was initially working as a clerk in the receiving area under the supervision of Officer White when appellant arrived at the prison, Mr. Corrieo discontinued acting in his clerk capacity as soon as he saw appellant. Immediately, Mr. Corrieo informed officer White as to why he could no longer continue his duties. (3 RT 594-595, 602-603.) Officer White had no arrangement with Mr. Corrieo to have him speak with appellant and did nothing to encourage appellant to speak with him. . . . To the contrary, *Officer White immediately removed Mr. Corrieo from the receiving area and placed him in the property room so that he would not have contact with appellant.* (3 RT 595; 11 RT 3048-3057-3058.) Officer White then left to speak with Lieutenant Reed. (13 CT 2231.) Mr. Corrieo sought out appellant's location from a co-worker, not Officer White (11 RT 3038.) Mr. Corrieo then reacted to having some limited access to the suspect in his relatives' murders and took that opportunity to threaten him. (3 RT 595, 602-604.) At that point, Mr. Corrieo was acting on his own behalf, not as an agent for *the correctional officers who did all they could to properly deal with the chance encounter between Mr. Corrieo and appellant.* (13 CT 2231; 3RT 595, 602-605; 11 RT 3048, 3057-3058.)

The italicized claims are clearly at odds with the facts. Officer White did not "remove" Mr. Corrieo from the receiving area or "place" Mr.

Corrieo in an area where he could not have contact with appellant. He simply told Corrieo to go to an adjacent area in the same building -- described by White as "outside the door" of the receiving area and by Corrieo as "the property room" – and "stay right there" while White left to speak with the lieutenant. (RT 595, 603.) White's response to Corrieo's disclosure was obviously that of a supervisor dealing with a trusted employee rather than that of a prison guard responding to a prisoner. If Corrieo had been "removed . . . so as not to have contact with appellant " none of what followed could have happened.

Furthermore, respondent's argument is inapposite for two reasons.

First, the state's responsibility for an employee's conduct does not turn on whether other state actors were negligent in hiring or supervising him. None of the cases deeming an individual actor to be a state actor (discussed in the preceding section) involves any allegation that the offensive actor's conduct was "attributable to" his supervisors or to the people who gave him a state function. The issue is whether the misconduct is attributable to the state, not whether it is attributable to any particular individual .

Second, the court must consider the "totality of the circumstances" surrounding a confession in determining whether the subject's will was

overborne. Those circumstances include factors that may have made the defendant particularly susceptible, including those not known to the interrogators. (See *Arizona v. Fulminante, supra,* 499 U.S. 279, 286 fn.2 [listing relevant susceptibility factors not relied on by the state court, including psychiatric hospitalization and request for protective custody during prior term of incarceration].) Corrieo stood outside appellant's walled holding cell and displayed his knowledge of appellant's name and those of the victims in his pending charges before declaring appellant to be "a dead man." He did not identify himself. Appellant was made to feel that he was the target of a group of prisoners poised to attack with their many tentacles in New Folsom prison. This is a "circumstance"surrounding the confession that cannot be ignored.

3. The correctional officers' questioning of appellant coerced his confession by implying that the officers could not or would not protect appellant from inmate violence unless he answered their questions

Corrieo's status notwithstanding, appellant's confession was the product of coercive state action. The correctional officers were "state actors." Their persistent questioning of appellant about his fear of inmate violence implied that they could not protect appellant from becoming

victimized unless he answered their questions. Their behavior is thus analogous to that of the FBI informant who was held to have coerced the confession in *Arizona v. Fulminante* (1991) 499 U.S. 279, 288.

Respondent argues that this case is distinguishable from *Fulminante* in that "the officers made no promises or threats to appellant to prompt his confession. For example, the officers did not tell appellant they would put him in segregated housing only if he told them about the charges pending against him." (RB 38.)

The fact that the officers did not say what they would or would not do if appellant did not make additional disclosures does not distinguish this case from *Fulminante*, where the informant simply said, "'You have to tell me about it,' you know. I mean, in other words, 'For me to give you any help.'" (Id., at p. 283.) Like the correctional officers here, the *Fulminante* informant simply said what the officers implies here, i.e., that he truly needed to know what the defendant had done in order to help him avoid the attacks he feared.

Respondent also suggests that our case is distinguishable from *Fulminante* in that the correctional officers "were completely unaware of Corrieo's threat" when they questioned appellant. (RB 33.) That is not entirely true. Mr. Corrieo made the officers aware that appellant was *the*

suspect in the murder of Corrieo's mother and sister, and that Corrieo believed appellant to be guilty of those crimes. (3RT 594-595, 602-603.) The officers knew Corrieo was angry and believed he could not keep from acting on that anger in appellant's presence. (3RT 654-655.) Lieutenant Reed directed that Corrieo be locked up accordingly. Clearly, the officers knew that there was a "credible threat" of inmate violence against appellant when they interviewed him, even if they did not know that Corrieo had already verbalized a death threat to appellant while White was consulting Reed about the situation. Indeed, the prosecutor conceded in oral argument to the jury that White and Reed knew from appellant's statements that appellant had been threatened, and "White knew that Corrieo was the one who probably threatened him." (13RT 3480.)

Respondent also tries to distinguish this case from *Fulminante* on the theory that we have no evidence of a "direct intent by government officials to obtain the incriminating statements ...". (RB 38.)

The trial court espoused a similar viewpoint in its written opinion, which emphasized the court's belief that defendant failed to "carry his burden" of proving that the officers wanted something more than prison safety and security.

Both respondent and the trial court overlook White's written report

of the episode, which suggests that getting an incriminating statement was indeed the goal, or at least one of the goals of the interview. White wrote just one thing about what appellant said in the interview, i.e., that he "admitted that he had in fact killed two Hispanic people." (13CT 4946)

Moreover, the argument is off base as a matter of law. Contrary to the prosecutor's misleading arguments in the court below, the Supreme Court of the United States has made clear that the questioner's intent to obtain incriminating statements cannot be determinative of a Fifth Amendment claim, particularly where, as here, the official actor's putative intent was to rescue or protect a person in danger. (*New York v. Quarles* (1987) 467 U.S. 649, 655 fn. 5 [questioning of prisoner for public safety purposes rather than incrimination may not require *Miranda* warnings, but the response is inadmissible if "coerced under traditional due process standards"]; *Id.,* at p. 656 [officer's subjective intent to question only for public safety purposes not determinative of public safety exception to *Miranda* because "different police officers in similar situations may act out of "a host of different … and largely unverifiable motives" (*ibid.*), and the legality of their conduct "should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer"]; *Rhode Island v. Innis* [(1980) 446 U.S. 291] at 301

[officer's subjective intent to incriminate not determinative of whether "interrogation" occurred]; *People v. Davis* (2009) 46 Cal. 4th 539, 593 [basing rescue exception to *Miranda* on evidence that rescue was "the primary purpose and motive of the interrogators" disapproved as inconsistent with *Quarles* and other Supreme Court decisions] .)

Respondent also overlooks the persistence with which the officers questioned appellant. After asking appellant "who" was going to stab him, and hearing appellant declare that he could not or would not say, White kept pushing, believing that his pertinacious behavior was justified. As he explained at the hearing,"that's not an uncommon response from inmates if they tell you that they're in danger and you make an inquiry as to who it is, they often say . . . something like that . . . 'cause they're afraid of what -- if it gets back to the person who threatened them originally, that they told the officers, then it would just be worse for them, at least from there -- that's their idea of it." (3RT 614.) White could not recall "exactly what other questions were asked" prior to the fateful "Why are they going to stab you." He simply recalled that he and Reed were "*trying to get him to divulge* who was going to stab him." (3RT 614) In White's view, overcoming appellant's will was appropriate. Coercive governmental action served

some greater good.

Respondent also argues that this case is distinguishable from *Fulminante* in that there is no causal "connection between Mr Corrieo's threat and appellant's confession to the correctional officers." (RB 38.) The causal connection between the threat and the confession is evident not only in the close temporal relationship between the two, but also in appellant's statements to the officers about his need for locked housing and his belief that he was a target for inmate violence. His fearful statements prompted the officers to ask questions, the last of which ("Why would anyone want to stab you?") was squarely answered with the confession: "I killed two Hispanic people". Respondent does not and cannot claim that appellant's confession was volunteered or spontaneous, like that of the mentally ill defendant in *Colorado v. Connelly* (1988) 479 US 157. [4]

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[4] Respondent cites *Connelly* for the proposition that "coercive police activity" is a "necessary predicate for a finding that a confession is involuntary within the meaning of the Due Process Clause of the Fourteenth Amendment." (RB 30) Two sentences later, respondent seems to acknowledge that *police* activity means *government* activity rather than that of police officers per se. (RB 31.) The issue in *Connelly* was the admissibility of a confession that a defendant aggressively volunteered to police officers and then sought to suppress on the theory that the constitution prohibited prosecutorial use of a confession produced by mental illness. The Supreme Court held that the flaw in the state court decision under review was a failure to "recognize the essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the other." The Court also noted that its "'involuntary confession' jurisprudence [was] entirely consistent with the settled law requiring some sort of 'state action' to support a claim of violation

Finally, respondent claims that appellant was "a sophisticated criminal who had been properly arrested, indicted, arraigned, appointed counsel, and spent 16 months in prison on another conviction by the time he reached C.S.P Sacramento." (RB 39.) There is no evidence that appellant, imprisoned at age 19 for a gang-related assault, was a "sophisticated criminal" let alone a man of such steeliness as to escape an ordinary inmate's despair at being declared dead on arrival by someone who had the superior access that Mr. Corrieo enjoyed at New Folsom Prison. The officers gave appellant no *Miranda* warnings, and no sympathy when he appeared afraid to say who had threatened him.

The record is clear that appellant was not inclined to confess, boast, or speak causally about the Corrieo murders. Numerous previous interviews of appellant by Contra Costa County authorities had produced no confession. No one adduced evidence that appellant boasted that he killed anyone, nor that he spoke casually of such things. No one suggested that anything other than terror caused appellant to admit killing two Hispanic people after he was declared dead on arrival by an Hispanic inmate clerk. On the contrary, the prosecutor touted the seriousness of Corrieo's threat and appellant's terror in arguing that appellant indeed "admitted" to killing

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of the Due Process Clause of the Fourteenth Amendment."

two Hispanic people just as Officer White's report said. (13RT 3480.)

Contrary to respondent's claim, appellant was not prepared to withstand or understand whatever came his way when he arrived at the prison. There is no evidence that he was informed that Mr. Corrieo was the intake clerk at Folsom Prison or that he would face any inmate threats on arrival. The prosecution had the burden of proof on the voluntariness issue, and presented no evidence as to when appellant was allowed to sleep or given food or access to his appointed counsel while being moved from prison to prison for institutional security reasons. Respondent's present assertion that there is "nothing to indicate that appellant ... had been denied any basic needs" (RB 39) is not persuasive. Even if it were lawful to assume that appellant's basic needs were met prior to the interview, respondent's claim that the "correctional officers did nothing to hinder his free will" (RB 39) would remain untenable. The officers made no such claim, and White said much to the contrary.

4. Respondent's "no custodial interrogation" arguments require new and unreasonable determinations at odds with our facts

(a) Miranda Custody

Respondent concedes that the trial court was off base when it

"suggested that a custodial interrogation refers only to a pending criminal charge or a pending criminal investigation. (13CT 5032.)" (RB fn. 7, p. 42.) Ergo, respondent asks this court to "review the correctness of the trial court's ruling, not the reasons underlying it" and "uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked." (RB fn. 7, p. 42.)

Respondent suggests that the correct basis for that ruling may be found in the test for *Miranda* custody announced by the Ninth Circuit in *Cervantes v. Walker* (9th Cir 1978) 589 F.2d 424, 428 which asks whether a reasonable person in the prisoner's position "would believe there had been a *restriction of his freedom over and above that in his normal prisoner setting*." (RB 45, emphasis respondent's.)

The *Cervantes* test does not aid respondent here, for two reasons.

First, the record reveals "restriction of freedom over and above" the "normal prisoner setting" (*Ibid.*). Officer White testified that appellant was handcuffed. He was removed from a holding cell shared with other prisoners by Officer White. He was escorted, alone, to a room used by correctional officers for intake interviews. He remained handcuffed and alone with the officers while undergoing questioning. (3RT 610.)

Second, the United States Supreme Court has defined *Miranda*

custody for incarcerated prisoners, beginning to end: "When a prisoner is removed from the general prison population and taken to a separate location for questioning, the duration of *that separation* is assuredly dependent upon his interrogators" such that the period of "interrogative custody" constitutes *Miranda* custody. *(Maryland v. Shatzer* (2010) 599 U.S. ___ [175 L.Ed 2d 1045,__ ;130 S.Ct 1213, 1225 fn. 8, emphasis in original; *Simpson v. Jackson* (6th Cir. 2010) 615 F.3d 421, 441, fn. 8.)

Appellant was plainly removed from the general prison population and taken to a separate location for questioning. The duration of that separation was dependent upon his interrogators. It was a period of "interrogative custody" and thus was *Miranda* custody under *Shatzer*. (*Ibid.*)

(b) Interrogation

Respondent denies that appellant was "interrogated" within the meaning of *Miranda*, claiming that the correctional officers "could not have reasonably known" that their questions about the source of appellant's fear ("Who is going to stab you?" and "Why are they going to stab you?") would have elicited an incriminating response from appellant because they were "further responses to appellant's safety concerns and his request to be placed in administrative segregation. (3RT 613-614, 619.)" (RB 49.)

Respondent's argument is a non-sequitor. Questions may be "responses to safety concerns" and nonetheless constitute "interrogation."

An interrogation includes any questions "that the police should know are reasonably likely to elicit an incriminating response from the suspect." *(Rhode Island v. Innis*, *supra*, 446 U.S. at p. 301.) The interrogation analysis focuses "primarily upon the perceptions of the suspect, rather than the intent of the police." (*Ibid*; see also *Illinois v. Perkins* (1990) 496 U.S. 292, 296 [stating "[c]oercion is determined from the perspective of the suspect"].) The focus on a suspect's perceptions "reflects the fact that the *Miranda* safeguards were designed to vest a suspect in custody with an added measure of protection against coercive police practices, without regard to objective proof of the underlying intent of the police." (*People v. Haley* (2004) 34 Cal.4th 283, 300.)

There is no exception to the *Innis* definition of interrogation for questions that are responsive to a prisoner's safety concerns. The cases on police questioning of putative crime victims and incarcerated prisoners on which respondent relies (RB 50-51) are not to the contrary. In each, the defendants were not in custody for *Miranda* purposes. Those courts had no occasion to determine whether the questioning was reasonably likely to produce an incriminating response per *Innis*.

Moreover, respondent's argument ignores the United States Supreme Court's decision on "safety concerns" and *Miranda*. In *New York v.*

Quarles, supra, 467 U.S. 649, police "were confronted with the immediate necessity of ascertaining the whereabouts of a gun" which they had every reason to believe that a rape suspect had just removed from his empty holster and discarded in a supermarket. (*Id.,* at p. 657.) Police asked the defendant, then in custody, where the gun was located. The Court agreed that the question was justified by objectively reasonable concerns for public safety, and, nevertheless, it was custodial interrogation under *Miranda. (Id.*, at p. 655.) Rather than redefine "interrogation" to exclude questioning responsive to immediate public safety needs, the Court authorized police questioning responsive to reasonable public safety concerns, sans *Miranda* warnings, if there exists an immediate public safety necessity to question the prisoner.

Respondent does not acknowledge *Quarles,* nor claim that the officers had any immediate necessity for the information they sought, much less a need related to *public* safety. Likewise, respondent never acknowledges the rescue doctrine, i.e., the exception to the *Miranda* warning requirement developed by California courts and applied where officers have an immediate need for answers to locate and rescue a crime victim. (See *People v. Davis, supra,* 46 Cal. 4th 539, 593 [discussing and refining rescue doctrine case law in California].) The cases construing the rescue doctrine may be particularly instructive, and helpful in understanding

how the trial court erred.

In *People v. Riddle* (1978) 83 Cal.App.3d 563 and its progeny, lower appellate courts articulated a three-part test to determine whether questioning of prisoners, *sans Miranda* warnings, was justified by the need to rescue an innocent person: "1. Urgency of need in that no other course of action promises relief; [¶] 2. The possibility of saving human life by rescuing a person whose life is in danger; [and] [¶] 3. Rescue as the primary purpose and motive of the interrogators." (*Riddle, supra*, 83 Cal.App.3d at p. 576.)

In *Davis*, this Court disapproved of that line of decisions insofar as it called for focus on the officers' subjective good intentions. *(People v. Davis, supra,* 46 Cal.4th 539, 594, fn. 4.) This Court explained:

> Reliance on Sergeant Meese's motivation was consistent with the test set forth in the Court of Appeal's decision in Riddle, the third prong of which, as previously mentioned, considers whether rescue is "the primary purpose and motive of the interrogators." (*Riddle, supra*, 83 Cal.App.3d at p. 576.) But this court has never adopted the Riddle test in determining applicability of the rescue doctrine. And that test's consideration of the motivation of the interrogating officer has been undermined by the high court's statement in *Quarles* (decided after *Riddle*), that the applicability of the public safety exception, which is analogous to the rescue doctrine, "does not depend upon the motivation of the individual officers involved." (*Quarles, supra,* 467 U.S. at p. 656.) A subjective test, the high court noted in *Quarles,* would be problematic because different police officers in similar situations may act out of "a host of different ... and largely

> unverifiable motives" *(ibid.)*, and the legality of their conduct "should not be made to depend on post hoc findings at a suppression hearing concerning the subjective motivation of the arresting officer" *(ibid.)*. In determining the applicability of the *Miranda* rule, the high court has generally frowned on the use of subjective tests. [Citations.] (*Davis, supra,* 46 Cal.4th 539, 593-594.)

Thus, while the trial court's focus on an officer's subjective intentions was understandable when appellant's case was tried, affirming the ruling would require identification of evidence of an *objective* need for *immediate* answers to protect human life.

No evidence of any immediate need to get any information from appellant was adduced in appellant's trial court. On the contrary, Lieutenant Reed testified that his protocol for housing prisoners who express fear of being attacked by other inmates is the same whether the inmate identifies his enemies by name, by motive, or not at all: he must assign Ad-Seg housing, and let the prison's Classification Committee determine the necessity for that housing, and address any other inmate safety concerns, at some later time. (3RT 693, 696.) Officer White testified that they had a block set aside for prisoners with known enemies, but did not claim that they needed to know whether appellant knew his enemies in order to decide whether to put him there. (3RT 611-612.) He also testified that "it was not in my job to basically interview the inmates for

housing. That was the lieutenant's job. The only questions I asked them was as I was processing and identifying inmates off the bus I would ask their gang affiliation because I needed to keep the different gangs separate in the different holding areas in R. and R., and that was about the limit of my interviewing techniques and responsibilities." (3RT 616-617.)

This testimony also belies respondent's claim that "the officers needed to ask some questions for the purpose of determining whether there was any specific or immediate harm to appellant that needed to be addressed beyond placing him in administrative segregation, as well as the extent of the segregation, including yard exercise privileges." (RB 50.) The officers denied having any need, or any authority, to determine anything beyond appellant's immediate placement.

Respondent attempts to distinguish *People v. Morris* (1987) 192 Cal.App.3d 380, where a jailer inquired about a defendant's pending charges and quickly obtained a confession that the Court of Appeal deemed inadmissible under *Miranda* and *Innis*: "Unlike the defendant in *Morris,* it was appellant who sparked the correctional officers' questions about who and why someone was going to stab him . . .". (RB 53.) But just one page earlier, respondent notes that the defendant in *Morris* had appeared "upset, nervous and crying" during the booking process (RB 52), phenomena that

no doubt "sparked" the concerns about safety that lay behind his jailer's questions.

Moreover, nothing in *Morris,* or in the United States Supreme Court decisions that *Morris* applies, suggests that questions "sparked" by concern for a defendant's safety fall outside *Miranda.* On the contrary, the *Morris* court specifically noted that "police may ask whatever the needs of jail security dictate. However, when police know or should know that such an inquiry is reasonably likely to elicit an incriminating response from the suspect, the subject's responses are not admissible against him in a subsequent criminal proceeding unless the initial inquiry has been preceded by *Miranda* warnings." (*People v. Morris,* supra, 192 Cal.App.3d at p. 390.)

Respondent also contends that *Morris* is distinguishable in that the defendant in *Morris* was seen crying shortly prior to the confession and "there is no evidence that appellant was visibly shaken during his brief meeting with the correctional officers." (RB 54.) There was no testimony about how appellant looked, but his words clearly indicated that he was fearful. Officer White inferred that he had been threatened. Indeed, White believed that appellant was afraid to disclose the identity of the person who threatened him.

Ergo, respondent errs in claiming that "appellant undoubtedly

perceived the correctional officers' questions as being *responsive* to *his* idea to be put in administrative segregation, and he clearly knew that their questions were not aimed at uncovering any information about his pending crimes under such circumstances." (RB 54.) There is no evidence that appellant had any such certainty about the officers' goals, nor that any such certainty would be reasonable. Appellant had just heard himself declared dead by a man who knew his name and the victims' names, and was able to circulate freely while appellant remained caged. The officers questioning of appellant was pertinacious, and likely added to his fears. Appellant may have correctly perceived that the officers knew more than they were telling him about the identity of his likely assailant. Obviously, appellant was not far off base if he sensed that Officer White would be satisfied if appellant said what White noted in his report, i.e., that he "admitted that he had in fact killed two Hispanic people." (13CT 4946.)

Finally, respondent contends that "appellant's case is more analogous to *People v. Claxton* (1982) 129 Cal.App.3d 638 (overruled on other grounds in *People v. Fuentes* (1998) 61 Cal.App.4th 956, 969) where the court found no interrogation." (RB 54.) Respondent concedes that the trial court misread *Claxton* to involve questioning by a probation officer, when in fact the person who did the questioning in that case was not any

type of "officer." (RB 54, fn. 8.) 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.) Mr. Claxton knew this employee from a prior commitment, sought the employee out, and initiated the conversation. Respondent contends that the question asked of young Mr. Claxton ("what did you get yourself into?") is like that of Lieutenant Reed in asking appellant "what his crime was" in that the latter "did not require an incriminatory response." (RB 55.) Respondent cites no authority for the proposition that a question that does not require an incriminating response cannot constitute interrogation, and appellant knows of none. Respondent also ignores the distinction between the correctional officers and the old acquaintance who obtained the confession in *Claxton*, and offers no theory as to how Officer White's question ("why would they [or anyone] want to stab you?") resembles anything asked in *Claxton*.

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." (13 CT 4946, emphasis added.) On the day immediately following the date of this report, Corrieo'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 some important information regarding this case" and appellant, which information her brother did not wish to discuss on the telephone. (13CT 4941.) When Ingersoll came to interview Mr. Corrieo, he found that Corrieo had heard from Officer White that appellant had asked for administrative segregation "because his life was threatened" by an unidentified person "because he killed two Hispanic women." (13CT 4942.) Corrieo also told Ingersoll that White had written a report on the statement and that Lieutenant Reed was present when the statement was made. (*Ibid.*) Ingersoll 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.*

5. Prosecutorial use of the confession violated the Right to Counsel and *Massiah*

The parties agree that the Sixth Amendment prohibits the State from deliberately eliciting incriminating statements from a formally-charged defendant in the absence of counsel, but disagree on the meaning of the term *deliberate elicitation.* Respondent contends that it cannot be found here because "the correctional officers were merely asking questions that were responsive to appellant's request to be placed in administrative segregation and his fear of being stabbed by an unidentified assailant or assailants." (RB 57.) Respondent relies on *State v. Kemp* (1996) 185 Ariz. 53; 912 P.2d 1281 and *People v. Lucero* (1987) 190 Cal.App.3d 1065.

Neither case is on point. In *State v. Kemp*, the defendant made admissions to two different correctional officers on two different occasions. On the first occasion, the officer asked the defendant why he was in protective custody. (185 Ariz. at pp. 57-58.) The appellate court opinion does not indicate that any questions preceded the latter admission to a different correctional officer. There is also no indication that either of the

Respondent's reliance on *People v. Lucero, supra*, 190 Cal.App.3d 1065, is similarly misplaced. The putative state actor who elicited the admissions in *Lucero*, a suspected crime partner, "did not ask questions of Lucero or otherwise seek particular, incriminating statements from him." (*Id.*, at p. 1068.)

In our case, the officers admitted that they were purposefully questioning appellant, and trying to make appellant "divulge" (in Officer White's words) any knowledge he had of the identity of the person or persons who threatened him. They deliberately elicited appellant's statements. And because of their prior talk with Corrieo, they had to have known that any statements appellant made about why he would be stabbed were likely to be incriminating. "[P]roof 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* (1985) 474 U.S. 159, 176 fn.12.)

Respondent cites *Bey v. Morton* (3rd Cir 1997) 124 F.3d 524, 531, in arguing that appellant "initiated" a conversation with government agents when he told them that someone was going to stab him. (RB 61.) In *Bey*, the defendant admitted his responsibility for the crime for which he had been sent to prison in several casual conversations with a prison guard.

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 . . ." . (*United States v. Furrow* (C.D. Cal 2000) 2000 U.S.Dist. LEXIS 21771.) Here, unlike in *Bey*, government agents initiated the contact with the defendant, brought him in handcuffs to an interview room, and asked the questions that elicited the confession. One of those agents promptly reported their receipt of a confession to Sergio Corrieo, who had his sister call in the prosecuting authorities on the following day. (13CT 4941-4942.)

Respondent attempts to distinguish *United States v. Furrow* (C.D. Cal 2000) 2000 U.S.Dist. LEXIS 21771 and *Estelle v. Smith* (1981) 451 U.S. 454, by noting that the defendants in those cases "had been charged with a capital offense at the time" of the examinations and "it was clear that future dangerousness would be a specific issue at their sentencing. Here, the correctional officers' intake interview of appellant was aimed at finding appropriate housing ...". (RB 61.)

This argument fails to acknowledge that appellant was facing capital charges, and that Officer White's question ("Why would they stab you?") is

hardly distinguishable from the ultimate question at every capital defendant's sentencing: why does the defendant deserve a sentence of death?

Moreover, the interviewers in *Furrow* and *Estelle v. Smith* were not aiming to discover future dangerousness for capital sentencing purposes. 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 about his problems with staff. In *Estelle v. Smith,* the examiner's aim was to develop information for a court-ordered mental competency evaluation.

Notably, respondent's argument on the *Massiah* issue suffers from the same problem discussed in the *Miranda* context. Respondent insists that constitutional protections ought not apply where the interviewer sought to develop information for a purpose other than criminal prosecution, and the United States Supreme Court has repeatedly rejected that view. "[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*

(1985) 474 U.S. 159, 180.)

Moreover, respondent's arguments on the *Massiah* claim are at odds with *Furrow* and *Estelle v. Smith* in their concern with whether the individual prosecuting attorney, or interviewer, knew or should have known that the latter would develop evidence for the former. The propriety of prosecutorial use of incriminating statements secured by other state actors during questioning of a represented defendant in the absence of counsel does not turn on the individual prosecutor's involvement in securing the statements, let alone what any individual state actor knew or should have known. When multiple government actors each play a small part in creating a situation likely to produce a confession from a defendant in the absence of counsel, resulting statements are excluded under *Massiah* even if no individual government actor appears blameworthy. As the *Furrow* court explained:

> Although Dr. Burris did not "deliberately set out to secure information for use in a pending prosecution," [fn] "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." [fn] 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." *(United States v. Furrow* (C.D. Cal. 2000) 2000 U.S. Dist. LEXIS 21771, 19-22.)

6. The use of the confession evidence at trial was not harmless

In claiming any error was harmless, respondent overlooks the centrality of confession evidence, and its particular importance at appellant's trial. 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.)

Respondent also ignores the template that the United States Supreme Court established in *Fulminante* for evaluating the impact of an erroneously admitted confession. In holding that the admission of Mr. Fulminante's confession evidence was not harmless, the Court emphasized 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.)

Respondent does not deny that those two factors are prominent in our case as well as in *Fulminante*. Instead, respondent recites the circumstantial evidence connecting appellant to the crime, and suggests that the known perpetrator, David Ross, was made credible by the evidence that he promptly told his sister (Bernadette) and his fence (West) that appellant had killed the women. Not so. Ross denied any recollection of telling his sister about the crime prior to his arrest. He testified that he made pre-arrest statements about the crime only to his fence (Mr. West), his girlfriend (Kari Meran) and his friend, Josh Adcock. (2RT 273.) None of those individuals testified. A transcript of a police interview of Josh Adcock included in our record reveals that what he heard from Ross was not consistent with Ross' testimony against appellant. As the prosecutor well knew, Ross told Adcock that he committed the robbery with two other men that Ross and Adcock knew, not Lolohea or appellant, and that both of Ross' accomplices were together inside the house when Ross was in the car and heard the shots fired at the victims. (3CT 969-972.) Ross told a

different story every time he spoke. 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 RT 4292.)

Respondent does not acknowledge the prosecutor's heavy reliance on the confession evidence, though it is hard to overlook. 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 concluding 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 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 3553-3554.)

In his rebuttal argument, the prosecutor 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 1362-1364.) 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.) Once appellant became the designated shooter in Ross's story of the crime, the Corrieo family and the State shared an interest in seeing appellant's guilt confirmed by other evidence. The family and the State advertised their offer of a $50, 000.00 reward for supporting evidence, and confirmed its continued availability after the arrest of Ross and Lolohea and before appellant arrived at New Folsom Prison. [5] The jury, having heard nothing about the open reward offer at the time the confession evidence emerged from Folsom, undoubtedly accepted the correctional officers' testimony as solid confirmation of appellant's guilt, as the prosecutor argued that they should.

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[5] As revealed in records that remained sealed and undisclosed to appellant until after he was sentenced to death, 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.) 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".)

In all cases governed by the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24, the test "is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in this trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) "Consistent with the jury-trial guarantee, the question ... the reviewing court [is] to consider ... is not what effect the constitutional error might generally be expected to have upon a reasonable jury, but rather what effect it had upon the guilty verdict in the case at hand." (*Ibid.*)

The prosecutor observed his witnesses, and the jury. He knew his evidence better than we can know it from reviewing the record. He concluded that the confession was critical to his case. "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.)

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.) 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 RIGHTS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS

A. Respondent's forfeiture claim fails

Respondent contends that some of appellant's arguments in support of this claim constitute a separate claim of "prosecutorial misconduct" which was forfeited because no "prosecutorial misconduct" basis for objection was articulated at trial. This is a red herring.

As stated in appellant's argument heading, appellant claims judicial error in permitting the prosecutor to lead accomplice-witness David Ross with an argumentative question that implied personal belief in the ability of a plea bargain to ensure the truthfulness of Ross's testimony.

Defense counsel stated two appropriate grounds for objection – i.e., that the question was leading and argumentative. The trial court promptly

overruled the objections, explaining only that the court saw a permissible "purpose" in what the court acknowledged only as a "somewhat leading" question. Where the defendant's stated objection to the question "was promptly overruled, his failure to request a curative admonition was justified. [Citations.]" (*People v. Stitely* (2005) 35 Cal. 4th 514, 559-560.)

Thus, even if appellant's present claim is indeed one of "prosecutorial misconduct" that claim "has been preserved for appeal." (*Ibid; People v. Zambrano* (2004) 124 Cal. App. 4th 228, 236 [upon overruling of objections to the prosecutor's "were they lying" questions on the grounds of speculation and relevance, "defendant is excused from making a timely objection or requesting a curative admonition regarding the prosecutor's alleged misconduct because it appears both would have been futile."] .)

Under these circumstances, "a request for a jury admonition or the lodging of further objections would have been futile. Additional objections were not necessary to preserve the claim. [Citation.]" (*People v. Chatman* (2006) 38 Cal. 4th 344, 380 [overruled objections to "were they lying" questions as speculative, argumentative and irrelevant preserved appellate claim of prosecutorial misconduct].)

The same holds true as to any objection counsel could have made to the prosecutor's assertions about the plea bargain's power in closing argument. Respondent misplaces reliance on *People v. Bemore* (2000) 22 Cal.4th 809, 854, *People v. Davenport* (1995) 11 Cal.4th 1171, 1214, and *People v. Williams* (1997) 16 Cal.4th 635, 673. (RB 72.) In all three cases, the defense stated no legal ground for objection to the prosecutor's penalty phase argument or leading questioning at trial, raised a variety of objections for the first time on appeal, and pointed to no prior ruling of the court or other justification for failing to object at trial. [6]

Here, the trial court's prior ruling provides clear justification for refraining from objecting to the prosecutor vouching for the truth-ensuring power of Ross' plea bargain during closing argument. The trial court's decision overruling defense objections to the prosecutor's leading and

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[6] Mr. Bemore claimed that "the prosecutor's remarks violated his privilege against self-incrimination because they alluded to his failure to take the stand at the penalty phase, confess guilt, and express remorse. [Citations.] Defendant also asserts the prosecutor committed *Boyd* error *(People v. Boyd, supra*, 38 Cal. 3d 762, 771-776) by invoking lack of remorse as a nonstatutory aggravating factor, and *Davenport* error (*People v. Davenport, supra*, 41 Cal. 3d 247, 288-290) by misrepresenting the absence of mitigating evidence of remorse as aggravating. Related federal and state due process claims are based on the notion that the prosecutor injected an irrelevant and impermissible factor into the penalty determination. [Citations.]"(*People v. Bemore, supra,* 22 Cal. 4th 809, 854.)

argumentative question permitted the prosecutor to assert the efficacy of a plea bargain's truth-telling provision during the direct examination of his witness. That ruling necessarily implies that the same prosecutorial argument will be permitted at the portion of the trial when argument is generally proper. Objection during closing argument would have been futile. (See *People v. Johnson* (2004) 119 Cal. App. 4th 976, 984 [overruling of defense objection to prosecutorial argument paraphrasing court's preinstruction shows futility of any objection to the latter].)

B. Respondent's arguments on the merits fail

Respondent argues that the trial court did not err in overruling defense objections to the prosecutor's leading and argumentative direct-examination question asserting, in the presence of the jury, that David Ross, the witness to whom he gave a plea bargain, understood that the plea bargain required only that he tell the truth.[7]

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[7] To quote:

> PROSECUTOR: 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.

(RB 65-67.) Respondent first claims that the question was not argumentative because "[t]he question had not already been asked and answered [and] did not call for an answer that would have contradicted anything to which Ross had previously testified. The question merely sought to elicit facts within Ross' knowledge ...". (RB 67.)

Respondent's argument is hard to fathom. Respondent offers no authority suggesting that the cited facts reveal that the prosecutor's question was not as argumentative as appellant asserts. Nor does respondent identify anything wrong with the definition of "argumentative" set forth by Jefferson and Witkin, and by this court in *People v. Williams* (1997) 16 Cal.4th 635, 672, and repeated in appellant's opening brief: a question is argumentative and thus improper when it seeks no new information, but rather seeks only

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> 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. (10RT 2677-79.)

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; AOB 86.) Respondent's failure to meet the law on argumentative questioning requires no further comment.

Respondent also claims that "the prosecutor's question was not leading." (RB 67-68.) Although respondent acknowledges the law defining leading questions to include any " question that suggests the answer to the witness" (RB 67-68) respondent offers no authority or logical path to the conclusion that the question at issue here escapes that definition. The fact that the challenged question "merely required Ross to answer `yes' or `no,'" (RB 69) does not mean that the question did not suggest the answer the prosecutor desired. Likewise, respondent's claim that the question "did not suggest that he *must* answer one way or another" (RB 69, emphasis added) misses the mark. A question is leading if it suggests the response that the questioner needs or desires, without regard to whether the questioner indicates that the deal is dead if the witness gives the wrong answer.

Respondent later alleges "even if the question was leading the

trial court did not abuse its discretion by allowing the prosecutor to ask it if there was no danger of false suggestion. (See *People v. Harris* (2008) 43 Cal.4th 1269, 1285 [finding no abuse of discretion where `the possibility of improper suggestion was remote'].) Ross had already testified during the grand jury proceedings that the prosecutor had promised not to seek the death penalty against him in exchange for Ross's promise to testify truthfully. (1CT 142-144.) Moreover, the written agreement . . . stated that Ross had agreed to tell the truth about the crimes ...". (RB 69.) Notably, Ross's grand jury testimony on this point was also in response to leading questions. Appellant could not object or even attend the grand jury proceedings. But at his jury trial, he was entitled to have his jury see Ross's demeanor and hear him say in his own words what he thought the agreement required of him, and to prevent the prosecutor from substituting his own credibility for that of Mr. Ross on this critical issue at trial. (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.)

Respondent also argues that the jury would not likely reach a different verdict if the objection had been sustained, assuming no

federal constitutional violation occurred. (RB 70.) That assumption is not a fair one. Respondent cites *People v. Hinton* (2006) 37 Cal.4th 839, 865, which involved the use of leading questions on "foundational matters." The defendant did "not assign any prejudice to this sequence, and none can be imagined." (Ibid.) Those are not our facts. Ross's supposed belief that he need only tell the truth to preserve his bargain was not a "foundation" for the introduction of other evidence, but rather a key point to the credibility of his testimony. Absent credible assertions that Ross believed he was free to tell the truth at appellant's trial (even if the truth was that Ross and Lolohea committed the crimes alone) reasonable jurors would reasonably infer that the plea bargain effectively compelled him to "stick to the story" even if it meant lying.

Finally, respondent claims that the challenged question and related closing argument "did not constitute improper vouching. The prosecutor did not give his personal opinion that the agreement ensured the truthfulness of Ross's testimony, nor did he imply that he could verify Ross's testimony ...". (RB 73.) Respondent does not quote or reference much of the prosecutor's closing argument in so

contending. Here is the actual text of the prosecutor's final remarks on Ross:

> David [Ross] 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.)

In the view of the United States Court of Appeals for our circuit, jurors hear the prosecutor vouching for his plea bargain when prosecutors say what the prosecutor said here.

> "[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.)

Accordingly, appellant sees a "reasonable likelihood" that the jury construed or applied the prosecutors remarks – including those stated in the challenged question as well as those in final argument – in "an objectionable fashion." (*People v. Clair* (1992) 2 Cal.4th 629, 663.) One cannot say, with the requisite certainty, that those remarks did not contribute to the verdict.

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

Respondent's long and boilerplate-heavy presentation buries, and often misstates, the basis of appellant's claim: The trial court granted the prosecutor's challenge to death-reluctant Juror W.M. without finding,

expressly or implicitly, that W.M. was biased or substantially impaired. Indeed, the trial court expressly 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. At a bench conference immediately prior to the ruling, the trial court declared:

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

Then, 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.)

Citing *Gray v. Mississippi* (1987) 481 U.S. 648, appellant submits that the grant of the prosecutor's challenge for cause was improper because the trial court correctly found that W.M. was not impaired. 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.

Respondent contends that "contrary to appellant's claim, the trial court did make a finding of substantial impairment with respect to Juror W.M. (8 RT 2166.)" (RB 83) But like the rest of the record, the cited page does not reveal any finding that Juror W.M. was substantially impaired. To the contrary, the cited page is the one where the trial court expressly finds that the prosecutor's challenge of W.M. was not "meritorious" and then committed itself to grant that challenge if it granted a defense challenge to a juror who favored the death penalty.

Furthermore, nothing in our record supports respondent's suggestion that the trial court came to a different appraisal of W.M. based on "further consideration of the record." (RB 84.) The court's finding that the

challenge to W.M. was unmeritorious was announced at the same bench conference at which the court heard the challenge and told counsel that the court would rule as soon as counsel returned to their seats. The decision to excuse W.M. was indeed announced as soon as counsel returned to their seats following the bench conference. (8RT 2166.)

Citing *Uttecht v. Brown* (2007) 551 U.S. 1, 7) respondent claims that a trial court's "granting of a motion to excuse a juror for cause constitutes an implicit finding of bias." (RB 83.) The cited page of *Uttecht* indeed states that the granting of a motion to excuse for cause constitutes an implicit finding of bias. But on the following page, *Uttecht* distinguishes the rare cases where the trial court grants a challenge for cause after expressly finding that the juror was not biased or impaired. "[I]in the typical situation there will be a state-court finding of substantial impairment; in *Gray v. Mississippi* (1987) 481 U.S. 648], the state courts had found the opposite." (*Uttecht v. Brown, supra,* 551 U.S. at p. 8.)

Uttecht thus confirms the Court's continued accord with the general rules of appellate procedure precluding reviewing courts from implying a trial court finding that "contradicts an express recital in the record . . . ." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 349, p. 395.))

"[P]resumptions are indulged to support [the trial court judgment] on

matters as to which the record is silent" (*Denham v. Superior Court* (1970) 2 Cal. 3d 557, 564) but not as to matters on which the record directly speaks. (*People v. Molina* (1994) 25 Cal.App.4th 1038, 1041 [implied findings are deemed made where there are no express findings]; see also *Reid v. Moskovitz* (1989) 208 Cal.App.3d 29, 32 [appellate court will not infer an implied finding was made by trial court where the record shows the trial court expressly declined to make it].)

Respondent also claims that W.M. was in fact impaired by his views (which favored the death penalty but asserted it was used too randomly – RB 79-80) and his doubts about whether he could impose the penalty himself. (RB 80-81.) But respondent cites no authority allowing a state appellate court to make its own judgment of the evidence after a trial court finds that a death-reluctant juror was not actually impaired. On the contrary, the authorities cited by respondent compel this court to accept the trial court's "determination as to the juror's state of mind", particularly where, as here, the juror's statements are "conflicting or ambiguous." (RB 81, citing *People v. Mayfield* (1997) 14 Cal.4th 668, 727 and *People v. Beeler* (1995) 9 Cal.4th 953, 989.)

Furthermore, the trial court's express finding that W.M. was not substantially impaired accords with the evidence and the governing law.

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* (2004) 33 Cal.4th 425, 447, further discussion at AOB 95-98.)

Finally respondent suggests that removing Juror W.M. was appropriate insofar as the defense challenge that the trial court deemed equally unfounded, i.e., that of automatic-death-juror R.H. -- was appropriately granted. Respondent claims Juror R.H. was "just as equivocal as Juror W.M. [citations] and just as much a deficient juror given his fixed ideas ... for the death penalty and against life ...(RB 85.) We disagree. Unlike Juror W.M., Juror 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.[8]

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[8]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

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 an awful lot of time on that juror for not getting very much."– 8RT 2165) While it may be that defense counsel and the prosecutor were equally guilty of inefficient voir dire, our constitutional case law does not permit trial courts to reject a qualified death-scrupled

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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.) When 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.*)

juror whenever defense counsel's voir dire of another is disturbingly inefficient. Reversal is required.

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

This court has long held that when a defendant makes an untimely request to discharge counsel and represent 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, 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.*]

Appellant's opening brief argues that the trial court failed to fulfill this obligation. The sole response to the prosecutor's request for a statement of appellant's 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. Appellant's brief also sets forth why he should not be deemed to have invited the error. (AOB 107.)

Respondent asserts that appellant's claim is "not an appealable issue." (RB 90.) Citing a case in which this Court wrote that a defendant may not "complain of error" in a trial court's failure to weigh the *Windham* factors if his *Faretta* motion was granted *(People v. Clark* (1992) 3 Cal.4th 41, 109) respondent seeks to avoid recognition of the error here.

Clark may well be distinguishable here. *Clark* cites *People v. Brownlee (*1977) 74 Cal.App.3d 921, 924, a case in which the claim was rejected based on the invited error doctrine. There, the defendant's lawyer "represented to the court that Brownlee had an absolute constitutional right to act as his own lawyer, and the error, if any, in appointing Brownlee to act as his own lawyer comes within the doctrine of invited error." (*People v. Brownlee*, supra, 74 Cal. App. 3d 921, 933.) As respondent tacitly concedes, there is no basis to find the invited error doctrine applicable here.

And, even if there were a basis for such a finding, this Court would still be able to grant relief in its discretion. "'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.' " (6 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Reversible Error, §36, p. 497, quoting *People v. Williams* (1998) 17 Cal.4th 148, 162, fn. 6.)

Respondent next contends that the trial court "properly granted appellant's *Faretta* motion" insofar as none of the common grounds for denying a *Faretta* motion were apparent. (RB 91-95.) Respondent erroneously claims that "[a]ppellant had not made any prior requests to represent himself or to substitute counsel." (RB 94.) In fact, appellant made at least two attempts to remove appointed counsel prior to trial, one of which was abandoned, and the other denied after a contentious hearing in camera. (1RT 11-14, 21, 59, 71-72.) Appellant also wrote letters to the court stating he had difficulty with his counsel and wished to be granted "temporary pro per" status, but received no response. (2CT 441- 441-442.)

Moreover, the trial court's duty to inquire into the defendant's reasons for seeking pro per status, as declared in *Windham*, does not depend on the appearance of obvious grounds to deny the motion. A trial court that fails or refuses to make an inquiry demanded by *Windham* and goes on to grant the *Faretta* motion has not exercised the required discretion. Put

another way, 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.)

Federal constitutional principles lead to the same result. 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

Appellant's opening brief cites error in (1) the trial court's rejection of appellant's timely request to make the prosecutor disclose, *in limine,* the testimony he wished to offer as victim impact evidence, so that the court could rule out any improper questions or testimony that the prosecutor wished to pursue, and (2) the trial court's refusal to strike that portion of the victim impact evidence respecting a family member's wish to see appellant dead.

Respondent claims the prosecutor's disclosure obligations and duty to give reasonable notice were discharged when he "informed appellant and the trial court that he intended to call Mr. Corrieo as a witness to provide impact witness testimony" at least insofar as the jury had already "heard Mr. Corrieo tell the jury about threatening [appellant] during their brief

encounter ...". (RB 100.)

Respondent apparently assumes the prosecutor disclosed his intent to call Sergio Corrieo before calling him to the stand. That assumption is belied by the record. At the *in limine* hearing, the prosecutor disclosed only that he was considering calling either Sergio Corrieo or one of Sergio's sisters, Lili Williams, "on the matter of victim impact." (13RT 3687.) Despite appellant's specific request to discover the identity of the witness, there is no record of appellant being told that Sergio Corrieo would be called, much less that the prosecutor would ask him any questions about his feelings toward appellant. 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.) 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.

A criminal defendant may request, and a trial court may demand, details of the prosecutor's contemplated approach to "victim impact" testimony when the prosecutor discloses intent to introduce such evidence. (See, e.g., *People v. Carrington* (2009) 47 Cal. 4th 145, 196; AOB 125-128

[review of cases from other jurisdictions mandating detailed disclosure.) "[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* (D. Kan. 2006) 2006 U.S. Dist. LEXIS 14107, 23.)

Appellant appropriately requested detailed disclosure of the prosecutor's game plan by motion in limine. "A motion in limine is made to exclude evidence before the evidence is offered at trial, on grounds that would be sufficient to object to or move to strike the evidence. The purpose of a motion in limine is 'to avoid the obviously futile attempt to "unring the bell" in the event a motion to strike is granted in the proceedings before the jury.' [Citations.]" (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 26.)

The trial court's refusal of appellant's request was unreasonable, particularly in light of the facts known to the court at the time. After hearing Mr. Corrieo's testimony at earlier proceedings, the trial court knew or should have known that there was a special need to hear the details of the prosecutor's victim-impact game plan as soon as the prosecutor said that Mr. Corrieo was being considered as a victim impact witness. The trial court had previously heard Corrieo testify not only about the death threat he

delivered to appellant in prison, but also about his expressed inability to keep himself from acting out his feelings if given access to appellant. That evidence put the trial court on notice of a strong possibility that the contemplated victim impact testimony included a further expression of Sergio Corrieo's personal feelings about the crime, appellant, and the appropriate sentence – all matters that the United States Supreme Court still holds beyond the pale. (See *Payne v. Tennessee* (1991) 501 U.S. 808, 830, fn. 2; *Miller v. State* (Ark. 2010) 2010 Ark 1, 44.)

Respondent also prejudicially misstates appellant's position in claiming that appellant now "asserts he would have rebutted the victim impact evidence had he been provided the details of it in advance of Mr. Corrieo's testimony." (RB 104.) As stated in appellant's brief (AOB 130-131) appellant had no access to the prosecution's compilation of background information on the family, which remained under seal throughout the trial, and thus could not have rebutted the victim impact testimony without that additional disclosure. That compilation, which was unsealed during appellate record correction proceedings, shows that appellant might have been able to reveal a different picture of the family, if given access to that compilation. But the compilation does not show, and appellant does not claim, that all he needed was advance notice of the

details of the victim impact testimony in order to make his case.

Respondent also errs in assuming that appellant's failure to introduce any mitigating evidence or cross-examine Mr. Corrieo shows that appellant had no interest in impeaching Mr. Corrieo. (RB 105.) A defendant may decline to introduce available mitigating evidence because he fears humiliation or pity, and may decline to cross examine a witness simply because he could not prepare to do so effectively under the circumstances. Neither indicates that he did not need or want any of his procedural rights.

Moreover, if the prosecutor had been forced to disclose what he intended to ask Mr. Corrieo, defendant surely could have raised a persuasive objection to any line of inquiry respecting Sergio Corrieo's feelings about appellant. Respondent's contrary arguments do not meet the facts or the governing law.

Respondent claims that the prosecutor's inquiry about Corrieo's prior threat and current feelings sought evidence that was admissible"for the purpose of reminding the jury that Mr. Corrieo was a biased witness." (RB 109.) Respondent relies on *People v. Bemore* (2000) 22 Cal.4th 809, 855, to suggest that a prosecutor may be said to have "anticipated predictable defense argument." (RB 109.) But *Bemore* does not say that a prosecutor may justify a foray into an area of inquiry precluded by federal

constitutional law whenever he anticipates the defense might raise similar facts for impeachment of a victim impact witness. Nor is that a sensible position to take. On the contrary, if the law were as respondent suggests, there would be few if any capital cases in which prosecutors could not justify asking a victim-impact witness if he wants to see the defendant sentenced to death.

Respondent also relies on *People v. Taylor* (2010) 48 Cal.4th 574, 647, where the only objectionable aspect of the testimony was a family member's reference to the defendant as "that idiot" when responding to a proper question. Like *Bemore, Taylor* never held that prosecutors may ask a witness to state an opinion about the defendant or the appropriate penalty. Prosecutorial tactics prohibited by the Unites States Supreme Court in *Booth* and *Payne* must remain off limits to California prosecutors.

When evidence was elicited in violation of the federal constitution, the proper focus is on the role that the evidence actually played in the case as it was tried, not the viability of a case lacking that evidence. As argued in appellant's opening brief, the trial court's refusal of appellant's in limine requests for reasonable notice of the planned testimony effectively precluded appellant from making what should have been a successful objection to at least one aspect of the plan, and from otherwise preparing to

meet the specific evidence that was offered. On this record, we cannot say that the other evidence would have been the same, or that a death verdict would necessarily follow. Penalty reversal is required.

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

Respondent's argument on this point begins by misstating appellant's claim as one of error in failing to "give the proposed limiting instruction." (RB 113.) No one has argued that the trial court should have used the entirety of the instruction on victim impact evidence that appellant proffered.

As appellant pointed out in his opening brief, and respondent nowhere disputes, a request for a special instruction that is otherwise appropriate is not properly refused on the grounds that it is faulty in some particulars. (*People v. Falsetta* (1999) 21 Cal. 4th 903, 924; *People v. Fudge* (1994) 7 Cal. 4th 1075, 1110; *People v. Stewart* (1976) 16 Cal.3d 133, 139-141, further discussion at AOB 134-135.) Respondent's criticism of appellant's proposed instruction on points not raised in his appeal serves

only to obscure the actual issues.

As stated in appellant's opening brief, 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.)

Respondent claims these statements are "not correct." Respondent cites and quotes *People v. Pollock* (2004) 32 Cal.4th 1153, 1195 to state that "`[A] a jury at the penalty phase of a capital case may properly consider *in aggravation*, as a circumstance of the crime, *the impact of a capital defendant's crimes on the victim's family.* '" (RB 117, emphasis respondent's.)

Respondent's quote from *Pollock* is incomplete and misleading. The sentence written by this Court does not begin or end where respondent indicates. Moreover, the portions of the sentence omitted by respondent, and the entire context of the quoted statement, shows that this Court was not addressing this appellant's claim, but rather the propriety of an instruction barring any exercise of sympathy for the victims' families. As stated in *Pollock*:

> The defense requested the following special instruction (Special Instruction No. 16) on victim impact evidence: "Although you have heard testimony from the family and neighbors of Earl and Doris Garcia and you may consider such testimony as a circumstance of the crime, *you must not be influenced by passion, prejudice, or sympathy in that regard.*" The trial court declined to use Special Instruction No. 16, commenting that the point was covered by the instructions the court proposed to give.
>
> `The proposed instruction misstated the law in asserting that the jury, in making its penalty decision, could not be influenced by sympathy for the victims and their families engendered by the victim impact testimony. *Although a jury must never be influenced by passion or prejudice*, a jury at the penalty phase of a capital case may properly consider in aggravation, as a circumstance of the crime, the impact of a capital defendant's crimes on the victim's family, and in so doing *the jury may exercise sympathy for the defendant's murder victims and for their bereaved family members*. (*People v. Stanley* (1995) 10 Cal.4th 764, 831–832 [42 Cal. Rptr. 2d 543, 897 P.2d 481].)[9] The instruction was properly refused as incorrect. (*People v. Pollock, supra,* 32 Cal. 4th 1153, 1195, emphasis added.)

"`It is axiomatic that cases are not authority for propositions not considered.' [Citation.] `The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.' [Citation.]" (*People v. Jennings* (2010) 50 Cal.4th 616, 684.)

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[9] Like *Pollock*, the *Stanley* case presented only the question of whether the sentencer can exercise sympathy for the victims and their bereaved family members.

As respondent ultimately concedes (RB 118-119), 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"].)

When, in *Payne v. Tennessee, supra,* 501 U.S. 808, 827, the Court held that states may choose "to permit the admission of victim impact evidence and prosecutorial argument on that subject" the Court did not 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.

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.)

Respondent nowhere denies that the Eighth Amendment prohibits treating the impact of a capital homicide on survivors as a circumstance in aggravation. In the end, respondent simply claims that appellant's proposed instruction "fails to provide any guidance to the jury in this regard" because "the proposed instruction is confusing, duplicative, and repetitive and had the potential for misguiding the jury due to its inclusion of inaccurate statements of the law." (RB 119.) However valid those criticisms may be as to other parts of the proposed instruction, they are not valid as to appellant's request to tell the jury that victim impact evidence is not the same as aggravation circumstance, and "proof of an adverse impact on the victim's family is not proof of an aggravating circumstance." (15CT 5714.)

Indeed, appellant's suggested language for preventing the jury from mistakenly treating all survivor impact evidence as capital murder aggravation states the rule as plainly as the language recently adopted by the Florida Supreme Court for instructing capital sentencing juries, acknowledging that victim impact evidence was presented to the jury, but the jurors "may not consider this evidence as an aggravating circumstance". (*In re Std. Jury Instructions in Crim. Cases*--Report No. 2005-2, 22 So. 3d

17, 21 (Fla. 2009).)

As noted in both parties briefs (AOB 136, RB 117), the first paragraph of appellant's proposed instruction also requests instruction barring the jury's use of victim impact evidence that is not foreseeably related to the personal characteristics known to the defendant at the time of the crime. (15CT 5714.) Appellant contends that 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* (1991) 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."

Respondent claims that these statements of law are incorrect because "victim impact evidence is not limited to matters within the defendant's

knowledge. (*People v. Pollock*, *supra,* 32 Cal.App.4th at p. 1183; *People v. Carrington, supra*, 47 Cal.4th at pp. 196-197.)" (RB 117.) *Pollock* so holds, and rejects a claim that its holding renders our death penalty law impermissibly vague, but does not address appellant's argument respecting Eighth Amendment limits on treating as "aggravating" facts unrelated to the blameworthiness of the defendant, or common to all murders. (See AOB 136.) *Carrington* may be read to reject those arguments as grounds for excluding victim impact evidence, but does not speak directly to the propriety of denying defendant a limiting instruction. It is one thing to say that certain evidence is admissible, and another to say that it can be treated as an aggravating circumstance. If *Pollock* and *Carrington* are susceptible to the broad reading that respondent suggests, they should be reconsidered.

Finally, respondent claims that any error was harmless. Although respondent correctly notes that the prosecutor's argument did not dwell upon the victim impact evidence, neither that argument, nor the trial court's instructions, included any guidance to mitigate or constrain the jury's use of the survivors' grief as an aggravating factor. The capital crimes were not otherwise so replete with aggravation as to make the survivors' grief unimportant in determining whether the imposition of the death penalty was appropriate in this case. For these reasons, in addition to the reasons stated

at AOB 137-138, appellant respectfully submits that 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.)

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

Respondent contends that appellant forfeited his present claim when he failed to object to the subject instruction or request a correct instruction at trial.

Respondent ignores Penal Code section 1259, which authorizes this court to review jury instructions affecting the defendant's substantial rights whether or not the defendant objected or requested a correct instruction below.

Respondent relies solely on cases holding "that an instruction, *correct in law*, should have been modified is not cognizable on appeal where the defendant requested no such modification below. [citations.]" (RB 121, emphasis added.) Such cases are inapposite where, as here, appellant claims that the challenged instruction is *not* a correct statement of

law. The fact that the editors of CALJIC placed that assertedly incorrect statement of law in a standard instruction that states other principles of law that are not in controversy here does not call for treating the misstatement of law as though it were correct.

On the merits, respondent asserts that "the trial court did ***not*** err by ***not*** instructing the jury that it could consider the impact of appellant's execution on his daughter." (RB 122, emphasis added.) This assertion is inapposite. No question of whether the trial court was obliged to instruct the jury on consideration of the interests of appellant's family is presented here. The trial court's instruction affirmatively limited consideration of the interests of appellant's family. In so doing, it violated the federal constitution, if not state law. "States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty." (*McCleskey v. Kemp* (1987) 481 U.S. 279, 306.)

As stated in appellant's opening brief, 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.)

Respondent claims that the high court decisions cited above do not

imply that courts must permit consideration of the interests of the capital defendant's family. No federal authority is cited, and appellant knows of no controlling federal authority supporting respondent's claim.

Further, the principle assumed in the state cases on which respondent relies – 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.)

Notably, although respondent cites many cases in which this Court has accepted respondent's argument that execution impact evidence is inadmissable insofar as it is irrelevant to the assessment of the defendant's character (RB 122), respondent does not claim that those cases held that a trial court may instruct a jury as the trial court did here. Again,"`cases are not authority for propositions not considered.' [Citation.] `The holding of a decision is limited by the facts of the case being decided, notwithstanding the use of overly broad language by the court in stating the issue before it or its holding or in its reasoning.' [Citation.]" (*People v. Jennings, supra,* 50 Cal. 4th 616, 684.) Instructing a jury that it must not consider the harm that

a death sentence will bring to a defendant's family is an affirmative act "limit[ing] the sentencer's consideration" (*McCleskey v. Kemp*, *supra,* 481 U.S. 279, 306) of a relevant circumstance that could cause it to decline to impose the death penalty. Even if permissible under state law, such action violates the federal constitution.

Finally, respondent's argument on prejudice assumes that the only error lay in "not giving an execution impact instruction." (RB 127.) Respondent does not claim that this court can find harmless error if, as appellant contends, the trial court gave an execution impact instruction that affirmatively misstated the law so as to prevent the jury from assessing the evidence on the point. This tacit concession is appropriate.

The United States Supreme Court has never held that jury instructions errors that preclude effective consideration of mitigating evidence can be found harmless by a reviewing court. (See, e.g., *Brewer v. Quarterman* (2007) 550 U.S. 286, 293-296 [instructional error precluded full jury consideration of mitigating evidence at defendant's penalty phase, death sentence reversed without application of a harmless error test]; *Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 247-265 [same]; *Tennard v. Dretke, supra*, 542 U.S. 274; *Penry v. Johnson* (2001) 532 U.S. 782, 796-803 [same]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 319-328 [same];

Eddings v.Oklahoma, supra, 455 U.S. 104 [sentencer refuses to consider evidence regarding defendant's childhood; held, death sentence reversed without application of a harmless error test]; *Lockett v. Ohio, supra*, 438 U.S. 586 [state statute precluded sentencer from considering mitigating evidence; held, death sentence reversed without application of a harmless error test]; see also *Smith v. Texas* (2007) 550 U.S. 297, 316 (Souter, J., concurring) ["In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with error as described in *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). We do not and need not address that question here."].)

Accordingly, lower federal courts have held that this type of error is not subject to harmless error review. (See, e.g., *Nelson v. Quarterman* (5th Cir. 2006) (*en banc*) 472 F.3d 287, 314, observing that the "reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments" to which harmless error tests are applied.)

In *People v. Lucero* (1988) 44 Cal. 3d 1006, 1031-1032, this court read the Supreme Court's decision in *Hitchcock v. Dugger* (1987) 481 U.S. 393, 399, to "suggest" that "a harmless error test might apply" to instructions precluding consideration of mitigating evidence. This court

therefore applied *Chapman* analysis to error in excluding mitigating evidence in *Lucero* and in other cases decided since then. (See, e.g., *People v. Smith* (2005) 35 Cal.4th 334, 368; *People v. Mickle* (1991) 54 Cal.3d 140, 193.) While *Chapman* may still be appropriate for evidentiary exclusion errors, it is not equally appropriate where jury instructions erroneously precluded or limited the jury's discretion to choose a life sentence. (*Nelson v. Quarterman*, *supra*, 472 F.3d 287, 314.) As stated by the high court:

> [I]t is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence," id. at 319 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)). (*Penry v. Johnson, supra*, 532 U.S. 782, 797.)

Furthermore, even if a harmless error test could be applied, it would not be appropriate to focus on the relative weight of the other evidence as respondent suggests. To declare the error harmless, this Court would have to find no reasonable possibility of a different result if the jury had been allowed to consider the interests of appellant's family. For the reasons stated in appellant's opening brief (AOB 144-145), and in light of the

unique moral and practical elements involved in weighing the impact of a death sentence on the defendant's family, no one can say that a life sentence was not reasonably possible here.

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.*

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 evidence of other 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.)

Respondent contends that appellant's claim of error was forfeited, citing *People v. Richardson* (2008) 43 Cal4th 959, 1022-23 and other cases establishing a rule for claims of error involving instructions that are not erroneous statements of law. (RB 130.) As one of the cited cases explicitly notes, the rule is inapplicable where, as here, the defendant's claim is that the instruction misstates the law so as to affect his substantial rights. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) .

Respondent also seeks forfeiture of appellant's claim on the grounds that one of the cases appellant cites, *Apprendi v. New Jersey* (2000) 530 US 466, was decided prior to appellant's trial. Although *Apprendi* was indeed decided in June and appellant's penalty trial commenced in September of 2000, the Supreme Court of the United States did not extend the *Apprendi* rule to death penalty cases until two years later in *Ring v. Arizona* (2002) 536 US 584. And, as respondent duly notes, this court has consistently held that the procedural rights recognized in *Apprendi* simply do not apply to California's death penalty scheme. Forfeiture cannot be premised on a failure to take action in the court below when such action would have been futile. (*People v. Birks* (1998) 19 Cal.4th 108, 116, fn. 6 [no waiver where lower court was bound by higher court on issue].)

Respondent's arguments on the merits correctly recite the decisions

of this court rejecting appellant's claims in other cases. (RB 131-132.) The United States Supreme Court has yet to rule that those decisions are incorrect. Accordingly, appellant hereby requests reconsideration of those decisions and submits the matter as suggested by this court in *People v. Schmeck* (2005) 37 Cal.4th 240, 304.

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

A. Respondent's forfeiture arguments are inapposite

Respondent's forfeiture argument assumes that relief should be granted on appellant's claim only if this court finds that the prosecutor committed misconduct. That assumption is incorrect.

A prosecutor's misinterpretation of the law in argument to the jury may be effectively misleading to the jury, yet not described or appropriately chargeable as "misconduct." (*People v. Morgan* (2007) 42 Cal.4th 593, 612 [reversal required due to prosecutor's misinterpretation of law in closing

argument at a time when language in one of this court's decisions may have misled the prosecutor to think his argument was proper]; *People v. Lucero* (1988) 44 Cal. 3d 1006, 1031, fn 15 [prosecutorial argument effectively eliminated a statutory mitigating factor yet no misconduct or basis for faulting the defendant's failure to object on misconduct grounds where trial was held prior to appellate decisions disapproving prosecutor's interpretation of death penalty law].) The court's concern "is not with the ethics of the prosecutor or the performance of the defense, but with the impact of the erroneous interpretation of the law on the jury." (*Ibid;* accord *People v. Milner* (1988) 45 Cal. 3d 227, 254-258 [reversing death sentence, without a charge or finding of misconduct, where prosecutor argued that jury did not have final sentencing responsibility and neither trial court's instructions nor defense counsel's argument effectively contradicted the prosecutor's claim]; *People v. Robertson* (1982) 33 Cal. 3d 21, 57-59 [Reversing on other grounds, while noting that "the prosecutor's line of argument [regarding sympathy] was seriously misleading, for it erroneously foreclosed the jury from considering potentially mitigating factors which may have persuaded one or more jurors that life imprisonment without possibility of parole, rather than death, was the appropriate punishment."].)

The United States Supreme Court's Eighth Amendment jurisprudence, on which appellant's claim is founded, does not call for a

determination of whether the prosecutor's argument constituted misconduct. It calls only for a determination of whether, in light of the entire record, there exists a reasonable likelihood that a juror believed the law required the sentencer to disregard some or all of the mitigating factors or mitigating evidence in the case. *(Brown v. Payton* (2005) 544 U.S. 133 [*Boyde* test proper for prosecutorial argument misrepresenting factor (k)].) "Although the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence, the standard requires more than a mere possibility of such a bar." (*Johnson v. Texas* (1993) 509 U.S. 350, 367.)

Whether the cause of the juror's misunderstanding of the law is the prosecutor's argument, the trial court's instructions, or a combination of the two, is of no particular interest to the high court. (*Abdul-Kabir v. Quarterman* (2007) 550 U.S. 233, 259, fn. 21[reversing sentence without a finding of misconduct while recognizing that prosecutorial argument may, like instructions from the court, deprive jury of a "'meaningful basis to consider the relevant mitigating qualities' of the defendant's proffered evidence"]; *Penry v. Lynaugh* (1989) 492 U.S. 302, 326 [reversing sentence without a finding of misconduct where "[i]n light of the prosecutor's argument, and in the absence of appropriate jury instructions, a reasonable

juror could well have believed that there was no vehicle for expressing the view that Penry did not deserve to be sentenced to death based upon his mitigating evidence."]; *Pierce v. Thaler* (5th Cir 2010) 604 F.3d 197, 211-212 [reversing sentence without a finding of misconduct where prosecutor "essentially instruct[ed] the venire members that `youth isn't relevant'"].)

Furthermore, any request for an appropriate admonition would have been futile under the circumstances of this case. This case was tried in 2000, at which time no controlling authority had held that a prosecutor is guilty of "misconduct" under the circumstances presented here. And as pointed out in appellant's opening brief, and nowhere acknowledged by respondent, appellant and his counsel were told, after guilt phase closing argument, that the court would "interject" to admonish the prosecutor without waiting for an objection if and when the court perceived a prosecutor's argument to be improper. (13RT 3576.) Thus, when the court remained silent while the prosecutor gave the jury his misinterpretation of the statutory mitigators, the court effectively told appellant that the prosecutor's argument was not improper.

Finally, as indicated in the argument heading, appellant's claim is fundamentally one of instructional error affecting his substantial rights and

therefore protected by Penal Code section 1259. He contends that where, as here, the prosecutor's argument misinterprets state law in argument to the jury, the judge is required to give a corrective instruction, even if (as in *all* the cases cited above) none was requested. (*Brown* v. *Payton, supra,* 544 U.S. 133, 146 ["The trial judge, of course, should have advised the jury that it could consider Payton's evidence under factor (k), and allowed counsel simply to argue the evidence's persuasive force instead of the meaning of the instruction itself"]; *People v. Morgan*, *supra*, 42 Cal.4th 593, 611 [reversing where "[n]othing in the instructions ... disabused the jury of [the] notion" that one of the prosecutor's theories was legally correct]; *People v. Green* (1980) 27 Cal.3d 1, 68 [same]; Cf. *People v. Williams* (1997) 16 Cal.4th 153, 270 [finding no instructional error after noting the absence of misleading prosecutorial argument]; *People v. Livadatis* (1992) 2 Cal.4th 759, 784-785 [same].)

"The judge is, after all, the one responsible for instructing the jury on the law, a responsibility that may not be abdicated to counsel." *(Brown v. Payton,* supra, 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].) If the trial court's instructional duty may not be delegated to counsel, that duty should not devolve upon a 19-

year-old layman appearing without counsel at a penalty trial.

B. Respondent's arguments fail on the merits

Respondent accuses appellant of taking the prosecutor's remarks out of context. Yet the context each side presents is indistinguishable. (Compare RB 134 and AOB 152-153.)

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.)

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.)

Respecting factor (d), respondent argues that the prosecutor "did not limit the parameters of the extreme-mental-or-emotional-disturbance factor solely to instances where a defendant believes his crime was commanded by God or served a moral purpose. . . . [T]he prosecutor merely gave the jury

an example of a type of defendant who might suffer from an extreme mental or emotional disturbance at the time of his crimes .... Thus, the prosecutor's argument about factor (d), when read in its entirety, was certainly not an improper statement of the law. . . ." (RB 137.)

Respondent's arguments do not fit our facts. Whether or not the prosecutor limited the parameters of factor (d), he plainly told the jury that factor (d) does not apply in this case because appellant does not have the particular delusions or deficits of which the prosecutor spoke. (14RT 3850-3851.) He spoke these words by way of explanation for his previous statement of belief that none of the statutory mitigators apply to this case. (14RT 3850.) He was the attorney for the People, sufficiently experienced to be entrusted with a capital case. Reasonable jurors could hardly doubt his knowledge of the law or his duty to state the law fairly in closing argument.

Moreover, no contrary view of the law was put forth in the trial court's instructions, nor in appellant's argument. None was implicit in the structure of the trial or the nature of the evidence presented. Although mental and emotional disturbance was implied by appellant's history as testified to by his mother in the guilt phase, as well as in the testimony that the prosecutor treated as evidence of cruelty and sadism, that evidence had

clear purposes other than mitigation. Its presence in the case carried no suggestion that the prosecutor must be wrong in claiming that factor (d) does not apply to a defendant who does not have particular delusions or deficits the prosecutor said factor (d) "brings to mind."

Respondent also posits that the prosecutor's argument on this point "was not that evidence of extreme mental or emotional disturbance cannot be considered. . . ." (RB 137.) Of course not. The prosecutor asked the jury to consider the direct evidence of mental disturbance, i.e., what the prosecutor called cruelty and sadism in the accounts of the Corrieo murders and the subsequent attack on a female acquaintance – as evidence in *aggravation.* (RT 3857-3858.) Meanwhile, his uncontradicted interpretation of factor (d) told the jury that any mental disturbance suggested by the evidence in this case was not legal mitigation. In so doing, he undermined the court's generic instruction to consider the defendant's age, and prevented the jury from giving any evidence of mental disorder any mitigating effect. (*Abdul-Kabir v. Quarterman, supra*, 550 U.S. 233, 246, 259; *Brewer v. Quarterman, supra*, 550 U.S. 286, 289-290.)

Respondent posits that the prosecutor's argument on the meaning of factor (d) did not prevent the jury from giving some mitigating effect to appellant's "difficult childhood" or the impact of his mother's prostitution

and drug addiction insofar as these were "sympathetic" factors covered by factor (k).[10] (RB 140.) That may be so, but only insofar as the trial court specifically instructed the jury that the guilt-phase evidence of appellant's childhood and family circumstances could be considered mitigating under factor (k) "to the extent that you believe it had an effect upon his development." (RT 3835.) The prosecutor's argument on the meaning of factor (k) posited that it applied only to "extenuating circumstances" other than those covered by the factors he previously defined. He claimed that appellant had introduced no such evidence. To quote:

> That brings us to what's sometimes called the catchall provision, the factor (k). These are (a), (b), (c), (d) through (k) provision which says: Are there any *other extenuating circumstances*? And from that you must examine the evidence. You must determine whether from the sum of the evidence there is any extenuating circumstances.
>
> *You will note that the defendant has introduced absolutely none*. In this phase of the trial, the evidence that you must consider along with all the evidence in the guilt

---

[10]Appellant's mother was only 12 when she became a prostitute. Throughout appellant's childhood, she worked as a prostitute, used "crank," cocaine, and methamphetamine, spent time in jail, and "lots of time on the street." (RT 3125-28.) Appellant "was on his own a lot of the time." Appellant's father was violent with her and with appellant; and was repeatedly arrested for beating appellant as a child. (RT 3132.) She married another man who abused her and appellant. To escape his beatings, she took appellant to the home of her grandmother, who used racial epithets toward appellant, whose father was black. (RT 3135.)

phase, there are none. Not a single extenuating circumstance. And if there is, I leave the defendant to show you where that is.

So as we see, ladies and gentlemen, while there are those murderers from whom one or more factors in mitigation may apply, for Corey Leigh Williams there are none.

A principled analysis of all these factors when you review the evidence will demonstrate to you that although I carry no burden, even though I do not carry a burden, that beyond a reasonable doubt, beyond reasonable doubt, though I need not meet that burden, there are no factors in mitigation.

So now when presented with the task of weighing the factors in mitigation against the factors in aggravation, even if the factors in aggravation were only slight they would outweigh substantially because there is nothing on the other side.

There are murderers who have some extenuating factors and factors of mitigation to put on this scale, but there are none attributable to Corey Williams. (RT 3855-56.)

Assuming the jury considered appellant's background under factor (k) in light of the court's specific instruction to do so, appellant was nevertheless harmed by the prosecutor's uncontradicted argument on factor (d). Appellant had a statutory and constitutional right to have the jury consider mental and emotional disturbance as mitigators in their own right, especially if the jury determined that it affected his development as suggested by the court's instruction applying factor (k). "[T]he jury must be allowed not only to consider such evidence, or to have such evidence

before it, but to respond to it in a reasoned, moral manner and to weigh such evidence in its calculus of deciding whether a defendant is truly deserving of death." (*Brewer v. Quarterman, supra*, 550 U.S. 286, 296.) As stated in Penry II:

> *Penry I* did not hold that the mere mention of "mitigating circumstances" to a capital sentencing jury satisfies the Eighth Amendment. Nor does it stand for the proposition that it is constitutionally sufficient to inform the jury that it may "consider" mitigating circumstances in deciding the appropriate sentence. Rather, the key under *Penry I* is that the jury be able to "consider and give effect to [a defendant's mitigating] evidence in imposing sentence." 492 U.S. at 319 (emphasis added). See also *Johnson v. Texas,* 509 U.S. 350, 381, 125 L. Ed. 2d 290, 113 S. Ct. 2658 (1993) (O'CONNOR, J., dissenting) ("[A] sentencer [must] be allowed to give full consideration and full effect to mitigating circumstances" (emphasis in original)). For it is only when the jury is given a "vehicle for expressing its 'reasoned moral response' to that evidence in rendering its sentencing decision," *Penry I*, 492 U.S. at 328, that we can be sure that the jury "has treated the defendant as a 'uniquely individual human being' and has made a reliable determination that death is the appropriate sentence," id. at 319 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 305, 49 L. Ed. 2d 944, 96 S. Ct. 2978 (1976)). (*Penry v. Johnson, supra,* 532 U.S. 782, 797.)

With respect to the prosecutor's interpretation of age as a legal mitigating factor, respondent claims that "the prosecutor did not limit the parameters of the age factor to a defendant's `inability to know right from

wrong.' Rather, the prosecutor merely stated that courts use the word `metonym' when referring to this factor, and then focused the jury's attention on one aspect (i.e., whether the defendant's age rendered him capable of appreciating the wrongfulness of his conduct) of the age factor to argue that it was not a mitigating factor in appellant's case. This was not an incorrect statement of law or misconduct on the part of the prosecutor." (RB 145.) Respondent also submits that the prosecutor's argument was simply that "age was not a mitigating factor in appellant's case" and, ergo, his argument "did not prevent the jury from considering [age] as one if it thought it was appropriate to do so." (RB 146.)

Respondent's claim does not acknowledge what was actually said. The prosecutor told the jury that, under factor (i), a capital defendant's youth "might be" mitigating, but only if the defendant did not "know the difference between right and wrong" or "the harm he causes." He told the jury that by way of explanation for his conclusion that the mitigating factor for youth "simply does not apply" to appellant. (14RT 3854.)

Respondent claims the prosecutor's conduct is supported by this court's decisions holding that the defendant's knowledge of right and wrong was a "a permissible age-related inference" and therefore an arguable circumstance in aggravation. (See *People v. Carrington, supra,* 47

Cal.4th 145, 201-202, *People v. Slaughter* (2002) 27 Cal. 4th 1187; *People v. Mendoza* (2000) 24 Cal.4th 130, 190; RB 145-146.) Appellant disagrees.

Here, the prosecutor's argument did not suggest an "age related inference" about appellant. Rather, it posited that factor (i) contemplates only one potentially mitigating inference from youth, i.e., ignorance of the wrongfulness of the capital crime and the harm he has caused. Nothing in any of the cases cited by respondent supports that reading of factor (i). On the contrary, *Carrington* holds that factor (i) contemplates consideration of "any age-related matter suggested by the evidence or by common experience or morality that might reasonably inform the choice of penalty." (*People v. Carrington, supra,* 47 Cal.4th 145, 201-202.) The prosecutor's argument never acknowledged, and affirmatively denied, that our capital sentencing law recognizes the broad significance of a defendant's age, let alone the ability of the jury to draw mitigating inferences from appellant's youth based on common experience and morality.

Respondent also misplaces reliance on *People v. Box* (2000) 23 Cal.4th 1153, 1215. (RB 145.) In *Box,* the prosecutor explicitly stated that factor (I) was a mitigating factor that the jury could find applicable to the case, but asked the jury to look at "the sophistication" suggested by the

defendant's college attendance and attention to detail after the crime. "Such argument was appropriate. Contrary to defendant's assertion, chronological age is not `all that is relevant to this factor.' [Citation.]" (*Id.*, at p. 1215.) If appellant's prosecutor had conceded that youth is a mitigating factor, or if he had simply focused on facts that might suggest that appellant had none of the mitigating qualities of youth without opining on the meaning of factor (i), *Box* would be on point. But those are not our facts.

Furthermore, nothing in the trial court's instructions, including the instruction on factor (k), contradicted the prosecutor's claim or provided an alternative to factor (i) as a basis for the jury to give mitigating effect to appellant's youth. Per CALJIC No. 8.85, appellant's jury was instructed that it could consider the age of the defendant at the time of the crime (factor (i)) and "[a]ny *other* circumstance" and any "sympathetic or *other* aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death." (14RT 3828.) Because age was not an "other" circumstance, much less one that appellant offered as a basis for a life sentence, the prosecutor was able to keep the jury from giving effect to the mitigation inherent in appellant's youth by giving the jury a narrow and exclusive definition of factor (i).

Respondent thus misplaces reliance on *People v. Dennis* (1998) 17 Cal.4th 468, 547, where the issue was whether a prosecutor's argument precluded the jury from giving mitigating effect to the death of the defendant's son, a sympathetic circumstance presented by the defense and plainly comprehended by the factor (k) instruction. Where, as here, the jury was told that the law deems youth to be a mitigating factor only under inapposite circumstances, and no one says otherwise, consideration of youth as a mitigating factor is effectively foreclosed. Accordingly, the prosecutor concluded his remarks on the statutory mitigating factors by saying that there were no "extenuating circumstances" and therefore no mitigation to be considered per any factor, including factor (k). (RT 3855-56.)

As previously noted, "the reasonable likelihood standard does not require that the defendant prove that it was more likely than not that the jury was prevented from giving effect to the evidence". (*Johnson v. Texas*, *supra,* 509 U.S. 350, 367.) Appellant has clearly met his burden in showing federal constitutional error. Respondent has not shown that the error was harmless beyond a reasonable doubt.

C. The error was not harmless

As previously noted, the United States Supreme Court has never found harmless error, nor directed lower courts to apply any harmless error

analysis, to a claim that state action precluded or limited the jury's ability to either consider, or give full effect to, a capital defendant's mitigating evidence. (See *Tennard v. Dretke, supra*, 542 U.S. 274; *Penry v. Johnson* (2001) ("Penry II") 532 U.S. 782; *Penry v. Lynaugh* ("Penry I"), *supra*, 492 U.S. 302 *Eddings v. Oklahoma, supra,* 455 U.S. 104; *Lockett v. Ohio, supra,* 438 U.S. 586; see also *Smith v. Texas, supra,* 550 U.S. 297, 16 (Souter, J., concurring) ("In some later case, we may be required to consider whether harmless error review is ever appropriate in a case with error as described in *Penry v. Lynaugh,* 492 U.S. 302, 109 S. Ct. 2934, 106 L. Ed. 2d 256 (1989). We do not and need not address that question here."].)

In the *en banc* decision of the federal circuit most experienced in addressing this issue, the majority concluded that no harmless error test applies when the state effectively precluded the jury from giving effect to all the mitigating factors in the case. *(Nelson v. Quarterman, supra*, 472 F.3d 287, 314-315.) To quote:

> Implicit in the Court's failure to apply harmless error in cases where the jury has been precluded from giving effect to a defendant's mitigating evidence is the recognition that a *Penry* error deprives the jury of a "vehicle for expressing its 'reasoned moral response to the defendant's background, character, and crime,'" which precludes it from making "'a reliable determination that death is the appropriate sentence.'" *Penry* II, 532 U.S. at 797 (quoting *Penry* I, 492 U.S. at 328, 319) (internal quotation marks omitted) (emphasis added).

This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues. It also differs from those at issue in cases involving defective jury instructions in which the Court has found harmless-error review to be appropriate. Cf. *Neder v. United States*, 527 U.S. 1, 8-15, 119 S. Ct. 1827, 144 L. Ed. 2d 35 (1991) (applying harmless-error review where the jury instructions omitted an element of the offense, reasoning that, given the evidence presented, the verdict would have been the same had the jury been properly instructed); *Johnson v. United States*, 520 U.S. 461, 468-69, 117 S. Ct. 1544, 137 L. Ed. 2d 718 (1997) (applying harmless-error review where the jury instructions omitted the materiality element of the perjury charge, noting that the error did not warrant correction in light of the "overwhelming" and "uncontroverted" evidence supporting materiality). Given that the entire premise of the *Penry* line of cases rests on the possibility that the jury's reasoned moral response might have been different from its answers to the special issues had it been able to fully consider and give effect to the defendant's mitigating evidence, it would be wholly inappropriate for an appellate court, in effect, to substitute its own moral judgment for the jury's in these cases. See *Tennard,* 542 U.S. at 286-87 ("[T]o say that only those features and circumstances that a panel of federal appellate judges deems to be 'severe' (let alone 'uniquely severe') could have such a tendency [to serve as a basis less than death] is incorrect. Rather, the question is simply whether the evidence is of such a character that it 'might serve "as a basis for a sentence less than death"' (quoting *Skipper*, 467 U.S. at 5)); cf. *Sullivan v. Louisiana*, 508 U.S. 275, 281, 113 S. Ct. 2078, 124 L. Ed. 2d 182 (1993) (refusing to apply harmless error where the jury was improperly instructed on the burden of proof at the guilt/innocence phase, noting that "the essential connection to a 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates all the jury's findings. A reviewing court can only engage in pure speculation-its view of what a reasonable jury would have done. And when it does that, 'the wrong entity

judge[s] the defendant guilty'" (quoting *Rose v. Clark*, 478 U.S. 570, 578, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986)). *Nelson v. Quarterman, supra*, 472 F.3d 287, 314-315.)

Assuming the error in the present case is susceptible to harmless error analysis, respondent claims "there was no prejudice to appellant" in that "there was no evidence of extreme mental or emotional disturbance," appellant's closing argument asserted that he was both innocent and wholly responsible for his own "lifestyle" (RB 140-141) and appellant's youth was "not a mitigating circumstance" in this case. Respondent insists there was no "demonstration" of appellant's "lack of maturity" or his "underdeveloped sense of responsibility." (RB 148.) Instead, respondent sees only "sophistication" and "efforts of concealment" in the capital crime.

First, evidence tending to show mental or emotional disturbance need not be overwhelming, nor suggest an "extreme" level of disturbance, to make that disturbance mitigating and invoke federal constitutional protections. "To say that only those features and circumstances that a panel of federal appellate judges deems to be `severe' (let alone `uniquely severe') could have such a tendency is incorrect. Rather, the question is simply whether the evidence is of such a character that it "might serve 'as a basis for a sentence less than death'. [Citation.]" (*Tennard v. Dretke, supra*,

542 U.S. 274, 286-287.)

As to appellant's youth, respondent's allegation that the crime shows sophistication is, at best, a half-truth. The instigator of the robbery plan, the recruiter of other participants, and the organizer of the concealment attempts was not appellant, but co-defendant Dalton Lolohea. (RT 2663-2667.) Mr. Lolohea's jury rejected death and imposed life without parole.

Notably, the capital crime and appellant's record are similar to, but milder than, that of the 19-year-old defendant in one of the high court's decisions recognizing the mitigating significance of youth. *Johnson v. Texas* (1993) 509 U.S. 350, involved an armed robbery planned in advance with a friend, a killing to ensure that there were "no witnesses," followed by another attempted robbery murder in which he shot a clerk in the face resulting in permanent disfigurement and brain damage. A longtime friend of Mr. Johnson testified that he had hit her, thrown a large rock at her head, and pointed a gun at her on several occasions. His girlfriend reported that he had become angry with her one afternoon and threatened her with an axe. Johnson also had a prior conviction for commercial burglary for which he was on probation at the time of the capital crime. The Court divided sharply on the question of whether the trial court's instructions

precluded the jury from giving effect to Johnson's youth as a mitigator[11], but not on whether Johnson's youth was "a relevant mitigating circumstance that must be within the effective reach of a capital sentencing jury . . ." . (*Johnson v. Texas, supra*, 509 U.S. 350, 367.)

Moreover, respondent's harmless-error argument ignores the number and variety of mitigating inferences that a sentencer can draw from the fact that a defendant was only 19 years old – if not improperly precluded by judicial instruction or prosecutorial argument to the contrary. As shown by

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[11] The majority held that jury instructions requiring the jury to determine Mr. Johnson's future dangerousness allowed the jury to give mitigating effect to Mr. Johnson's youth. They posited that the "relevance of youth as a mitigating factor derives from the fact that the signature qualities of youth are transient; as individuals mature, the impetuousness and recklessness that may dominate in younger years can subside." *(Johnson v. Texas, supra*, 509 U.S. 350, 368.) Also, the jury was unlikely to believe that the defendant's youth had no legal significance in light of the arguments of defense counsel respecting Mr. Johnson's youth and the testimony of Mr. Johnson's father, who said 19 is "a foolish age. They tend to want to be macho, built-up, trying to step into manhood. "*[A] kid eighteen or nineteen years old has an undeveloped mind, undeveloped sense of assembling not - I don't say what is right or wrong*, but the evaluation of it, how much, you know, that might be - well, he just don't - *he just don't evaluate what is worth - what's worth and what's isn't like he should like a thirty or thirty-five year old man would. . . .*" (*Johnson v. Texas, supra,* 509 U.S. 350, 355-356, emphasis added.)

In the case at bar, the jury received no such guidance on the mitigating qualities of youth nor any instructions to refrain from imposing death if the jury did not find future dangerousness.

several decisions of the United States Supreme Court, the fact that appellant was only 19 at the time of the capital crimes provided several good grounds to refrain from imposing death.

First, the Court declared that "youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage." (*Eddings v. Oklahoma, supra*, 455 U.S. 104, 115-116. The Court then noted:

> Adolescents everywhere, from every walk of life, are often dangerous to themselves and to others." The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: Juvenile Delinquency and Youth Crime 41 (1967). "[Adolescents,] particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. *Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth.*" Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders, Confronting Youth Crime 7 (1978). (Eddings v. Oklahoma, supra, 455 U.S. 104, 115-116, fn. 11.)

The Court also recognized how the defendant's youth at the time of the crime greatly increases the relevance of any evidence that the

defendant's family was violent or dysfunctional, as was appellant's.[12]

The Court observed:

> In some cases, such evidence properly may be given little weight. But when the defendant was 16 years old at the time of the offense there can be no doubt that evidence of a turbulent family history, of beatings by a harsh father, and of severe emotional disturbance is particularly relevant. (*Eddings v. Oklahoma, supra,* 455 U.S. 104, 115.)

Six years later, in *Thompson v. Oklahoma* (1988) 487 U.S. 815, 835, the plurality opinion added these observations on the significance of a capital defendant's youth:

> Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult. (*Thompson v. Oklahoma* (1988) 487 U.S. 815, 835.

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[12] Appellant's mother raised him and his siblings while she was addicted to drugs, working as a prostitute, living in transient housing and "on the streets." (RT 3125-3128.) Appellant's father beat him and his mother. To escape his beatings, appellant and his mother often stayed with her grandmother, who disliked appellant's father's race. (RT 3132.) This evidence was offered in the guilt phase to explain appellant's control over the cash that he asked Wendy Beach to recover after his arrest. (See AOB 29.)

In *Roper v. Simmons* (2005) 543 U.S. 551, the Court outlawed capital punishment for crimes committed while a minor. In so doing, it emphasized the heightened likelihood of reforming a youthful offender. The Court repeated the observations articulated in *Eddings and Johnson*, and added that "the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. [Citation]" (*Id.*, at p. 570.)

Most recently, in *Graham v. Florida* (2010) __ US __, 130 S. Ct. 2011, 2026, the Court precluded life without parole for juveniles not convicted of homicide, even though Mr. Graham was deemed incorrigible by the sentencing judge. The Court again declared that juveniles have a "'lack of maturity and an underdeveloped sense of responsibility'"; they "are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and their characters are "not as well formed." [Citation.] These salient characteristics mean that "[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption." [Citation.] The Court added:

> [P]arts of the brain involved in behavior control continue to mature through late adolescence. See Brief for American Medical Association et al. as Amici Curiae 16-24; Brief for American Psychological Association et al. as Amici Curiae 22-27. Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of "irretrievably depraved character" than are the actions of adults. [Citation.] It remains true that "[f]rom a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed." Ibid. (*Graham v. Florida, supra*, 130 S. Ct. 2011, 2026-2027.)

In the present case, the fact that appellant was only 19 at the time of the capital crime was, as the high court has found, a fact capable of supporting several inferences and moral judgments favoring a life sentence. Like Mr. Johnson's father (see footnote 11, page 107, *ante*), reasonable jurors know that 19 "is a foolish age" at which boys "want to be macho, built-up, trying to step into manhood" with "an undeveloped mind." *(Johnson v. Texas, supra*, 509 U.S. at pp. 355-356.) Reasonable jurors could see that appellant was suffering from that transitory condition, and from the still-fresh effects of the abuse, neglect and mental and emotional disturbance of his extremely disadvantaged childhood. *(Eddings v. Oklahoma, supra*, 455 U.S. at p. 115.) They could see that he was less able than an adult to evaluate the consequences of his conduct and, temporarily, "apt to be motivated" by "peer pressure." (*Thompson v.*

Oklahoma, supra, 487 U.S. at p. 835.) They could acknowledge the difficulty of knowing whether appellant's crime "reflects unfortunate yet transient immaturity" rather than "irreparable corruption." (*Graham v. Florida, supra*, 130 S.Ct at p. 2026.) If not misled about the law, reasonable jurors could have drawn any and all of the mitigating inferences noted in the cases discussed by the high court, based on the common experience of jurors and jurists alike. No one can say, with the requisite certainty, that no reasonable juror would vote for life on the basis of these inferences from the evidence in this case. Reversal is required.

X. THE CUMULATIVE EFFECT OF ALL THE ERRORS WAS AN UNFAIR TRIAL RESULTING IN UNRELIABLE GUILT VERDICTS 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

Appellant submits, and respondent denies, that 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. (AOB 158-159.) Respondent generally asserts that there were no prejudicial errors and the case is solid as a rock. (RB 149-151.)

Some of respondent's underlying claims are more meaningful in their specificity. When respondent claims that "there was no evidence that appellant's confession was coerced *by the correctional officers or otherwise invalid*" (RB 150) we might ask whether respondent believes that the confession was coerced by Sergio Corrieo alone. When respondent claims that "the prosecutor did not vouch for the truthfulness *of Ross's testimony*" we wonder if respondent believes that the prosecutor really stopped substantially short of that point when he vouched for the ability of the plea bargain to ensure Ross was motivated to testify truthfully. Be that as it may, the prosecutor seems to have agreed with appellant that Ross's testimony was not credible without the confession evidence. As he told the jury in his summation:

> 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's apparent belief that Mr. Ross's testimony was not sufficiently corroborated by other evidence is understandable. Contrary to

respondent's claim, no forensic evidence or anything other than Ross's statements support his claim that appellant was the shooter. 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.) When Ross's fence, Clemus West, was brought into the interrogation room and was allowed to confer with Ross alone, under the surveillance of a video camera, 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 2783-85; 2830-2831.)

Ross's testimony did not explain 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. [13] However, when asked to explain his

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[13] 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

prior statement placing Lolohea inside the house during the killings, Ross said he was trying to "protect" Lolohea "from being the shooter." (11RT 2832.)

Respondent claims that appellant was surely "a major participant who had, at a minimum, a reckless indifference to human life" and would thus qualify for the death penalty in any event. (RB 151.) Not so. Even if one assumes that the cash appellant had hidden at a friend's home was taken from the Corrieos, it does not follow that appellant must have participated in the robbery, much less with reckless indifference. Lolohea and Ross may well have given appellant funds from the Corrieo robbery for reasons no one wished to disclose. The evidence that appellant was overheard telling a friend "*they* came up with money hella quick" (11RT 3007-3008) indicates that appellant was impressed with the speed with which "they" had accumulated funds, not that appellant himself participated in a robbery murder with them. And even if there were solid and properly-

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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.)

admitted evidence of appellant's substantial participation in the robbery, appellant would still be entitled to have a jury determine whether he had the mental state required to impose death on a robber who did not kill. Having been led to rely exclusively on the theory that appellant was the actual killer, appellant's jury had no need or reason to find such facts at his trial.

Finally, respondent misrepresents appellant's claim as one that "his actions did not warrant the death sentence." (RB 151.) Appellant submits that his trial was too fraught with error to provide a reliable basis for opinion or judgment of his actions. In reminding this court of the lesser sentences given to appellant's co-defendants, appellant's point is simply that this case is not so aggravated as to compel everyone to conclude that the participants should receive capital punishment. This court has indeed held that capital juries need not be informed of the lesser sentences received by co-defendants, but that does not mean that this court should ignore such data in determining whether a more favorable verdict is reasonably possible.

CONCLUSION

Based on the foregoing, and for all of the reasons set forth in appellant's opening brief,[14] reversal is required.

DATED: 4/21/11

Respectfully submitted,

JEANNE KEEVAN-LYNCH
Attorney for Appellant
COREY LEIGH WILLIAMS

[14] Appellant submits this Reply Brief in connection with those issues where additional briefing appears likely to be helpful to the Court in deciding this case. As to those issues on which appellant does not provide additional briefing here, appellant submits that both sides have thoroughly briefed the issues presented and these other issues are fully joined by the briefs currently on file with the court. The absence of additional briefing on these other issues should not be taken as a concession of any nature or as a lack of confidence in the merits of the matters not addressed. (See People v. Hill (1992) 3 Cal.4th 959, 995, fn. 3.)

CERTIFICATE OF COUNSEL

The foregoing opening brief on appeal was produced in 13 point proportional Times Roman typeface and contains 26,531 words as counted by WordPerfect version 12.

JEANNE KEEVAN-LYNCH
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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 reply 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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JEANNE KEEVAN-LYNCH

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

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Executed under penalty of perjury under the laws of the state of California and the United States of America on April 25, 2011.

/s/
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