No. _____

IN THE
# Supreme Court of the United States

**SAMUEL W. SWOOPES,**
*Petitioner,*

**vs.**

**CHARLES L. RYAN, ET AL.,**
*Respondent.*

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

## PETITION FOR A WRIT OF CERTIORARI

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August 16, 2018

## QUESTIONS PRESENTED

1. Does it violate Due Process and the Sixth Amendment to exclude a defendant from the court's consideration and answering of a jury question?

2. Did the trial judge's incorrect and prejudicial answer to a jury question violate Due Process and the Sixth Amendment, even if it was not wholly ex parte?

## PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption. The petitioner is not a corporation.

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Petitioner Samuel W. Swoopes requests that a writ of certiorari be issued to review the judgment entered by the United States Court of Appeals for the Ninth Circuit on March 2, 2018.

## OPINION BELOW

The decision by the Ninth Circuit Court of Appeals, attached to this Petition as Appendix A, is unpublished. *Swoopes v. Ryan,* 714 Fed.Appx. 732 (9th Cir., March 2, 2018).

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit entered its judgment on March 2, 2018. The Court of Appeals denied Petitioner's petition for rehearing en banc on May 18, 2018. Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely.

## CONSTITUTIONAL PROVISIONS

The Fifth Amendment to the U.S. Constitution provides that "No person shall be . . . deprived of life, liberty, or property, without due process of law . . . .

The Sixth Amendment to the U.S. Constitution provides that "In all criminal prosecutions, the accused shall enjoy the right to a . . . public trial, . . . [and] to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defense."

The Fourteenth Amendment to the U.S. Constitution guarantees due process and equal protection of the laws to all citizens of the United States, and forbids any state from depriving any person of liberty in contravention of those guarantees.

## STATUTORY PROVISIONS

This case originated prior to enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), and so is governed by the earlier, less deferential version of 28 U.S.C. § 2254(d). The version applicable here directs that "a determination . . . on the merits of a factual issue, made by a State court of competent jurisdiction . . . , shall be presumed to be correct." 28 U.S.C. § 2254(d) (1966). The statute requires de novo review of issues of law or mixed law and fact. *Schiro v. Farley*, 510 U.S. 222, 232 (1994) (citations omitted).

## STATEMENT OF THE CASE

### A. Introduction

This pre-AEDPA habeas case, filed in 1993, was previously before this Court *sub. nom. Swoopes v. Sublett*, 119 S.Ct. 2335 (1999). It has twice been remanded from the Ninth Circuit to the United States District Court for the District of Arizona, and Petitioner Swoopes was previously granted a new trial by the Arizona post-conviction court, which found that he had been "deprive[d] . . . of a fair trial." (*Swoopes v. Ryan,* CA9 No. 16-15506, Excerpts of Record (ER) 1 44.) That ruling was overturned by the Arizona Court of Appeals on procedural grounds. (ER1 31.)

The post-conviction court's grant of a new trial was based, ultimately, on its finding that the trial judge had used an "unfortunate choice of wording" in answering a jury question—wording that had "incorrectly implied" the existence of inculpatory identification evidence. (ER1 43-44.) Unable to determine "what procedure the trial judge followed in responding to the note," the post-conviction court surmised that it was "highly likely that the judge contacted counsel 'off the record' about the note as was customary . . ." (ER1 43.) The court so speculated—in this order granting, in any event, a new trial for Mr. Swoopes—notwithstanding defense counsel's affidavit that, had he been present, he never would have agreed to the wording used in answering the note. (ER3 407-09.) It is undisputed, however, that Mr. Swoopes himself was not present for any discussion of the note, nor for the formulation and delivery of the answer.

### B. Statement of Facts

#### Overview

The case arose from a January 1984 home-invasion robbery and burglary, committed by three black men against three white victims. One of the men was armed; a different man took the sole female victim into a separate room and sexually assaulted her.

Shortly after the crime, all three victims rejected Mr. Swoopes as a suspect based on photo lineups, and one—Linda, the victim of the assault—told police the gunman did not have a scar. Sixteen months later and under suspect circumstances,

the victims identified Mr. Swoopes as the gunman. Despite her original statement that the gunman did not have a scar, Linda's based her later identification of Mr. Swoopes solely on the prominent scar between his right eye and eyebrow. The defense focused heavily on this discrepancy in Linda's story.

Against this backdrop, the prosecutor in rebuttal argument, as summarized by the post-conviction court, wrongly "stated that Linda had told the police about a scar and the scar was mentioned the night of the incident." There was "no factual basis for this claim." (ER1 44.) Subsequently, the jury had a single mid-deliberation question: a request "to see any statement made by Linda of a blemish before the physical lineup." Although there was no such statement, the trial court answered that "[t]he statement is not admissible." (ER3 356.) Mr. Swoopes and defense counsel both affirmed that this response by the court was ex parte.

The ensuing 30 years of post-conviction litigation have focused primarily on constitutional violations arising from the admission of the eyewitness testimony, the prosecutor's material misstatements, and the trial court's material and prejudicial misstatement in its answer to the jury question. A much-condensed summary of the facts and rulings relevant to this Petition follows.

### The contested eyewitness evidence, prosecutorial misstatement during rebuttal argument, and incorrect, prejudicial answer to jury question

Mr. Swoopes, a black man, was convicted in 1986 of robbery, burglary, and sexual assault, and sentenced to 42 years in prison. The conviction turned on hotly

contested identification evidence from the three victims, all white, and all of whom initially rejected Mr. Swoopes as a suspect based on photo lineups. One of the victims, Linda, told police that the suspect did not have a scar.

Sixteen months later, the two male victims learned that Mr. Swoopes was on trial for a similar crime; they went to the courtroom of that trial. One of them identified Mr. Swoopes as the gunman in their case; the other did not, but later changed his mind. A few weeks later, Linda, the spouse of the victim who claimed to have made a positive identification, identified Mr. Swoopes at a line-up. Notwithstanding her earlier statement that the suspect had no scar, she identified Mr. Swoopes *solely* by the prominent horizontal scar between his right eye and eyebrow. The defense argued the identifications were mistaken, focusing, *inter alia*, on the discrepancy between Linda's initial description—"no scar"—and her later identification, which was based entirely on his scar.

It was in this context that the prosecutor in rebuttal argument, as summarized by the post-conviction court and agreed with by every subsequent court, wrongly "stated that Linda had told the police about a scar and the scar was mentioned the night of the incident." There was "no factual basis for this claim." (ER1 44.) Subsequently, the jury had a single mid-deliberation question: a request "to see any statement made by Linda of a blemish before the physical lineup." No such statement existed. Nonetheless, the trial court told the jury that "[t]he statement is not admissible." (ER3 356.)

Mr. Swoopes and defense counsel both affirmed that this response by the court was ex parte. (ER3 407-09, 415-16.) Defense counsel's affidavit further stated that, had he seen it, he "would have objected to [it] as an improper and inaccurate comment on the evidence . . . [that] would have substantially prejudiced Mr. Swoopes . . . ." (ER3 409.)

**The post-conviction court's grant of a new trial, later overturned on procedural grounds**

The post-conviction court granted a new trial, holding that the judge's answer, with its "unfortunate choice of wording," "inured to the prejudice of the defendant and constituted fundamental error;" further, this error, together with the prosecutor's false assertion in rebuttal argument on the same point, "combined to deprive [Mr. Swoopes] of a fair trial." (ER1 43-44.) The court did not make a finding as to whether the answer was delivered ex parte or not, saying merely that it was "not convinced" that the answer was ex parte. (ER1 44.) In any event, the post-conviction court concluded, the misleading answer was not harmless, because the other two victims' identification of Mr. Swoopes had taken place "under suggestive circumstances." (ER1 44.)

The Arizona Court of Appeals overturned that ruling on state procedural grounds. (ER1 31.) Regarding the court's answer to the jury question, the Arizona Court of Appeals merely noted that "the [post-conviction] court found there was insufficient evidence that any ex parte communication had occurred between Judge Meehan and the jury." (ER1 30; *State v. Swoopes*, 216 Ariz. 390, 395 (Ct. App.

2007).) That finding, the court continued, "arguably supports an inference that Swoopes's trial counsel had known of, or been present for, or otherwise been consulted on Judge Meehan's response to the jury's note." *Id*.

**The district court's denials of relief, including after remand**

On federal habeas review, the district court twice denied relief. The first time, the court wrongly applied the AEDPA standard. On remand, the district court again denied relief, in an order that included, verbatim, entire pages from the state's briefing. Significantly, however, it also reiterated its adoption of the magistrate judge's report and recommendation, stating it "was detailed, unequivocally applied the correct standard of review, and was adopted in its entirety by this Court as its findings of fact and conclusions of law." (ER1 6 n.2.)

Regarding the trial judge's misleading answer to the jury, that report and recommendation had stated:

> The [post-conviction] court concluded that the trial judge probably consulted counsel and then failed to properly record the incident . . . . This finding, however, does not necessarily mean that trial counsel approved the misleading instruction. . . . [I]t is possible the trial court told counsel of the question, assured them that he would instruct the jury to rely on the evidence already presented during the trial, and then constructed the misleading instruction himself and so advised the jury.

(CR 157 23-24.) In other words, the district court expressly adopted the conclusion that the trial court's response to the jury question: (1) was misleading; and (2) may have been constructed and delivered ex parte, with a meaning not approved of—and that would have been objected to by—defense counsel.

The district court refused to defer to the post-conviction court's factual findings, despite the fact that the Arizona court of appeals had reversed on procedural grounds, not the merits. "[D]eferring to the PCR trial court's factual findings," the district court said—in one of the many passages taken from the state's pleadings—"would undermine Arizona law." (ER1 10.) Further, the district court wrongly stated that the grant of a new trial had been based on ineffective assistance of counsel. (ER1 5.) As noted, relief had been based on the jury-note issue; in fact, the post-conviction court nowhere mentioned ineffective assistance of counsel.

Regarding the jury-note claim, the district court held that any error was harmless "and did not render Petitioner's trial unconstitutional." (ER1 12.) It offered no reasoning for that conclusion.

### C. The Ninth Circuit panel opinion

On appeal to the Ninth Circuit from the district court's denial of his petition, Mr. Swoopes presented two arguments, both certified.

The first argument was that the trial court had violated Mr. Swoopes's due process and Sixth Amendment rights when it provided its misleading, prejudicial, ex parte answer to the jury question about the crucial identification evidence. The Ninth Circuit "defer[ed] to the factual finding of the Arizona Court of Appeals that the response was not ex parte," and concluded that, accordingly, Mr. Swoopes's "claim fails because he was not deprived of counsel." (App. A, p. 2.) (As noted, what

the Arizona Court of Appeals actually said was that an "inference" that defense counsel was aware of the response was "arguably supported.") Mr. Swoopes seeks a writ of certiorari as to this holding.

The Ninth Circuit also denied relief on the second argument—that the trial court violated Mr. Swoopes's due process right by admitting unduly suggestive and unreliable victim identification evidence. Although Mr. Swoopes disagrees with that holding, he does not seek a writ of certiorari for its review.

The Ninth Circuit denied a petition for panel or en banc rehearing.

After serving 33 years in prison, Mr. Swoopes was released on parole on August 9, 2018, and returned to his family in Tucson.

## REASONS FOR GRANTING THE WRIT

### I. This case presents an important question of constitutional law that this Court has yet to address, and about which the lower courts require guidance, namely, whether it violates Due Process and the Sixth Amendment to exclude a defendant from the court's consideration and answering of a mid-deliberation, substantive jury question.

A person accused of a crime has both a Sixth Amendment and a due process right, under the Fifth and Fourteenth Amendments, to be personally present "at every stage of [their] trial." *See Illinois v. Allen*, 397 U.S. 337, 338 (1970) (the Confrontation Clause protects this "most basic" right) (citing *Lewis v. United States*, 146 U.S. 370 (1892)); *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934) (the Fourteenth Amendment's guarantee of due process assures the extension of this right in state courts). A felony defendant therefore "has the privilege . . . to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge. *Snyder*, 291 U.S. at 105-06. Or, as this Court stated in *Lewis*, "after indictment found, nothing shall be done in the absence of the prisoner." 146 U.S. at 372.

In practice, the Court has construed this right to be present as applicable to "any stage of the criminal proceeding that is critical to its outcome if [the defendant's] presence would contribute to the fairness of the procedure." *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987). Put more simply, the right applies whenever the "substantial rights of the accused may be affected." *Mempa v. Rhay*, 389 U.S. 128, 134 (1967). Although it may seem a matter of common sense that this would

include the answering of substantive, mid-deliberation jury questions, that question—much-discussed by federal and state appellate courts—has not yet been addressed by this Court.

In federal cases, Rule 43(a) provides statutory protection regarding the defendant's personal presence at trial; it requires their presence at "every trial stage, including jury impanelment and the return of the verdict." Fed. R. Crim. P. 43(a)(2). It also specifies that a defendant's presence is not required at a conference or hearing that involves solely a question of law. Fed. R. Crim. P. 43(b)(3).

Rule 43 parallels the constitutional requirement that the defendant be personally present at all stages of trial. As the Seventh Circuit has noted, whether a "communication with the jury in the absence of defendant is . . . an impairment of defendant's sixth amendment right . . . or a breach of due process" is "very nearly the same question" as whether Rule 43 is violated. *Ware v. United States*, 376 F.2d 717, 718 (7th Cir. 1967).

Interpreting Rule 43, this Court in *Rogers v. United States* likewise concluded that "every stage of the trial" includes the answering of jury questions. "Federal Rule Crim.Proc. 43 guarantees to a defendant in a criminal trial the right to be present 'at every stage of the trial including the impaneling of the jury and the return of the verdict.' Cases interpreting the Rule make it clear, if our decisions prior to the promulgation of the Rule left any doubt, that the jury's message should have been answered in open court . . ." 422 U.S. 35, 39, (1975) (citation omitted).

Drawing on *Rogers*, the Seventh Circuit has held that the "[f]ailure to secure the defendant's presence during communications between the judge and jury violates Rule 43(a) unless the judge answers the jury's question in open court after giving defense counsel a chance to object and the jury's question raises issues on which counsel is not likely to consult the defendant or for which the defendant would not likely have an answer that would sway the judge." *United States v. Pressley*, 100 F.3d 57, 59 (7th Cir. 1996); *cf. Hegler v. Borg*, 50 F.3d 1472, 1477 (9th Cir. 1995) (regarding evaluating the impact of a constitutional violation involving "presence error").

That a judge's response to a jury question triggers a defendant's due process and Sixth Amendment rights to be present makes sense, given the importance—often decisive—of such answers. That importance has been repeatedly recognized by the federal courts, including by the Ninth Circuit in *Musladin v. Lamarque*, which affirmed that the answering of a jury question is a "critical stage" under *Cronic*. 555 F.3d 830, 835-37 (9th Cir. 2009) (applying *United States v. Cronic*, 466 U.S. 648, 658-59 (1984)).

In *Musladin*, the jury sent a mid-deliberations note to the trial judge, asking for "amplification" of the instruction defining murder in the first and second degree. *Id*. at 835. Defense counsel was notified, said he would "be right over," and arrived ten to fifteen minutes later. In the meantime, however, the trial judge had responded to the note "with the written direction: 'REFER TO THE INSTRUCTIONS.'" The jury returned a guilty verdict within the hour. *Id*.

The Ninth Circuit considered whether such a mid-deliberation communication with the jury constitutes a critical stage of trial; that is, whether it is "'a step of a criminal proceeding . . . that [holds] significant consequences for the accused.'" *Id*. at 839 (quoting *Bell v. Cone*, 535 U.S. 685, 695-96 (2002)). It determined that it did. More particularly, it held that "[t]he 'stage' at which the deprivation of counsel may be critical should be understood as the *formulation* of the response to a jury's request for additional instructions, rather than its delivery.'" *Musladin*, 55 F.3d at 842.

That conclusion followed from the critical nature of communications between the deliberating jury and the trial court. "Jury deliberations are the apex of the criminal trial. . . . Jurors are particularly susceptible to influence at this point, and any statements from the trial judge—no matter how innocuous—are likely to have some impact . . ." *Id*. at 840.

The impact of the trial judge's answers to the jury is particularly heavy where—as here—"[t]he crucial evidence against the accused was sharply disputed, and, more significantly, the jury was experiencing considerable difficulty in resolving the dispute." *United States v. Ronder*, 639 F.2d 931, 934-35 (2nd Cir. 1981) (citing *Bollenback v. United States*, 326 U.S. 607, 612-13 (1946)).

In *Evans v. United States*, the Sixth Circuit addressed facts similar to those presented here, but in the context of a Rule 43 violation. In *Evans*, the trial judge answered several jury questions in open court and with defense counsel present, but

in the absence of the defendant. 284 F.2d 393, 393 (6th Cir. 1960). The Sixth Circuit reversed Evans's conviction, holding that "[i]t was error for the Trial Judge to instruct the jury in the absence of the defendant even though his counsel was present." *Id*. at 394 (citing, *inter alia*, *Shields v. United States*, 273 U.S. 583, 588 (1927)). The court stated that:

> Defendant was entitled to be present in the courtroom when the additional instructions were given to the jury by the court. He had the right to see and observe the manner in which the proceedings were being conducted and to consult with his counsel. Had defendant been present he could have objected to any part of the instructions and the Judge would then have had the opportunity of correcting the instructions if he deemed it advisable to do so.
>
> . . .
>
> He was deprived of this right. The instructions given did not relate to trivial, insubstantial matters, but involved vital issues in the case.

*Id*. at 395 (citing *Fillippon v. Albion Vein Slate Co*., 250 U.S. 76 (1919)).

The Sixth Circuit reversed Evans's conviction even though, in that case, the judge's answer was not "erroneous in any respect." 284 F.2d at 394. Here, in contrast, the judge's answer was not just formulated and given in the absence of Petitioner Swoopes, but was also misleading, erroneous and highly prejudicial—a finding by the post-conviction court that has never been disturbed and is fully documented by the record. In telling the jury that "[t]he statement is not admissible," the trial court clearly—and wrongly—suggested that the statement requested by the jury—a statement by the victim describing a scar on the gunman—in fact *existed*; it did not.

In limited situations, a defendant's constitutional right of presence "may be adequately protected by the presence of his or her counsel." *United States v. Frazin*, 780 F.2d 1461, 1469 (citing *United States v. Gagnon*, 470 U.S. 522, 526-27 (1985) (1985); *Snyder v. Massachusetts*, 291 U.S. 97 (1934)). However, the question of whether the absence of the defendant from the formulation and delivery of substantive jury questions is subject to this carve-out or is, rather, "constitutionally fatal," has yet to be addressed. *See Frazin*, 780 F.2d at 1469.

## II. This case is the ideal vehicle for resolution of this issue.

This case presents an ideal vehicle for the Court to address and resolve this issue. It is undisputed that Mr. Swoopes was not afforded an opportunity to be present during "all stages of trial," because the trial court considered and responded to the pivotal jury question in his absence. It is undisputed that the question raised by the jury was not one of law, but of evidence. It is further undisputed that the content of the trial court's answer was not only incorrect, but prejudicial; so prejudicial, in fact, that it led to a grant of a new trial. Finally, it is undisputed that Mr. Swoopes did not waive his Sixth Amendment or due process right to be present.

Because the record is clear as to all salient factors, this case is an ideal vehicle for the Court to resolve this important constitutional question.

## III. The court below erred in denying relief, because the trial judge's incorrect and prejudicial answer to a jury question violated Petitioner Swoopes's due process and Sixth Amendment rights, even if it was not wholly ex parte.

The post-conviction court's reference to the "unfortunate choice of wording" indicates its conclusion that, even if the discussion of the jury question was not wholly ex parte, the trial judge's formulation and delivery of the answer was. As noted in the Statement of the Case, this finding was shared by the magistrate judge and district court. (ER1 6 n.2.)

No court—including the Arizona Court of Appeals—has found that the judge's formulation of the response was *not* ex parte. The affidavits of Mr. Swoopes and trial counsel, meanwhile, unequivocally avow that it was ex parte—a conclusion likewise dictated by common sense, given the prejudicial nature of that response. The fact that Linda first said the gunman did *not* have a scar, and then did not mention a scar until a year and a half after she had excluded Mr. Swoopes as a suspect from a photo line-up, was crucial evidence that her identification of Mr. Swoopes was mistaken. As the post-conviction court found—and no court has disagreed—in that context, the trial judge's response referencing "the statement" was prejudicial. Indeed, the state itself has acknowledged that the "the trial court's response may have implicitly suggested that Linda made a prior statement about a blemish." (ER2 145.) Nor did the Arizona Court of Appeals disagree that Mr. Swoopes was deprived of a fair trial. It merely held that, *under Arizona law*, that finding did "not necessarily equate to a finding that any right "of sufficient constitutional magnitude to require personal waiver by the defendant" was at issue

and violated . . ." *State v. Swoopes*, 216 Ariz. 390, 399 n.9 (Ct. App. 2007) (citation omitted).

The post-conviction court's finding that the trial judge's answer "incorrectly implied [to the jury] that Linda had given a pre-lineup statement about a scar" was an explicit finding of fact that the district court and the Ninth Circuit should have deferred to. "The substance of the *ex parte* communications and their effect on juror impartiality are questions of historical fact entitled to [the] presumption" of correctness. *Sumner v. Mata*, 455 U.S. 591, 597 (1982). Even only "'fair support'" in the record is sufficient to require that the state-court finding be deferred to. *Id*.

Neither the district court nor the Ninth Circuit, however, even mentioned the finding that the judge's answer had incorrectly implied the existence of inculpatory identification evidence, much less addressed it. Nor did either court acknowledge the post-conviction court's finding—a finding not disturbed by the Arizona Court of Appeals—that "the prosecutor's argument and the judge's subsequent response to the jury note combined to deprive the defendant of a fair trial." (ER1 44.) Rather, the Ninth Circuit's discussion regarding the jury note issue—the central issue throughout 30 years of postconviction litigation—was, *in toto*, that "[w]e defer to the factual finding of the Arizona Court of Appeals that the response was not ex parte." As noted above, however, the Arizona Court of Appeals made no such finding; it merely said that it could arguably be inferred that defense counsel had participated in the formulation of the answer. That statement, further, was dictum. *United States v. Johnson*, 256 F.3d 895, 919-20 (9th Cir. 2001) (Tashima, CJ, concurring)

(noting this Court's adoption of Black's Law Dictionary definition of "dictum" as a statement not essential to the determination of a case) (citation omitted).

The facts as found by the Arizona courts and even the district court indicate that the trial judge's formulation of the jury-note response was ex parte, and that neither Mr. Swoopes nor his attorney were present when the answer was delivered. However, even if the defense counsel was involved in the answer, its misleading and prejudicial nature constituted a denial of due process and a fair trial. *See Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993) (citation omitted) (on habeas review, constitutional errors are assessed for prejudicial impact, i.e., whether they had a "substantial and injurious effect or influence in determining the jury's verdict").

In addition to relief based on this prejudice, relief should be granted because of structural error. Under *Cronic*, the denial of counsel at a "critical stage" of trial requires automatic reversal. *United States v.* Cronic, 466 U.S. 648, 658-59 (1984) ("The presumption that counsel's assistance is essential requires us to conclude that a trial is unfair if the accused is denied counsel at a critical stage of his trial"). As discussed above, a trial judge holds great influence over a jury. The presence of the defendant and his attorney, or at minimum the attorney, "'is critical when a jury's questions are discussed because '[c]ounsel might object to the instruction or may suggest an alternative manner of stating the message'—a critical opportunity given the great weight that jurors give a judge's words." *Frantz v. Hazey*, 533 F.3d 724, 743 (9th Cir. 2008) (quoting *United States v. Rosales-Rodriguez,* 289 F.3d 1106, 1110 (9th Cir. 2002)). Because Mr. Swoopes was denied counsel at this critical

stage of formulating a response to a jury question, automatic reversal is required. *See Musladin v. Lamarque*, 555 F.3d 830, 842 (9th Cir. 2009). *See also United States v. Martinez*, 850 F.3d 1097, 1105 (9th Cir. 2017) (although not all errors regarding jury communications require automatic reversal, those that involve jury notes with "'substantive inquir[ies] about the facts or the law'" do) (quoting *United States v. Mohsen*, 587 F.3d 1028, 1032 (9th Cir. 2009) (further citation omitted)).

Even if automatic reversal under *Cronic* and *Musladin* were not required, the Ninth Circuit should have reversed due to prejudice under the *Chapman* standard. *See Chapman v. California*, 386 U.S. 18, 21–22 (1967). The three factors to consider, under *Chapman*, are:

1. The probable effect of the message sent;
2. The likelihood that the trial court "would have sent a different message had it consulted with appellants beforehand;" and
3. "[W]hether any changes in the message that [the defendant] might have obtained would have affected the verdict in any way.

*United States v. Frazin*, 780 F.2d 1461, 1470 (9th Cir. 1986).

Regarding the first factor, the post-conviction court found that the effect of the message sent by the trial judge was to suggest to the jury—wrongly—that Linda had made a pre-lineup statement about a scar to the police.

Regarding the second factor, defense counsel averred that, had he been made aware of the trial judge's response, he would have objected to it "as an improper and inaccurate comment on the evidence."

Regarding the third factor, had defense counsel been present for the formulation and delivery of the answer to the jury, the content of that answer would have been markedly different—it would have been correct, and not prejudicial to Mr. Swoopes—and the verdict might have been different. It was a case based on eyewitness testimony, and all such testimony was problematic and heavily attacked by the defense; further, there was minimal corroborating evidence. The fact that the jury asked the question—the only question it did ask—itself demonstrates the importance of the issue to their deliberations.

Finally, relief should be granted because Mr. Swoopes was excluded from the answering of this crucial jury question. *See supra* 10-15.

## CONCLUSION

For the reasons set forth above, the Court should grant the writ of certiorari, reverse the judgment of the Ninth Circuit Court of Appeals, and grant Mr. Swoopes's petition for a writ of habeas corpus.

Respectfully submitted: August 16, 2018

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