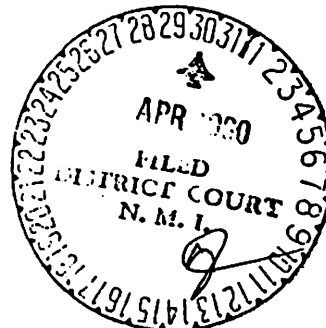


UNITED STATES DISTRICT COURT
NORTHERN MARIANA ISLANDS
APPELLATE DIVISION

Commonwealth of the Northern Mariana Islands,
Plaintiff/Appellee,
vs.
Mariano Faisao Mendiola,
Defendant/Appellant.

DCA NO. 88-9024
CTC NO. 88-43

OPINION



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BEFORE: MUNSON, HATTER,¹ and KAY,² District Judges

KAY, Judge:

¹The Honorable Terry J. Hatter, Jr., Judge, United States District Court for the Central District of California, sitting by designation.

²The Honorable Alan C. Kay, Judge, United States District Court for the District of Hawaii, sitting by designation.

1 area of Saipan in the dense undergrowth known as the "boonies."
2 Mendiola was accompanied by Mario Reyes who allegedly did not
3 directly participate in any of the crimes. Reyes was never
4 charged with any crime in relation to the Mack and Conley
5 murders.⁴ It was through conversations with Reyes (then
6 incarcerated for other crimes) that police investigators were led
7 to Mendiola (then incarcerated for unrelated homicide charge).
8 Reyes testified at trial that Mendiola committed the murders.

9 The facts and circumstances surrounding various
10 interrogations of Mendiola are the subject of the instant appeal.
11 The facts are essentially uncontroverted. It is only the legal
12 ramifications of those facts that are at issue. It is
13 particularly relevant to an analysis of this case that strong
14 evidence indicates that Mendiola was mentally retarded, while it
15 is uncontroverted that he was at least borderline mentally
16 retarded.⁵

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18
19 ⁴Reyes admitted that he was present during the kidnapping,
20 robbery and double murder. There was also evidence that the murder
21 weapon belonged to Reyes and that some of the items stolen from the
22 murder victims were found in his possession. Nevertheless, Reyes
23 was never charged with any crime in connection with the Mack and
24 Conley murders. The nature of whatever agreement, if any, was
25 reached between Reyes and the police has not been made known to this
26 reviewing court.

24 ⁵Dr. Ruth Dickson, psychiatrist, opined that Mendiola has an
25 I.Q. of 70-80; an I.Q. below 70 is defined as constituting mental
26 retardation. Dr. E. Woodyard, psychiatrist, interpreting the
results of a battery of 5 standardized tests comprising the WAIS
battery, concluded after two full days of testing that Mendiola had
an I.Q. of only 61 - well within the range of mental retardation.
Brief for Appellant at 26-28.

1 While the total number of times Mendiola was questioned
2 by the police is not clear, five sessions are relevant to the
3 instant appeal. Defense counsel objected to the introduction of
4 every handwritten document purporting to be the statement of
5 Mendiola.⁶

6
7 First Session

8 On March 17, 1988 at approximately 6:00 p.m., Mendiola
9 was first questioned⁷ concerning the Mack murders. Questioning
10 continued for five hours. RT at 696. The questioning was
11 initiated by Sergeant Ray Camacho and occurred in the Juvenile
12 unit of the Detectives Office at the Department of Public Safety.
13 Prior to commencement of questioning, Sergeant Camacho informed
14 Mendiola that "he have a right not to talk to me - to talk to me,
15 and he had a right to see a lawyer." RT at 657. That this
16 warning may have been in violation of the Constitutional
17 requirements delineated in Miranda v. Arizona, 384 U.S. 436
18 (1966), is not seriously contested by the Commonwealth. Instead,
19 the Commonwealth argues (i) this first questioning period was not
20 a custodial interrogation requiring Miranda warnings and (ii) even
21 if Miranda warnings were required and even if the warning given by
22

23 ⁶See Brief of Appellant at page 40 and related references.

24 ⁷The Commonwealth characterizes this first session as a
25 "preliminary investigation" not requiring Miranda warnings.
26 Mendiola characterizes the same session as a custodial investigation
requiring full Miranda warnings. The more neutral term "questioning
session" is used for the purposes of the discussion herein.

1 Sergeant Camacho was Miranda violative, Mendiola was not
2 prejudiced thereby because virtually nothing that was a product of
3 the first interview was introduced as evidence at trial.

4 A very short introductory statement that was a product
5 of this first questioning session was, however, introduced at
6 trial. Sergeant Camacho testified that he notified Captain Castro
7 "after he [Mendiola] admitted to me" Whatever it was that
8 Mendiola admitted to Sergeant Camacho was never admitted into
9 evidence. The Commonwealth argued that even if these five words
10 were the product of a Miranda violative interrogation, that in
11 light of the weight of the other evidence against Mendiola,
12 admission of these five words did not taint the verdict so as to
13 constitute reversible error. Mendiola's statement prompted
14 Sergeant Camacho to report the admission to Captain Castro.

15
16 Second Session

17 At approximately 6:40 p.m., Captain Castro arrived with
18 Sergeant Camacho. At that time Mendiola was fully Mirandized in
19 the English language and again in Mendiola's native language of
20 Chamorro. The adequacy of these warnings is not contested.
21 Mendiola then waived his rights by signing a written waiver.
22 Finally, Sergeant Camacho read from paragraph 9 of a
23 "Constitutional Rights" form to Mendiola asking, "Knowing these
24 rights, do you want to talk to me without a lawyer present."
25 Mendiola responded in writing - "Yes." The questioning began at
26 6:55 p.m. and ended at 11:40 p.m.

1 Each question and Mendiola's response were handwritten
2 by one of the officers. At the end of each page of handwritten
3 notes, Mendiola allegedly reviewed what was written and was told
4 by the police officers to sign the bottom of the page indicating
5 that the notes were accurate.⁸ The first question asked by
6 Sergeant Camacho was "What do you know about the death of Mr.
7 Galen Mack and Mrs. Remedios Conley at Obyan?" Mendiola allegedly
8 responded - "I'm the one who killed them."

9 At 11:40 p.m., Mendiola asked if the questioning could
10 be discontinued for the night and continued the next day. The
11 officers honored his request. During the course of the
12 questioning, Mendiola was allowed to smoke cigarettes and was
13 permitted to take coffee breaks.

14 15 Third Session

16 On the morning of March 18, 1988, Sergeant Camacho
17 arrived to continue questioning Mendiola. Mendiola was again
18 Mirandized. Again Mendiola was asked to sign paragraph 9 of the
19 "Constitutional Rights" form. But that time, next to the
20 paragraph that read "Knowing these rights, do you want to talk to
21 me without a lawyer present." Mendiola responded in writing -
22 "No." He then allegedly requested to speak to Captain Castro.

23
24
25
26 ⁸Mendiola's ability to read the English language is very
doubtful. This is discussed further infra.

1 Fourth Session

2 When Captain Castro arrived at 2:45 p.m. on March 18,
3 1988, Mendiola was again fully Mirandized in English and Chamorro.
4 That time, Mendiola completely waived his Miranda rights and again
5 confessed to the Mack murders. The propriety of that set of
6 Miranda warnings and waivers is uncontroverted.

7
8 Fifth Session

9 On March 19, 1988 at 2:15 p.m. Mendiola was again
10 Mirandized and waived his relevant Constitutional rights. The
11 propriety of that set of Miranda warnings and waiver is also
12 uncontroverted. At that session, Mendiola confessed more details
13 of the murder, allegedly reviewed the police notes of his
14 confession, and signed each page.

15 After the questioning, Mendiola, Captain Castro and
16 Sergeant Camacho drove to Obyan Beach, where Mendiola was
17 instructed to re-enact the murders. Sergeant Camacho photographed
18 that reenactment and those photographs were introduced into
19 evidence at trial. It is unclear from the record whether defense
20 counsel objected to admission of these photographs at trial.

21
22 IV. ISSUES

- 23 1. Whether the Trial Court erred in
24 admitting into evidence Mendiola's
25 statements made pursuant to appropriate
26 Miranda warnings, where previous
"interrogation" may have been instituted
pursuant to partially incomplete Miranda
warning.

1 that is not Miranda violative. Questions of law are independently
2 reviewed by the appellate court de novo. Bose Corp. v. Consumers
3 Union of U.S., 466 U.S. 485, 514 n.31 (1984); Pullman-Standard v.
4 Swint, 456 U.S. 273, 287 (1982).

5 Assuming that the first session of questions were, as
6 contended by defense counsel, pursuant to a custodial
7 interrogation requiring full Miranda warnings, and assuming that
8 the abridged warning given by Sergeant Camacho were Miranda
9 violative, defense counsel argues that all later interrogations
10 and any statements that were the products thereof were fatally
11 tainted by the earlier inadequacy of the Miranda warnings prior to
12 Mendiola's single cryptic admission that was never entered into
13 evidence and the full context of which is unknown.⁹

14 In support of his contention, defense counsel relies
15 upon United States v. Wauneka, 770 F.2d 1434 (9th Cir. 1985).
16 Defense counsel's reliance upon Wauneka, however, is misplaced.
17 The facts of the instant case fall clearly outside of the rule as
18 delineated by the Ninth Circuit. The gravamen of the rule is that
19 a pre-Miranda confession taints a post-Miranda confession only
20 where the former was actually coerced in violation of the Fifth
21 Amendment. The rule does not apply where, as in the instant case,
22 the pre-Miranda statement was merely technically violative:

23 Under the Supreme Court's analysis in Elstad,
24 in determining the admissibility of a
25 defendant's statement given after the Miranda
warning, the court should look first to

26 ⁹I.e., Camacho's statement at trial referring to Mendiola as
having said "after he admitted to me . . ."

1 determine whether the statement made by a
2 defendant before the Miranda warning was
3 actually coerced in violation of the fifth
4 amendment. * * * If, on the other hand, the
5 prior statement was voluntary in the sense that
6 it was not coerced in violation of the fifth
7 amendment, though obtained in technical
8 violation of the Miranda requirements, the
9 court should suppress the statement given after
10 the Miranda warning only if the court finds
11 that the subsequent statement was not
12 voluntarily made. Wauneka, 770 F.2d at 1440.

13
14 It follows that the Trial Court did not commit
15 reversible error by admitting into evidence post-Miranda
16 statements based upon an alleged taint arising out of a pre-
17 Miranda confession where neither confession was coerced and the
18 pre-Miranda statements were at worse only technically violative.

- 19
20 2. Whether the Trial Court erred in admitting
21 into evidence Mendiola's statements of
22 March 18th and 19th, 1988 after he had
23 indicated on the morning of March 18, 1988
24 that he did not wish to talk to police
25 officers without having a lawyer present.

26
Standard of Review

The facts relevant to this issue are uncontroverted. It follows, therefore, that it is a question of law as to whether an accused who has invoked his right to have an attorney present at a custodial interrogation may, subsequent to such invocation, effectively waive such right and whether Mendiola's actions constituted such waiver. Questions of law are independently reviewed by the appellate court de novo. Bose Corp. v. Consumers

1 Union of U.S., 466 U.S. 485, 514 n.31 (1984); Pullman-Standard v.
2 Swint, 456 U.S. 273, 287 (1982).

3 Mendiola maintains that the Trial Court's admission of
4 any evidence or testimony relating to anything he said or did
5 after the third session on the morning of March 18, 1988
6 constitutes reversible error. The basis of his objection is that
7 once Mendiola communicated that he did not want to talk to
8 Sergeant Camacho without a lawyer present, everything he
9 subsequently said or did is inadmissible.

10 It is clear under Miranda v. Arizona, 384 U.S. 436, 474
11 (1966), that once the accused states that he wants an attorney,
12 "the interrogation must cease until an attorney is present."
13 Sergeant Camacho allegedly adhered to this rule. Upon learning
14 that Mendiola did not want to talk to him without the presence of
15 an attorney, Sergeant Camacho allegedly halted the questioning
16 session. Moreover, it is evident that Mendiola did not
17 specifically request an attorney, he merely stated that he did not
18 want to talk to Sergeant Camacho without an attorney being
19 present.

20 But even after an accused has manifested his desire not
21 to communicate with the authorities without counsel, he may
22 nevertheless waive that decision by initiating further
23 communication with the police. Edwards v. Arizona, 451 U.S. 477,
24 484-85 (1981) (The accused "is not subject to further
25 interrogations by the authorities until counsel has been made
26

1 available to him, unless the accused himself initiates further
2 communications, exchanges, or conversations with the police.")

3 Mendiola allegedly did request to speak to Captain
4 Castro. He therefore waived his invocation of the right to have
5 counsel present during interrogation and under Edwards v. Arizona
6 subjected himself to further interrogation by the police.

7 It follows that there is no authority for or substance
8 to Mendiola's claim that the Trial Court committed reversible
9 error by admitting evidence of his statements and actions
10 subsequent to his invoking his right to counsel at the beginning
11 of the third session.

- 12
13 3. Whether the Trial Court erred in admitting into
14 evidence Mendiola's confession in the form of
15 handwritten "transcripts" of interrogation
16 sessions, written by police officers and signed by
17 Mendiola, in light of (i) the probability that
18 Mendiola was not able to read the "transcripts" he
19 had signed, (ii) Mendiola had an I.Q. that was
20 either borderline mentally retarded or he was in
21 fact mentally retarded, (iii) Mendiola was not
22 represented by legal counsel, and (iv) Mendiola was
23 not advised of his "right" not to sign the
24 "transcripts."

25 Standard of Review

26 The question of whether an accused knowingly and
voluntarily waived his Fifth and Sixth Amendment rights as
articulated in Miranda v. Arizona is a mixed question of law and
fact United States v. Doe, 819 F.2d 206, 208-09 (9th Cir. 1985)
(as corrected 1987). Although the appellate court will apply a

1 clear error standard to the trial court's findings of fact
2 attendant to a confession, the ultimate determination of the
3 voluntariness of an accused's confession to police officers is a
4 legal question that is reviewed de novo. United States v. Wolf,
5 813 F.2d 970, 974 (9th Cir. 1987), citing, Miller v. Fenton, 474
6 U.S. 104 (1985); United States v. Crespo de Llano, 830 F.2d 1532,
7 1541 and n.2 (9th Cir. 1987), amended, 838 F.2d 1006 (1987).

8 The Constitutional requirement that confessions must be
9 voluntary is drawn both from the accused's Fifth Amendment right
10 against self-incrimination and also from the Fourteenth
11 Amendment's standards of Due Process. Oregon v. Elstad, 470 U.S.
12 298 (1985). Once a defendant objects to the admission of his
13 alleged confession, the trial court must determine whether the
14 prosecution has affirmatively demonstrated that such confession
15 was voluntary.¹⁰ Such determination must be apparent from the
16 record.¹¹ Where it is not evident from the record that the trial
17 court made a determination of voluntariness, such error will not
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19
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21

22 ¹⁰"A defendant objecting to the admission of a confession is
23 entitled to a fair hearing in which both the underlying factual
24 issues and the voluntariness of his confession are actually and
reliably determined." Jackson v. Denno, 378 U.S. 368, 380 (1964).

25 ¹¹"Although the judge need not make formal findings of fact or
26 write an opinion, his conclusion that the confession is voluntary
must appear from the record with unmistakable clarity." Sims v.
State of Georgia, 385 U.S. 538, 544 (1967).

1 be held harmless.¹²

2 The Commonwealth bears the burden of proving that the
3 defendant's confession was voluntarily obtained. Crespo de Llano,
4 830 F.2d at 1542. The test for voluntariness of a confession is
5 the "totality of the circumstances," whereby the trial court
6 should consider all circumstances, including past history,
7 education, physical condition, state of mind, and existing
8 conditions when the confession was given. Crane v. Kentucky, 476
9 U.S. 683 (1986); Mincey v. Arizona, 437 U.S. 385 (1978);
10 Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Jackson v. Denno,
11 378 U.S. 368 (1964); United States v. Doe, 819 F.2d at 209,
12 citing, Fare v. Michael C., 442 U.S. 707, 725 (1979). Moreover,
13 in order to be voluntary, a confession must be a product of a
14 rational intellect and a free will. Blackburn v. Alabama, 361
15 U.S. 199 (1960); United States v. Wolf, 813 F.2d 970 (9th Cir.
16 1987); United States v. Crespo de Llano, 830 F.2d 1532 (9th Cir.
17 1987). Thus, the mental capacity of the accused is a relevant
18 factor to be considered. Fikes v. Alabama, 352 U.S. 191 (1957);
19 Haley v. Ohio, 332 U.S. 596 (1948); Russell v. Parratt, 543 F.2d
20 1214 (8th Cir. 1976); United States v. Roark, 753 F.2d 991 (11th
21 Cir. 1985).

22
23
24
25 ¹²"[A]ny criminal trial use against a defendant of his
26 involuntary statement is a denial of due process of law 'even though
there is ample evidence aside from the confession to support the
conviction.'" Mincey v. Arizona, 437 U.S. 385, 398 (1978) (emphasis
in original).

1 Under the totality of the circumstances test, the
2 potential factors that may be considered on the issue of
3 voluntariness are probably limitless. Nevertheless, Title 18
4 U.S.C. § 3501(b) lists five factors which must be considered in a
5 determination of voluntariness: (i) time elapse between arrest and
6 arraignment if the confession was made during that period, (ii)
7 defendant's awareness of the relevant charges, (iii) advisal of
8 the right to remain silent, (iv) advisal of the right to counsel,
9 and (v) presence or absence of legal counsel. The presence or
10 absence of any of those factors is not determinative in a totality
11 of the circumstances analysis. See e.g., United States v. Wilson,
12 838 F.2d 1081, 1984 (9th Cir. 1988); United States v. Fouche, 776
13 F.2d 1398 (9th Cir. 1985) (defendant's statements may be found to
14 have been involuntary even where he was advised of his Miranda
15 rights and waived them.) However, the Ninth Circuit has held that
16 an unreasonable delay between arrest and arraignment in excess of
17 six hours can by itself form the basis of involuntariness despite
18 defendant's waiver of right to remain silent and right to presence
19 of an attorney. United States v. Wilson, 838 F.2d at 1086-87.

20 In the instant case, the time lapse between Mendiola's
21 arrest and arraignment is not readily ascertainable from the
22 record. But it is evident that while interrogations began on
23 March 17, 1988, Mendiola was apparently not arraigned until early
24 April. See Brief for Appellant at 48. In light of the fact that
25 Mendiola was already in custody on an unrelated matter at the time
26 of his interrogation, this inquiry may not be directly relevant.

1 It is also not clear from the record when Mendiola was informed
2 that he was facing kidnapping and murder charges.¹³ It is evident
3 that Mendiola was informed of his right to remain silent and his
4 right to have counsel present during interrogation. However,
5 legal counsel was not present during any of the subject
6 interrogations. Moreover, although the police began questioning
7 Mendiola regarding the Mack and Conley murders on March 17, 1988,
8 Mendiola was not provided an attorney until sometime in April.
9 Brief of Appellant at 48 n.229. Thus, the subject interrogations
10 pass muster on factors three and four alone, fail factor five, and
11 the record is unclear as to factors one and two.

12 There is in the record no apparent determination by the
13 Trial Court that Mendiola's "confessions" were voluntary. The
14 United States Supreme Court has made it clear that such omission
15 cannot constitute harmless error. Mincey v. Arizona, 437 U.S. at
16 398.

17 The so-called "transcripts" of Mendiola's confessions
18 were not transcripts at all. At best, they were the interrogating
19 officer's recollections of his questions and Mendiola's responses.
20 That the handwritten notes were not in fact "transcripts" is
21 evident from their face. Transcripts almost invariably have a
22
23

24
25 ¹³Defense counsel asserts that Mendiola was "never informed he
26 was under arrest or booked for the Mack murders." Brief of
Appellant at 37. Defense counsel apparently meant that Mendiola
was not informed of the charges against him during the course of
the five subject questioning sessions.

1 quality that distinguishes them from other types of documents.
2 Even highly educated and articulate persons are not capable of
3 speaking for prolonged periods of time without momentary
4 hesitations, typically punctuated with such verbal fillers as
5 "uh," or "let me think now," or "what was that you said?"
6 Moreover, very few individuals are capable of speaking for a
7 period of several hours in complete sentences and otherwise
8 grammatically correct English. Certainly, an individual of
9 Mendiola's lack of education, reduced mental capacity, and absence
10 of sophistication could not have done so.

11 The method of creating these "transcripts" is not clear
12 from the record. The questions were apparently asked both in
13 Chamorro and English, and Mendiola's Chamorro response was then
14 written in English. From the record it appears that the
15 "transcript" was not read back to Mendiola in either Chamorro or
16 English. He was merely invited to review the handwritten document
17 written in the English language, a language in which he was almost
18 totally illiterate, and told to sign the bottom of each page
19 attesting to the document's accuracy.

20 The Commonwealth cites unconvincing state court
21 authority for the proposition that an accused's written confession
22 does not have to be in his own handwriting and does not have to
23 repeat his exact words in order to pass Constitutional muster.
24 State v. Boykin, 298 N.C. 687, 259 S.E.2d 883 (1979), cert.
25 denied, 446 U.S. 911 (1980) (such a confession is not
26 Constitutionally violative where the accused adopts the statement

1 after reading it and indicating inaccuracies by encircling them
2 and then initialing the changes).

3 The Commonwealth also provides state court authority for
4 the proposition that it is not necessary in order to be admissible
5 against the defendant that the written confession be in a language
6 understood by the accused if the confession were translated for
7 him into a language which the accused understood. State v.
8 Berberick, 100 P. 209 (1909).

9 The limited authoritative weight of the Commonwealth's
10 cases aside, they are nevertheless easily distinguished from the
11 instant case. Regarding Boykin, it is evident that Mendiola was
12 incapable of reading the officer's handwritten notes of his
13 statement. Unlike the accused in Boykin, Mendiola's ignorance of
14 the contents of the handwritten documents which he supposedly
15 adopted is supported by evidence that he could not read more than
16 the most rudimentary English words, e.g., words like "stop," and he
17 "was not able to read simple sentences."¹⁴ Mendiola's ignorance
18 of the contents of his "confessions" is further supported by the
19 fact that unlike the accused in Boykin, Mendiola did not make a
20 single correction to any of the handwritten notes.

21 Regarding Berberick, there is no evidence in the record
22 whatsoever that Mendiola's written confession was ever translated
23 into Chamorro.

26 ¹⁴Testimony of Dr. Ruth Dickson, a psychiatrist at the
Commonwealth Health Center. RT at 799, 800.

1 In accordance with the foregoing, WE HOLD that because
2 the Trial Court did not make an explicit determination of
3 voluntariness, reversible error occurred.¹⁵

- 4 4. Whether the Trial Court erred in
5 admitting into evidence pictures of
6 Mendiola's enactment of the crimes of
7 which he was charged.

7 Standard of Review

8 Evidentiary decisions are reviewed for abuse of
9 discretion. McGlinchy v. Shell Chemical Co., 845 F.2d 802, 806
10 (9th Cir. 1988). Moreover, a reviewing court will not reverse for
11 an abuse of discretion unless it has a definite and firm
12 conviction that the court below committed a clear error of
13 judgment. Kern Oil Refining Co. v. Tenneco Oil Co., 840 F.2d 730,
14 738 (9th Cir.), cert. denied, 109 S.Ct. 378 (1988); see also,
15 Maddox v. City of Los Angeles, 792 F.2d 1408, 1412 (9th Cir.
16 1986); Potlach Corp. v. United States, 679 F.2d 153, 157 (9th Cir.
17 1982).

18 In addition, an evidentiary ruling will not be reversed
19 unless the erroneous ruling so prejudiced the nonprevailing party
20 that the ruling tainted the verdict below:

21 Evidentiary rulings are reviewed for abuse of
22 discretion and will not be reversed absent
23 some prejudice. To reverse, we must say that

24 ¹⁵Mendiola's argument that he should have been advised of his
25 right not to sign the transcriptions of his statements is
26 unconvincing and without authority. Mendiola was advised that he
had the right to remain silent and chose not to exercise that right.
He has presented no authority for the proposition that one who has
waived his right to remain silent must again be warned that he has
the right not to sign a written confession.

1 more probably than not, the error tainted the
2 verdict. Kisor v. Johns-Manville Corp., 783
3 F.2d 1337, 1349 (9th Cir. 1986) (cites
4 omitted).

5 In the early evening of March 19, 1988, Captain Castro
6 and Sergeant Camacho took Mendiola to the scene of the crime at
7 Obyan Beach. The police told Mendiola to reenact the crimes of
8 which he was accused. According to defense counsel, "Mendiola
9 proved an ignorant, retarded, illiterate, and malleable subject
10 who would follow (almost) any instruction given him."¹⁶ Mendiola
11 accordingly enacted the part of the perpetrator and one of the
12 police officers played the parts of the two victims while the
13 other officer photographed the reenacted crimes.

14 These photographs were admitted as evidence at trial
15 over defense counsel's objection. Appellant's counsel argued that
16 admission of these photographs constituted reversible error
17 because they were taken subsequent to Mendiola's invocation of his
18 right not to speak to the police without the presence of legal
19 counsel. Regarding the merits of this argument, see the
20 discussion above addressing defense counsel's contention that all
21 Mendiola's statements uttered after he invoked his right to
22 counsel on the morning of March 18, 1988 should have been
23 excluded. The conclusion of that discussion is that an accused
24 waives his invocation of the right to have counsel present during
25 interrogation where he initiates further communication with the
26 police. Mendiola allegedly did initiate further communication by

¹⁶Brief of Appellant at 24.

1 requesting to speak to Captain Castro. It follows that the
2 photographs may not be excluded for the reason proffered by
3 defense counsel.

4 Although the inculpatory photographs should not have
5 been excluded from evidence for the reasons proffered by defense
6 counsel, they should have been excluded for violation of Rule 403
7 F.R.E. Rule 403 provides that relevant evidence may be excluded
8 if its probative value is substantially outweighed by the danger
9 of unfair prejudice. While use of the word "may" in Rule 403 is
10 clearly indicative of the Rule's discretionary character, the Rule
11 "is primarily an effort to regularize and channel the use of
12 discretion in the administration of the rules of evidence * * *
13 [Moreover,] any grant of discretion carries with it a limited
14 immunity from appellate review." Wright & Graham, Federal
15 Practice and Procedure, Evidence § 5212 at 250-52 (1978) ("Wright
16 & Graham"). The trial court will be reversed, therefore, only for
17 an abuse of its discretion.

18 Rule 403 requires the trial court to perform a conscious
19 process of balancing the costs and benefits of the evidence.
20 Wright & Graham § 5214 at 263; see also, Advisory Committee's Note
21 to Rule 403 F.R.E. Rule 403 applies to demonstrative evidence
22 such as photographs. See e.g., Douglass v. Hustler Magazine, 769
23 F.2d 1128, 1142 (7th Cir. 1985), cert. denied, 475 U.S. 1094
24 (1986) (reversing and remanding for new trial because trial court
25 exceeded its discretion in allowing admission of photographs where
26

1 their prejudicial impact substantially outweighed their probative
2 value).

3 In the instant case, there is no indication that the
4 Trial Court ever consciously balanced the probative worth of the
5 photographs of Mendiola "reenacting" the crimes against the risk
6 of unfair prejudice resulting from admission of such evidence. In
7 light of Mendiola's borderline mental retardation, it is difficult
8 to imagine how the probative value of such evidence would not be
9 substantially outweighed by the danger of unfair prejudice. The
10 impact of seeing the defendant perform the role of a kidnapper,
11 thief, and murderer would have to have had an inflammatory effect
12 upon the jury.

13 That the photographs were unfairly prejudicial and had a
14 tremendously strong impact upon the decision was virtually
15 admitted by the Commonwealth:

16 I suggest to you that these photographs are
17 devastating. These three photographs are the
18 most important evidence in this trial. * * *
19 They say pictures speak louder than words or a
20 picture is worth a thousand words? [sic]
You've got three thousand words here by Mr.
Mendiola saying "I murdered Galen Mack and
Remedios Conley." RT at 815 and 824
(Prosecutor's closing statement to jury).

21 It follows that the Trial Court abused its discretion in
22 accepting into evidence the photographic enactments of Mendiola
23 committing the very crimes of which he was charged. Such abuse of
24 discretion constitutes reversible error and would mandate a new
25 trial even without considering the voluntariness of Mendiola's
26 "confession."

1 VI. CONCLUSION

2 The accused is at best borderline mentally retarded. He
3 can neither speak nor read the English language. He was
4 interrogated on at least five occasions without the benefit of
5 legal counsel. His "confessions" were written in a language which
6 he could not read; he was then somewhat ironically asked if he
7 wanted to make any corrections to the handwritten notes -- he made
8 none.

9 The murder weapon was never found and there was evidence
10 that it may have been Reyes' weapon.¹⁷ There was almost a total
11 dearth of circumstantial evidence linking Mendiola to the crime
12 with which he was charged. Mendiola was convicted primarily on
13 the strength of his "confessions," the testimony of Reyes, his
14 admitted accomplice, and the photographs of Mendiola acting-out
15 the murder.

16 It was reversible error for the Trial Court not to have
17 made an explicit determination of the voluntariness of Mendiola's
18 confessions. It was reversible error for the Trial Court to have
19 admitted into evidence the photographs of Mendiola enacting the
20 crimes of which he was accused because their probative value is
21 substantially outweighed by the danger of unfair prejudice.

22 In accordance with the foregoing and in the interests of
23 justice, the convictions of Mendiola are hereby **VACATED** as to all
24 counts and this case is **REMANDED** for a new trial consistent with
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¹⁷Brief for Appellant at 20.

1 this Opinion.

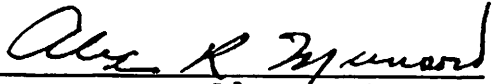
2 It is hereby ORDERED that at the new trial the photographs
3 depicting Mendiola enacting the crimes of which he is charged shall
4 be excluded from evidence.

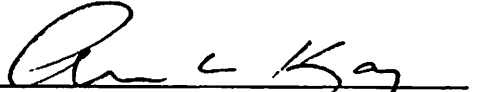
5 It is further ORDERED that the Trial Court shall conduct a
6 pre-trial hearing on the issue of the voluntariness of the proffered
7 "confessions." The § 3501 factors and all other factors relevant
8 to a totality of the circumstances analysis shall be considered.

9 It is further ORDERED that the Trial Court shall conduct a
10 pre-trial hearing at which it shall be determined whether Mendiola
11 is legally competent to stand trial.

12 It is further ORDERED that in light of Mendiola's mental
13 capacity, the police shall not be permitted to interrogate him
14 without the presence of his attorney.

15 FINALLY, counsel for neither party was present for oral
16 argument before this Court. Counsel are hereby cautioned that oral
17 argument at appeal should not be waived in a case of this magnitude.

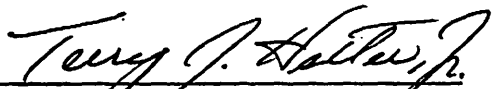
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Alex R. Munson
United States District Judge

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Alan C. Kay
United States District Judge

1 HATTER, J. Concurring and Dissenting, in part.

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3 I join in the decision of the majority with regard to
4 their findings, conclusions, and orders, with one important
5 exception. I respectfully dissent from that part of the decision
6 which would require new hearings to determine the voluntariness of
7 the "confessions."

8 For the very same reasons stated by the majority for
9 ordering new hearings, I am compelled to find that no set of
10 circumstances can undue the gross prejudice to the Appellant
11 already determined, and, therefore, would exclude all confessions
12 previously made during any retrial of this matter.

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15 Terry J. Hatter, Jr.
16 United States District Judge
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