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In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **JOSE SAUCEDA-CONTRERAS,** **Defendant and Appellant.**

Case No. _____

Fourth Appellate District, Division Three, Case No. G041831
Orange County Superior Court, Case No. 07NF0170
The Honorable Richard Toohey, Judge

PETITION FOR REVIEW

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PETITION FOR REVIEW

TO THE HONORABLE TANI CANTIL-SAKAUYE, CHIEF JUSTICE, AND THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT.

Respondent, the People of California, respectfully petitions this Court to grant review, pursuant to rule 8.500 (b) (1) of the California Rules of Court, of the above-entitled matter, following the issuance of an unpublished Opinion on February 16, 2011, by the California Court of Appeal, Fourth Appellate District, Division Three, reversing appellant's first degree murder conviction in Orange County Superior Court Case No. 07NF0170. Respondent filed a petition for rehearing on March 3, 2011, which was denied by the Court of Appeal on March 17, 2011. A copy of the Court of Appeal's opinion and order denying the rehearing are attached.

ISSUE PRESENTED

When a suspect is advised of his *Miranda*[1] rights, and responds, "If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me," may an officer ask questions to clarify whether the suspect wished to invoke his *Miranda* rights?

GROUNDS FOR REVIEW

A grant of review is necessary in this case, pursuant to California Rules of Court, rule 8.500 (b) (1) to secure uniformity of decision and settle an important issue of law.

Sauceda-Contreras' first degree murder conviction was reversed after the majority found a *Miranda* violation when it interpreted his initial

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[1] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2 694, 86 S.Ct.1602].

response to the *Miranda* admonition as being an unambiguous request for counsel. The third justice on the panel filed a dissenting opinion after finding the response had been an inquiry as to if and when he could get an attorney. Another interpretation of the response is that Sauceda-Contreras was under the impression he could not speak to investigators on his own and believed an attorney's presence was required in order to be able to talk to them.

Because the majority found Sauceda-Contreras' initial response had been an unambiguous request for counsel, it found *all* questioning should have immediately stopped and the questions asked to clarify his intent violated his rights under *Miranda.* However, by his words, Sauceda-Contreras also expressed a willingness and a need to speak to the detective. The complete exchange between the police officer and Sauceda-Contreras reflects that he knowingly waived his rights under *Miranda.* Review is necessary to resolve the existing ambiguity in the law as to how law enforcement officers should proceed when an arrestee mentions an attorney, but at the same time demonstrates he is willing to waive his rights and talk to investigators.

STATEMENT OF THE CASE

In an information filed by the Orange County District Attorney, Jose Sauceda-Contreras was charged with murdering Martha Patricia Mendoza on January 10, 2007, in violation of Penal Code section 187, subdivision (a). (2 CT 308-309.) On November 12, 2008, trial counsel for Sauceda-Contreras made a verbal motion to suppress his recorded police interview on the basis that it had been obtained in violation of *Miranda* as he had requested an attorney, but the officer continued to ask questions with the intent "to overcome his request for a lawyer." (1 RT 70-71.) The trial court, which had watched the DVD of the interview, denied the

Miranda motion because it found appellant had been properly advised of his rights and had answered three "clarifying questions" by affirming he was willing to talk to the police. (1 RT 72.) A jury found Sauceda-Contreras guilty of first degree murder on November 26, 2008. (2 CT 453, 513.) On March 13, 2009, he was sentenced to 25 years to life in prison. (2 CT 568.)

The Court of Appeal reversed the judgment after it found Sauceda-Contreras' right to counsel had been violated when the officer continued to ask him questions after he unambiguously requested an attorney. (Opin. at 16.) An associate justice filed a dissenting opinion as he found Sauceda-Contreras' initial response had actually been a request for information that invited a response. (Dissent at 1-2.) Respondent filed a petition for rehearing that presented the Court of Appeal with a third way of interpreting the initial response. The panel majority denied the petition for rehearing, but the dissenting justice was of the opinion it should be granted.

STATEMENT OF FACTS

Anaheim fire fighters discovered the burning body of Martha Mendoza in a metal trash can in the back yard of Sauceda-Contreras' residence after neighbors called 9-1-1 when they smelled smoke, burning hair and burning flesh. Sauceda-Contreras was seen adding gasoline to the fire in the can. (1 RT 113-116, 120, 165.) When fire fighters arrived, Sauceda-Contreras physically prevented them from entering the yard and said he was just cooking a pig for a planned party. (1 RT 159-161.) The same neighbors who called 9-1-1 had overheard portions of an argument between a man and a woman at the house one day earlier. During the argument, the woman said something about how if he could not give her money, he should let her go so she could get some. The neighbor then

heard the sound of a body hitting a wall, followed by the sound of a woman weeping. (1 RT 121-124.)

Sauceda-Contreras, who spoke little English, was arrested and taken to an interview room at the police station. A female police officer who was fluent in Spanish and English acted as the interpreter for him and a homicide detective. (2 RT 414-415.) The following exchange occurred:

> [Officer]: You have the right to remain silent. Do you understand?
>
> [Sauceda-Contreras]: Yes.
>
> [Officer]: Whatever you say can be used against you in court. Do you understand?
>
> [Sauceda-Contreras]: Yes.
>
> [Officer]: You have the right to have a lawyer present before and during this interrogation. Do you understand?
>
> [Sauceda-Contreras]: Yes I understand.
>
> [Officer]: If you would like a lawyer but you cannot afford one, one can be appointed to you for free before the interrogation if you wish. Do you understand?
>
> [Sauceda-Contreras]: Yes I understand.
>
> [Officer]: Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?
>
> [Sauceda-Contreras]: If you can bring me a lawyer, that way I[,] I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me. (Ellipses in original)
>
> [Officer]: Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?
>
> [Sauceda-Contreras]: Oh, okay that's fine.
>
> [Officer]: The decision is yours.

[Sauceda-Contreras]: Yes.

[Officer]: It's fine?

[Sauceda-Contreras]: A huh, it's fine.

[Officer]: Do you want to speak to him right now?

[Sauceda-Contreras]: Yes.

(2 CT 574-576.)

During the ensuing interview, Sauceda-Contreras never confessed to killing Mendoza, with whom he said he had a rocky relationship for eight years. (3 CT 619-322.) He said she had previously asked him to cremate her body and keep her ashes with him if she were to die. (3 CT 626-628.) Sauceda-Contreras' story about how Mendoza died, and how he found her body kept changing, and he got caught in some lies. (See, e.g., 3 CT 818-823.) He initially said he saw Mendoza's body through the open bathroom door and there were bubbles coming out of her mouth. (3 CT 665-667, 683, 684.) He later said he had knocked on the door and window and finally had to pry open the locked bathroom door. (4 CT 933-935.) He claimed Mendoza had asphyxiated herself by putting his belt around her neck, lying in the bathtub, looping the belt over the spigot, and holding the other end of the belt in her hand. (4 CT 947-952.) Sauceda-Contreras let slip one possible motive for murdering Mendoza, namely that she had threatened to have him deported if he did not give her money. (4 CT 912-913.)

At trial, Mendoza's sister testified Sauceda-Contreras was possessive and controlling of Mendoza and she had heard him threaten her on more than one occasion. Almost a year before Mendoza's death, Sauceda-Contreras told the sister he would rather see Mendoza dead than lose her. (1 RT 191-195.) The pathologist found no stab or gunshot wounds, and there was no evidence of blunt force trauma. He was unable to pinpoint a cause of death because of the severe damage to the body caused by the fire.

Methamphetamine and amphetamine in Mendoza's brain and liver were at lethal levels, but the levels had been elevated or concentrated by the desiccation of the tissues caused by the fire, so it was impossible to determine the ante mortem levels of the drugs. (2 RT 323-329, 363.) Mendoza's DNA was found on the inside of the belt worn by Sauceda-Contreras when he was arrested. (2 RT 394-396.)

ARGUMENT

The majority of the Court of Appeal found Sauceda-Contreras' initial response upon being asked if the detective could speak to him "right now," standing alone, was an unambiguous and unequivocal invocation of his right to counsel. (Opin. at p. 16.) Having reached that conclusion, the Court of Appeal found all questioning after that, even the non-coercive questions asked to clarify what appellant wanted to do, should have stopped immediately. (*Ibid.*)

In his dissenting opinion, Justice Aronson found Sauceda-Contreras' response was actually a question asking whether they could bring him an attorney, which also impliedly asked if they could bring him an attorney "right now," since that was when the detective wanted to speak to him. Justice Aronson found that by repeating the question by saying, "what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present," the officer effectively told appellant they could not provide him with an attorney "right now." (Dissent at pp. 1-2.) In other words, Justice Aronson found appellant's response was not an exercise "of his right to cut off questioning," but was instead a question inviting a response. (Dissent at p. 5.)

Respondent had maintained appellant's response was simply unclear and ambiguous and that the police officer was properly allowed to ask questions to clarify or understand exactly what appellant wanted to do.

(RB at pp. 17-23.) In addition to the two interpretations of the response by the majority and Justice Aronson, respondent offered a third interpretation of the meaning of the response in a petition for rehearing. Specifically, that Sauceda-Contreras, who spoke Spanish and apparently had a limited education (see 1 RT 71), was under the impression he could not speak to investigators on his own and believed an attorney's presence was required in order to be able to talk to them. This interpretation of appellant's response makes sense of all of the words he used in the sentence, "If you can bring me a lawyer, that way I[,] I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." It is also consistent with his immediate affirmative response after the officer asked him if he was willing to talk to the detective "right now without a lawyer present." By his words and responses to the non-coercive questions asked to clarify his intent, Sauceda-Contreras affirmatively waived his rights under *Miranda*.

The well-known *Miranda* admonition (advising of the right to remain silent; the right to consult a lawyer and have one appointed if necessary; the right to have a lawyer present during questioning; and the right against self-incrimination) is designed to protect the privilege against compelled self-incrimination from "the *coercive* pressures that can be brought to bear upon a suspect in the context of custodial interrogation." (*Berkemer v. McCarthy* (1984) 468 U.S. 420, 428 [104 S.Ct. 3138, 82 L.Ed.2d 317], italics added.)

In 1966, when Chief Justice Warren penned the holding in *Miranda*, the Court was addressing the then unfortunately widespread practice of law enforcement subjecting arrestees to hours, days, and sometimes weeks of psychologically (and occasionally physically) intimidating interrogations. (*Miranda v. Arizona, supra*, 384 U.S. at 439-458.) The prophylactic remedy designed to prevent coercive interrogations from happening (and false or compelled confessions being made) was to make sure an arrestee

understood his rights, and was willing to waive those rights, before being interviewed by law enforcement. (*Id.*, at 478-479.)

In *Smith v. Illinois* (1984) 469 U.S. 91[105 S.Ct. 490, 83 L.Ed.2d 488] (the case relied upon by the Court of Appeal in the instant matter), after being advised of his rights to remain silent, to consult an attorney, and have an attorney present during questioning, the arrestee responded, "Uh, yeah. I'd like to do that." The officer finished reading the balance of the *Miranda* admonition and asked if he was willing to talk without an attorney present. The arrestee said, "Yeah and no, uh, I don't know what's what, really." After the officer said if he agreed to talk, he could stop the interview at any time, the arrestee said, "All right. I'll talk to you then," and eventually confessed to robbery. (*Smith v. Illinois, supra*, 469 U.S. at 93.) The United States Supreme Court found that following the unambiguous response of, "Uh, yeah. I'd like to do that," the interview should have stopped (citing *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [101 S.Ct. 1880, 68 L.Ed.2d 378], and went on to explain that responses to further questioning "may not be used to cast retrospective doubt on the clarity of the initial request itself. Such subsequent statements are relevant only to the distinct question of waiver." (*Smith v. Illinois, supra*, 469 U.S. at 99-100.)

In *Connecticut v. Barrett* (1987) 479 U.S. 523 [107 S.Ct. 828, 93 L.Ed.2d 920], the United States Supreme Court held that the suspect's *partial* invocation of Fifth Amendment rights (i.e., stating he was willing to talk, but was not willing to provide a written statement without counsel) did not require cessation of all questioning. The Supreme Court specifically rejected a contention that the partial invocation of Fifth Amendment protections demonstrated such defects in the suspect's understanding of the consequences of his *Miranda* waiver as to preclude a finding that the partial waiver was made knowingly and intelligently. The Court explained:

> We also reject the contention that the distinction drawn by Barrett between oral and written statements indicates an understanding of the consequences so incomplete that we should deem his limited invocation of the right to counsel effective for all purposes. This suggestion ignores Barrett's testimony-and the finding of the trial court not questioned by the Connecticut Supreme Court-that respondent fully understood the *Miranda* warnings. These warnings, of course, made clear to Barrett that '[i]f you talk to any police officers, anything you say can and will be used against you in court.' App at 48A. The fact that some might find Barrett's decision illogical is irrelevant, for we have never 'embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness.'

(*Connecticut v. Barrett, supra*, 479 U.S. at 530, fn. omitted.)

The United States Supreme Court addressed the situation where an arrestee makes an ambiguous statement about having an attorney in *Davis v. U.S.* (1994) 512 U.S. 452 [114 S.Ct. 2150, 129 L.Ed.2d 362]. *Davis* involved a Navy sailor who was suspected of beating a man to death with a pool cue after the man failed to pay on a lost bet. When he was interviewed by the Naval Investigative Service, he was advised of his rights (similar to the *Miranda* rights) under Art. 31 of the Uniform Code of Military Justice. (10 U.S.C. § 831.) The sailor waived his rights and agreed to be interviewed. About one half hour into the interview, the sailor said, "Maybe I should talk to a lawyer." The interviewers explained they were not there to violate the rights of the sailor and would stop the interview if he wanted an attorney. However, they needed to clarify if he was asking for an attorney, or just making a comment about an attorney. The sailor said, "'No, I don't want a lawyer,'" and the interview continued. Later on, after a break, he was re-advised of his rights and this time the sailor said, "I think I want a lawyer before I say anything else," and questioning ceased. The sailor later moved to suppress the statements he made during the interview. (*Davis v. U.S., supra*, 512 U.S. at 454-455.) Certiorari was

granted to address how to approach equivocal or ambiguous references to counsel during custodial interrogations. (*Id.*, at 456.)

Writing for the Court, Justice O'Connor explained "the '"rigid" prophylactic rule'" of *Edwards* requires courts to "determine whether the accused actually *invoked* his right to counsel." (*Davis v. U.S., supra*, 512 U.S. at 458, quoting *Smith v. Illinois, supra*, 469 U.S., at 95 (emphasis added by O'Connor, J.).) However, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect might be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Davis v. U.S., supra*, 512 U.S. at 459.) Justice O'Connor explained,

> Rather, the suspect must unambiguously request counsel. As we have observed, "a statement either is such an assertion of the right to counsel or it is not." *Smith v. Illinois*, 469 U.S., at 97-98, 105 S.Ct., at 494 (brackets and internal quotation marks omitted). Although a suspect need not "speak with the discrimination of an Oxford don," *post*, at 2364 (SOUTER, J., concurring in judgment), he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect. See *Moran v. Burbine*, 475 U.S. 412, 433, n. 4, 106 S.Ct. 1135, 1147, n. 4, 89 L.Ed.2d 410 (1986) ("[T]he interrogation must cease until an attorney is present only [i]f the individual states that he wants an attorney") (citations and internal quotation marks omitted).
>
> . . . But when the officers conducting the questioning reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning "would transform the *Miranda* safeguards into wholly irrational obstacles to legitimate police investigative activity," *Michigan v. Mosley*, 423 U.S. 96, 102, 96 S.Ct. 321, 326, 46 L.Ed.2d 313 (1975), because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the

> suspect did not wish to have a lawyer present. Nothing in *Edwards* requires the provision of counsel to a suspect who consents to answer questions without the assistance of a lawyer. In *Miranda* itself, we expressly rejected the suggestion "that each police station must have a 'station house lawyer' present at all times to advise prisoners," 384 U.S., at 474, 86 S.Ct., at 1628, and held instead that a suspect must be told of his right to have an attorney present and that he may not be questioned after invoking his right to counsel. We also noted that if a suspect is "indecisive in his request for counsel," the officers need not always cease questioning. See *id.*, at 485, 86 S.Ct.at 1633.

(*Davis v. U.S., supra,* 512 U.S. at 459-460.)

Last year, in *Berghuis v. Thompkins* (2010) 560 U.S.___ [130 S.Ct. 2250, 176 L.Ed.2d 1098], the United States Supreme Court again addressed how law enforcement should approach an interview when an arrestee fails to make a clear, unambiguous request for counsel or to remain silent. In *Thompkins*, after the arrestee was advised of his *Miranda* rights, he remained mostly silent throughout a three hour interview. The arrestee only provided some short responses like, "Yeah," or "I don't know." Two hours and 45 minutes into the interview, he was asked if he believed in God. The arrestee answered in the affirmative. He was then asked, "'Do you pray to God to forgive you for shooting that boy down?'" The arrestee said, "'Yes,' and looked away." He subsequently moved to suppress his statement by arguing that by his prolonged silence, he had invoked his right to silent. (*Berghuis v. Thompkins, supra*, 130 S.Ct. at 2256-2257.)

Justice Kennedy, writing for the Court, explained,

> There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S., at 458-459, 114 S.Ct. 2350. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the

> consequence of suppression "if they guess wrong." *Id.*, at 461, 114 S.Ct. 2350. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. See *id.*, at 459-461, 114 S.Ct. 2350; *Moran v. Burbine*, 475 U.S. 412, 427, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights "might add marginally to *Miranda 's* goal of dispelling the compulsion inherent in custodial interrogation." *Burbine*, 475 U.S., at 425, 106 S.Ct. 1135. But "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.*, at 427, 106 S.Ct. 1135; see *Davis, supra,* at 460, 114 S.Ct. 2350.

(*Berghuis v. Thompkins, supra*, 130 S.Ct. at 2260.)

Justice Kennedy also addressed how *Miranda* rights could be implicitly waived. "Where the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." (*Berghuis v. Thompkins, supra*, 130 S.Ct. at 2262.)

This Court has also held "'when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney.'" (*People v. Bacon* (2010) 50 Cal.4th 1082, 1105, quoting *Davis v. U.S., supra*, 512 U.S. at 461; *People v. Farnam* (2002) 28 Cal.4th 107, 181; *People v. Johnson* (1993) 6 Cal.4th 1, 27.)

In the instant matter, the record shows the *Miranda* admonition was slowly and carefully provided to Sauceda-Contreras and he answered in the affirmative each time he was asked if he understood the right that was just read to him. After the officer acting as the interpreter asked if the detective could talk to him "right now," Sauceda-Contreras responded, "If you can bring me a lawyer, that way I[,] I with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone

to represent me." (3 CT 606-607.) By that response, while he spoke or asked about them bringing him an attorney, he also expressed his clear desire to speak to them. As this Court explained in *People v. Williams* (2010) 49 Cal.4th 405 (the case relied upon by Justice Aronson in his dissent in the instant matter), "the question of ambiguity in an asserted invocation must include a consideration of the communicative aspect of the invocation – what would a listener understand to be the defendant's meaning." (*Id.*, at 428.)

This Court has observed,

> The question whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, *subsequent* to a valid waiver, he or she effectively has invoked the right to counsel. [Citations.]
>
> With respect to an initial waiver. . . "[a] valid waiver need not be of predetermined *form*, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision." (*People v. Cruz* [(2008)] 44 Cal.4th [636,] 667, 80 Cal.Rptr.3d 126, 187 P.3d 970, italics added; see *Berghuis v. Thompkins* [(2010)] 560 U.S. [__,] __, 130 S.Ct. [2250,] 2261.) [*Miranda* "does not impose a formalistic waiver procedure that a suspect must follow to relinquish these rights"].

(*People v. Williams* (2010) 49 Cal.4th 405, 427.)

In *Williams*, as the murder suspect was being advised of his rights under *Miranda*, he indicated he was willing to waive his right to remain silent. He subsequently expressed his desire to have an attorney. As it was Saturday, one of the officers explained, "if you want an attorney here while we're talking to you we'll wait till Monday and they'll send a public defender over, unless you can afford a private attorney." This Court found that after it was made clear that there would be a two day delay, the suspect's "final and impatient ' yes, yes, yes' confirms our conclusion that,

once the question whether counsel could be provided immediately had been resolved, [he] had not the slightest doubt that he wished to waive his right to counsel and commence the interrogation." (*People v. Williams, supra*, 49 Cal.4th at 425-427.) This was similar to the situation in the instant matter. As Justice Aronson explained in his dissent, by strictly relying upon the sequential order of the questions and responses, "the majority's analysis in our case would have compelled in *Williams* the suppression of the defendant's subsequent statement because Officer Kneble continued to ask questions, including the entreaty, 'Are you sure?'" (Dissent at 3.)

This Court has explained,

> In certain situations, words that would be plain if taken literally actually may be equivocal under an objective standard, in the sense that in context it would not be clear to the reasonable listener what the defendant intends. In those instances, the protective purpose of the *Miranda* rule is not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant.

(*People v. Williams, supra,* 49 Cal.4th at 429.)

Sauceda-Contreras was advised of his rights under *Miranda*, and repeatedly agreed to talk to the detective without being tricked or coerced to do so. Respondent prays this Court will grant review in this matter to address the ambiguity as to how law enforcement officers should proceed when an arrestee mentions an attorney, but, at the same time, also expresses a willingness to talk to investigators. As Sauceda-Contreras was fully advised of his *Miranda* rights, his uncoerced statements should be construed as a waiver of those rights.

Dated: March 25, 2011

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached **PETITION FOR REVIEW** uses a 13 point Times New Roman font and contains 4,443 words.

Dated: March 25, 2011

KAMALA D. HARRIS
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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE SAUCEDA-CONTRERAS,

Defendant and Appellant.

G041831

(Super. Ct. No. 07NF0170)

OPINION

Appeal from a judgment of the Superior Court of Orange County, Richard F. Toohey, Judge. Reversed.

Diane Nichols, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Lynne G. McGinnis and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Sauceda-Contreras appeals from a judgment after a jury convicted him of murder. Sauceda-Contreras argues: (1) the trial court erroneously admitted his statements to police in violation of the Fifth Amendment pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*); (2) the court erroneously denied his suppression motion because there were not sufficient exigent circumstances; (3) insufficient evidence supports his conviction for premeditated and deliberate murder; (4) CALCRIM No. 362 created an impermissible inference of guilt; and (5) there was cumulative error. Sauceda-Contreras also asks this court to review sealed medical and police records to determine whether there is any discoverable information. Because we agree the court admitted Sauceda-Contreras's statements in violation of *Miranda*, we need not address his other claims. We reverse the judgment.

FACTS

One afternoon, Alondra Gaona Gutierrez and her husband, Pascuel Rivera Rodriguez, heard arguing at their neighbor's house. Gutierrez heard a woman say, "if he was unable to get the money to give her, . . . let her go and get the money." Gutierrez heard a bang, like a person hitting a wall, she heard the woman say, "if this was all that he had to give her more until he got tired." Gutierrez heard the woman crying but nothing else as she had to leave.[1]

The next morning, Gutierrez saw smoke and smelled burning hair, and she called to her husband who was in the garage. Ten minutes later, she smelled burning flesh. Gutierrez climbed a short playground ladder and saw smoke coming from the neighbor's backyard. Gutierrez climbed a taller ladder and saw a large metal can with what looked like a black ball protruding from the top. Flames and smoke were billowing from the can that was sitting on a concrete slab. Rodriguez arrived and stood next to

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[1] Gutierrez told police the woman sounded like she was outside, but at trial she testified the woman sounded to be inside and the man outside.

Gutierrez. A man, later identified as Sauceda-Contreras, poured liquid into the can and when the flames increased, Sauceda-Contreras backed away. There was a mattress propped against the wall to one side of the can and a Jacuzzi cover on the other side of the can. Gutierrez saw Sauceda-Contreras bend what appeared to be an arm and push it into the can.

Rodriguez got into his truck and drove around the block to get Sauceda-Contreras's address to call the fire department. Rodriguez saw Sauceda-Contreras look at him from behind a car parked in the driveway. Rodriguez drove home and called 911. When the firefighters arrived, Rodriguez, from his ladder, saw Sauceda-Contreras throw the mattress on top of the burning can.

Anaheim Firefighter Kevin Harris and three colleagues dressed in yellow "turnouts" and helmets responded to the call to investigate a "miscellaneous" fire. When they arrived, they did not see fire or smoke so they walked through an open gate along the side of the house where they met Sauceda-Contreras. Harris asked him if there was a fire, and Sauceda-Contreras nervously said there was a fire but it was out. Harris smelled gasoline and saw a metal trash can with smoke coming from it and a mattress laid over the top. Harris asked Sauceda-Contreras what was burning, and he said, "[N]othing[,] [n]o problem[,] [n]o problem, sir." Harris walked towards the trash can, and Sauceda-Contreras put his hands on Harris's chest to stop him. Harris stopped and saw a "slight flicker of flame" from the trash can. Harris called to his captain and said he needed police assistance, and the captain replied police had been called. The fireman and Sauceda-Contreras walked towards the front of the house, Sauceda-Contreras stated he bought a pig in Indio and he was cooking it in the trash can for a large party he was having.

When the police arrived, Harris and a colleague went to the backyard and removed the mattress and found a charred towel covering the can. Harris lifted the towel

and saw a human skull and burned body. The firefighters placed the towel and mattress to their original places and returned to the front yard. Harris motioned to the police officer and the officer handcuffed Sauceda-Contreras.

Terri Powers-Raulston, a forensic specialist, processed the crime scene. She photographed the crime scene: there was a car parked on the driveway; there was a bedroom with a sliding glass door adjacent to the backyard; a large metal can was partially covered with a box spring, and a spa cover lay nearby; and near the metal can was a charred piece of wood, two pairs of work gloves, a charred saucepan, a metal rod, and a bucket containing a liquid that smelled like gasoline and half a beer can. Inside the metal can, Powers-Raulston saw a charred body propped away from the can wall with a brick; the brick was from a nearby walkway. She removed a towel from the victim's head. She found a garden hose with a nozzle and the water turned on full. In a trash can located on the driveway, she found a plastic container, which smelled of gasoline and had hair attached to it. Powers-Raulston also processed the home's interior. The southeast bedroom was in disarray—the sheets were off the mattress and on a chair, and the mattress was moved off the box spring. In the bathroom across from the southeast bedroom, she saw a red stain on the bathroom floor. In the bathtub she found hair, unknown stains, and a cup. There was no evidence the bathroom door had been forced open.

Scott Flynn, a forensic specialist, photographed Sauceda-Contreras at the police station. He had injuries to the left side of his head, and his nose, lip, chin, and hands. He was wearing a shirt, jeans, and a belt. The jeans and belt were booked into evidence. There was gasoline on the jeans. The belt had almost a complete tear, near the belt buckle, and a diagonal line impression approximately 11 inches in from the buckle. Flynn took swabs of the belt for DNA analysis. Sauceda-Contreras tested negative for drugs and alcohol.

Detectives Robert Blazek and Julissa Trapp interviewed Sauceda-Contreras. Trapp, who was bilingual in English and Spanish, translated. Sauceda-Contreras stated he had lived at the residence with family members about one and a half years. He said he worked two jobs but that day and the previous day were his days off.

Sauceda-Contreras explained that eight years prior he lived in Long Beach with Martha Mendoza and her five children. He said she would leave her children with him and she would find men and use drugs. He claimed she would bring men to his house when he was at work. Sauceda-Contreras loved her but eventually he left her and the government took away her children. He stated that about one and a half years prior, she found him and told him she wanted to move in with him because he had a house and money. He told her that he did not want anything to do with her because she was never going to change. Mendoza contacted him the previous day. He stated they argued, she scratched him, and he told her to leave. Sauceda-Contreras said that after she calmed down, they went to a video store. She seemed nervous, like she needed drugs, and he told her that he loved her, but he could not be with her. Sauceda-Contreras said he told her that he would not give her money and to go to sleep.

Sauceda-Contreras said the next morning Mendoza was nervous and he told her that he would not give her money because he knew she would use it for drugs. He stated she told him that she lost everything she had, him, her children, and her mother, and no one loved her. He said she did not want to be on the streets earning money to live day by day. He claimed she made him promise that when she died that he would burn her, keep her ashes, and take care of the ashes as if she were alive. He said she told him to buy some things for her children and tell them she left and he did not know anything else. He stated he told her she was crazy and he continued gathering his laundry. Sauceda-Contreras claimed he had not seen her for awhile and he got nervous because she often stole things. He stated he found her lying in the bathroom.

Sauceda-Contreras asserted he thought about calling the police but he remembered what she had told him. He thought about all the years he supported her and tried to change her. He stated it hurt him so much as he watched her burn because his life was going with her and he would never forget her. He said he bought her a car and opened a bank account for her, but she spent all the money and she was stopped by police with drugs. He stated that over the last six months she stopped by the house a couple times a month.

When asked, Sauceda-Contreras said Mendoza arrived the prior morning at eight and she spent the night but no one saw her because he had his own bedroom and bathroom. He stated crystal methamphetamine was Mendoza's drug of choice but she did not use any that day because he would not let her. He denied drinking or using drugs, and later tested negative for both.

Sauceda-Contreras said they went to bed around nine the prior night and awoke at eight that morning and lay in bed until they heard everyone leave. He claimed she was very nervous and that is when she asked him to burn her. He stated that as he prepared the laundry he thought she went to take a shower because she was naked. He said that he went to look for her because she had stolen things from him in the past. He said the bathroom door was open and he found her lying in the bathtub not breathing. He said he hit her to try to wake her up because he did not know how to resuscitate her. He said she was "cold, cold, cold." He said she was out of his sight for approximately one and a half hours but he was not sure.

When Sauceda-Contreras said he could help the officers arrest "someone that's big," Blazek asked him how he got the scratches. He explained the prior afternoon Mendoza saw his Ipod and got mad because he never bought her anything. Mendoza asked for $100 or $200 and when he refused to give it to her, she scratched him.

When Blazek asked him whether there was any medication in the bathroom, Sauceda-Contreras replied only Alka-Seltzer. He said he did not know how Mendoza did it, but he saw bubbles coming from her mouth and she was really cold. When Blazek said it takes more than an hour and a half to get cold, Sauceda-Contreras said there were times she was sweating and times she was cold.

Sauceda-Contreras stated that when he found Mendoza in the bathtub, he felt anger and sadness because he wasted so many years of his life on her and he loved her very much. He said he moved her and yelled at her to wake up. He stated he took her out of the bathtub and hugged her. He said he considered calling the police but remembered what she had told him. He told her that she was not going anywhere to do bad things and she was going to stay there with him.

Sauceda-Contreras explained he put wood in the bottom of the trash can and put Mendoza in the trash can. He said he used gasoline and a match to start the fire. He stated he had gas in a can but he put gasoline into a pot to pour into the trash can. He claimed he wanted to take Mendoza out but the fire got really big. He stated he did not burn his hands because he was wearing gloves. He said he heard the sirens and decided to cover her with the mattress so they would not see her. He admitted lying to the firefighters.

When Blazek told him neighbors heard him arguing with Mendoza the previous day, Sauceda-Contreras said it must have been in the afternoon but it was minor. When Blazek told him the neighbors heard him yelling, he responded the window on the neighbor's side of the house was open. He explained Mendoza was yelling at him that he did not give her any money, and he told her to "shut up." He added, "Whatever happens . . . even if you judge me . . . I'm going to be at peace here because I didn't do anything to her." He stated the argument was "small" compared to other arguments he had with her. He denied arguing with her that morning.

Blazek asked him why he waited an hour and a half if he was concerned Mendoza might steal from him. He said he looked for her but oftentimes she just leaves. When Blazek asked him why he did not call 911, Sauceda-Contreras replied Mendoza told him not to. He added he was afraid because she had died in his house and the police had never helped him before and why would they help him now. He stated the police never believed him because he cannot speak English. He claimed he did not know there were places where you could take a body to be cremated. He repeatedly denied hitting or choking Mendoza or doing anything to cause her death.

Later, after a break, Blazek asked Sauceda-Contreras whose car was on the driveway. He responded it was his brother's car, and when asked he denied he drove the car that morning. Eventually, he stated he was not going to lie anymore and explained he moved the car onto the driveway so nobody would see what he was doing. He said that if he called the police they would think he killed Mendoza and he burned her because she told him to. He stated the gas can burned and he was pouring gas with a small plastic container. When Blazek asked him about the events that morning, Sauceda-Contreras repeated his story about gathering laundry and added details about eating and cleaning the kitchen before looking for and finding Mendoza in the bathtub. Blazek said his story did not make sense and accused him of lying. Blazek said Sauceda-Contreras had told "six different stories" and to slow down and tell the truth. He repeated his version of the events leading up to where he entered the bathroom. Blazek said Mendoza's body would not be cold in the time between her leaving and him finding her in the bathroom and his story made no sense and he was lying.

Sauceda-Contreras explained Mendoza killed herself with the belt he was wearing in the bathroom on the bathtub faucet. He claimed he loosened the belt from her neck and tried to revive her but her body was purple and she was warm. He repeated he thought about calling the police but decided to do what Mendoza told him to do. Sauceda-Contreras explained he "scorned her real badly" before her death. He told

Mendoza that he had seen her "selling herself on the streets of Long Beach" and leaving motel rooms with men. He stated he told her that she had ruined her life and the lives of the people who loved her. He admitted calling her "trash" and yelling profanities at her and this is what the neighbors heard. He said Mendoza was distraught and pleaded with him to hit her instead of calling her those names.

Sauceda-Contreras admitted they had sexual intercourse that evening. Sauceda-Contreras denied choking her with his belt. He explained "for eight years, it has hurt me to know that I'm eating . . . and know that she is out on the street doing who knows what things." He stated Mendoza told him that morning she wanted to move in with him and he said no because he knew she would never change. He stated he was in the country illegally and that morning Mendoza called him a "stupid Mexican" and a "wetback" and threatened to have him and his family deported and they would lose the house. He said he told Mendoza to leave, she left the bedroom, and later in the bathroom he heard her crying and what sounded like hitting. He said he gathered the laundry and cleaned the house, and "a lot of time [went] by." He claimed he knocked on the bathroom door, went outside and knocked on the bathroom window, and went back inside and again knocked on the door. He said he finally used a key to open the door.

Sauceda-Contreras insisted he did not kill Mendoza, said she was dead when he burned her, and claimed it was painful to watch her burn. Blazek asked him how she killed herself. He responded she was lying in the bathtub and she had the belt wrapped around her neck and looped over the bathtub faucet. He said she was holding on to the long end of the belt with her hands.[2]

An information charged Sauceda-Contreras with murder (Pen. Code, § 187, subd. (a)). Before trial, Sauceda-Contreras filed a motion to suppress evidence that was argued during the preliminary hearing. The trial court denied the motion.

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[2] DVDs of the interview were played for the jury. Transcripts of the interview were provided to the jury but not admitted into evidence.

Sauceda-Contreras renewed his suppression motion, and filed a motion to dismiss. The prosecutor opposed both motions. After hearing argument, the trial court denied both motions.

After the trial court empanelled the jury, Sauceda-Contreras moved to exclude his statements to officers pursuant to *Miranda, supra,* 384 U.S. 436. Defense counsel argued Sauceda-Contreras made an unequivocal and unambiguous invocation of his right to speak with counsel. Defense counsel contended that after Sauceda-Contreras invoked his right to counsel, Trapp violated his rights by asking him additional questions. Defense counsel asserted that after Sauceda-Contreras invoked his right to counsel, Trapp confused him by telling him maybe he did not understand his rights. Defense counsel said Sauceda-Contreras demonstrated he understood his rights by asking for a lawyer before he told the officers what had happened.

In ruling on the motion, the trial court stated: "And the court would note that I was able to view [Sauceda-Contreras] in his interaction with [Trapp] and [Blazek] and, the court knows there were clarifying questions. And at one point, it indicated 'the choice is yours.' And later questions 'you want to speak with him now?' The answer was 'yes.' [¶] The court finds that [Sauceda-Contreras] was appropriately *Mirandized* and there was a knowing, intelligent waiver of his constitutional rights." (Italics added.)

At trial, the prosecutor offered the testimony of Maria Rodriguez, Mendoza's sister. Rodriguez testified she knew Sauceda-Contreras approximately six to seven years. She stated that during the prior three years she had heard Sauceda-Contreras threaten Mendoza on more than one occasion. She stated that one evening, within nine months of her sister's death, Mendoza spent the night at her house. Rodriguez said Sauceda-Contreras banged on her door and when Mendoza went to speak with him, he threatened to beat up Mendoza if she did not go with him. Rodriguez stated that on another occasion, Sauceda-Contreras told her that he would never leave Mendoza alone,

and he would rather see her dead than lose her. On cross-examination, Rodriguez admitted that during her interview she did not tell the police Sauceda-Contreras said he would rather see Mendoza dead than lose her.

Annette McCall, a forensic scientist with expertise in DNA analysis, testified concerning the swab evidence.[3] McCall stated Sauceda-Contreras could not be excluded as a contributor to the DNA found on the car's steering wheel and Mendoza could be excluded. She also said Mendoza was a major contributor to the DNA found in the blood on the bathroom floor but Sauceda-Contreras could be excluded. Other swabs taken from the bathroom revealed Sauceda-Contreras or Mendoza were contributors to the DNA but nearly all were inconclusive. With regard to the DNA recovered from Sauceda-Contreras's belt, McCall testified to the following: Mendoza could not be excluded as a major contributor and Sauceda-Contreras could not be excluded as a minor contributor to the DNA near the belt buckle; testing on the belt's center was inconclusive; and Mendoza and Sauceda-Contreras could not be excluded as equal contributors to the DNA near the belt's end. On cross-examination, McCall testified she did not know whether the belt buckle corresponded to the labeled left or right side of the belt. She stated DNA could be transferred by touch so that it was possible for someone to hold someone's hand and transfer DNA to an object.

The prosecutor also offered the testimony of Dr. Anthony Juguilon, a forensic pathologist, who performed the autopsy. After removing Mendoza from the trash can, Juguilon conducted an external and internal examination, and from internal organs determined the body to be a female. During the external examination, Juguilon found significant thermal injury to the body—nearly all the skin was burned off and at

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[3] The parties stipulated the DNA profiles used as the known DNA profiles of Sauceda-Contreras and Mendoza were in fact from Sauceda-Contreras and Mendoza.

some places there was burning to the bone. Mendoza's scalp had been incinerated and her skull was fractured, which is common with burn victims. She had other thermal fractures throughout her body. The eyelids, lips, and nose were incinerated, and the brain and eyes were severely damaged. Mendoza's right hand had been incinerated. During the internal examination, Juguilon found the organs to be dehydrated or desecrated. He stated that although severe thermal injuries inhibit the ability to determine a cause of death, he was fairly confident she was dead before being burnt. Juguilon ruled out as the cause of death blunt force trauma such as a gunshot or stab wound. He also ruled out natural causes as the cause of death. Because of the severe burning to the head and neck, Juguilon could not determine whether Mendoza was strangled but he could not rule it out. He explained blood and tissue samples from the brain and liver demonstrated elevated levels of methamphetamine but because the thermal injuries caused dehydration, the concentration of methamphetamine in the tissue could be altered. He stated the blood was too damaged to analyze. Juguilon could not determine Mendoza's cause of death. On cross-examination, Juguilon testified the amount of methamphetamine found in the brain and liver was fatal had it not been for the thermal injuries. On redirect examination, he testified neither he nor a toxicologist could say with any certainty what affect the thermal injuries had on the methamphetamine levels.

At the close of the prosecutor's case-in-chief, Sauceda-Contreras moved for an acquittal. The trial court denied the motion. After deliberating for nearly 18 hours,[4] the jury convicted Sauceda-Contreras of first degree murder. The trial court sentenced Sauceda-Contreras to 25 years to life in prison.

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[4] The jury asked four questions during deliberations.

DISCUSSION

Sauceda-Contreras argues the trial court erroneously admitted his statements to police because unequivocally and unambiguously invoked his Fifth Amendment right to counsel and silence pursuant to *Miranda, supra,* 384 U.S. 436. We agree.

Legal Principles

"Under *Miranda* and the long line of cases following it, a suspect cannot be subjected to custodial interrogation unless there has been a knowing and intelligent waiver of the rights to remain silent, to the presence of an attorney, and, if indigent, to the appointment of counsel; and 'police interrogation must cease once the defendant, by words or conduct, demonstrates a desire to invoke his right to remain silent, or to consult with an attorney.' [Citations.] [¶] No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. [Citations.] In determining the validity of a *Miranda* waiver, courts look to whether it was free from coercion or deception, and whether it was '"made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."' [Citations.] Both aspects are tested against the totality of circumstances in each case, keeping in mind the particular background, experience and conduct of the accused. [Citation.] [¶] On review of a trial court's decision on a *Miranda* issue, we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 585-586 (*Davis*).)

"'*Miranda* holds that "[t]he defendant may waive effectuation" of the rights conveyed in the warnings "provided the waiver is made voluntarily, knowingly and intelligently." [Citation.] The inquiry has two distinct dimensions. [Citations.] First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.

Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveals both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived. [Citations.]' [Citations.]" (*People v. Smith* (2007) 40 Cal.4th 483, 501.)

"'[T]he rule that interrogation must cease because the suspect requested counsel does not apply if the request is *equivocal*; '[r]ather, the suspect must *unambiguously* request counsel.'" [Citations.]" (*Davis, supra,* 46 Cal.4th at p. 587.) "[I]f the defendant's invocation of the right to remain silent is ambiguous, the police may continue questioning for the limited purpose of clarifying whether he or she is waiving or invoking those rights, although they may not persist 'in repeated efforts to wear down his resistance and make him change his mind.' [Fns. omitted.]" (*People v. Peracchi* (2001) 86 Cal.App.4th 353, 360 (*Peracchi*).) Whether a suspect has invoked the right to counsel "'is an objective inquiry.'" (*Davis, supra,* 46 Cal.4th at p. 588.) The prosecution "must demonstrate the voluntariness of a confession by a preponderance of the evidence. [Citations.]" (*People v. Bradford* (1997) 14 Cal.4th 1005, 1033.)

The Interview

Here, as relevant to this issue, the following colloquy occurred between Blazek, Trapp, and Sauceda-Contreras:

"[Trapp]: Hello, good afternoon I am Detective Trapp.

"[Sauceda-Contreras]: Good afternoon how are you?

"[Trapp]: I'm going to translate for you okay?

"[Sauceda-Contreras]: Okay that's fine.

"[Blazek]: We'd like to talk to you.

"[Trapp]: The detective would like to speak with you.

"[Blazek]: But because you've been handcuffed and transported in a police car . . .

"[Trapp]: But because you're handcuffed and they brought you in the police car . . .

"[Blazek]: [W]e have to advise you of some rights.

"[Trapp]: I want to advise you of some of the rights you have.

"[Blazek]: Okay?

"[Sauceda-Contreras]: Okay.

"[Trapp]: You have the right to remain silent. Do you understand?

"[Sauceda-Contreras]: A huh, yes.

"[Trapp]: Whatever you say can be used against you in a court of law. Do you understand?

"[Sauceda-Contreras]: Yes.

"[Trapp]: You have the right to have a lawyer present before and during this interrogation. Do you understand?

"[Sauceda-Contreras]: Yes I understand.

"[Trapp]: If you would like a lawyer but you cannot afford one, one can be appointed to you for free before the interrogation if you wish. Do you understand?

"[Sauceda-Contreras]: Yes I understand.

"[Trapp]: Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?

"[Sauceda-Contreras]: If you can bring me a lawyer, that way I I [*sic*] with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.

"[Trapp]: Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak with him right now without a lawyer present?

"[Sauceda-Contreras]: Oh, okay that's fine.

"[Trapp]: The decision is yours.

"[Sauceda-Contreras]: Yes.

"[Trapp]: It's fine?

"[Sauceda-Contreras]: A huh, it's fine.

"[Trapp]: Do you want to speak with him right now?

"[Sauceda-Contreras]: Yes.

"[Trapp]: I explained to him, he said, about the attorney, I would tell you everything. I have no problem talking to you. And I said well I want to make sure that you did understand me correctly. The detective wants to know if you want to talk to him right now without an attorney present and he said yes."

Legal Analysis

Sauceda-Contreras argues his invocation of *Miranda* rights was unambiguous and unequivocal and Trapp should have ceased questioning him and ended the interview. The Attorney General counters Sauceda-Contreras's response was ambiguous and equivocal, Trapp was entitled to clarify whether he was invoking his *Miranda* rights, and Sauceda-Contreras repeatedly stated he would speak with the officers. Based on our review of the transcript of the interview, we conclude a reasonable police officer should have known Sauceda-Contreras was invoking his right to the advice of counsel and Trapp and Blazek should have ended the custodial interrogation. Instead, Trapp ignored Sauceda-Conteras's response and asked him another question.

In *Smith v. Illinois* (1984) 469 U.S. 91 (*Smith*), the United States Supreme Court addressed the issue we have before us here. After detectives asked defendant whether he was aware of an armed robbery and defendant implicated his cousin, a detective advised defendant of his *Miranda* rights. The detective stated, "You have a right to consult with a lawyer and to have a lawyer present with you when you're being questioned. Do you understand that?" The defendant replied, "*Uh, yeah. I'd like to do*

that." The detective completed advising defendant of his *Miranda* rights and asked defendant whether he wanted to speak with him without an attorney. After defendant said "*yeah and no*," the detective said, "*You either have [to agree] to talk to me this time without a lawyer being present and if you do agree to talk with me without a lawyer being present* you can stop at any time you want to." (*Id.* at p. 93.) Defendant agreed to speak with the detectives without an attorney. The Supreme Court held that all questioning must cease after a clear and unequivocal request for an attorney and defendant's statement, "'I'd like to do that,'" was neither indecisive nor ambiguous. (*Id.* at p. 97.) The Court explained that the lower courts construed defendant's request for counsel as "'ambiguous'" only by looking to defendant's "*subsequent* responses." (*Id.* at p. 97.) The court noted, "'No authority, and no logic, permits the interrogator to proceed . . . on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to say something casting retrospective doubt on his initial statement that he wished to speak through an attorney . . . .' [Citation.]" (*Id.* at p. 99.) The Court explained the "postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." (*Id.* at p. 100.)

Tellingly, the Attorney General ignores *Smith* and claims "the question was clearly asked for the purpose of clarifying whether [Sauceda-Contreras] was willing to talk to them at that time without an attorney." Clarification was unnecessary as Sauceda-Contreras clearly and unequivocally told Trapp that he wanted an attorney so he could tell them what had happened.

Trapp advised Sauceda-Contreras that he had the "right to have a lawyer present before and *during* this interrogation." (Italics added.) After Sauceda-Contreras said he understood, Trapp advised him an attorney would be appointed if he could not afford an attorney. After Sauceda-Contreras said he understood, Trapp asked him whether, having his rights in mind, Blazek could speak with him. Sauceda-Contreras

answered, "If you can bring me a lawyer, that way I I [*sic*] with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." After being advised it was his right to have a lawyer present *during* the interrogation, Sauceda-Contreras essentially responded—bring me a lawyer and I will talk. "No particular form of words or conduct is necessary to invoke the Fifth Amendment privileges." (*People v. Smith* (1995) 31 Cal.App.4th 1185, 1190, fn. 4; see *In re H.V.* (Tex. 2008) 252 S.W.3d 319, 326 ["While police often carry printed cards to ensure precise *Miranda* warnings, the public is not required to carry similar cards so they can give similarly precise responses"].) Sauceda-Contreras did not say, "'Maybe I should talk to a lawyer'" (*Davis v. United States* (1994) 512 U.S. 452, 455, 462, 466), or "'I think I should talk to a lawyer'" (*People v. Martinez* (2010) 47 Cal.4th 911, 952), both responses courts have found to be equivocal and ambiguous.

At this point, Trapp should have terminated the interrogation, but she ignored Sauceda-Contreras's response and continued the interview, and intentionally or not, confused Sauceda-Contreras about the nature of his constitutional rights. After Sauceda-Contreras unequivocally invoked his right to counsel, Trapp stated, "Okay, perhaps you didn't understand your rights." Sauceda-Contreras clearly understood his right to counsel and invoked it. His straightforward and clear response did not require clarification.

It is true police may seek clarification of a suspect's ambiguous response to a *Miranda* admonition. But the response must be equivocal and ambiguous. If the suspect's response is unequivocal and unambiguous, the interrogation must stop. Police may not seek clarification of a suspect's response in an attempt to change the suspect's mind after an invocation of *Miranda* rights. (*Peracchi, supra,* 86 Cal.App.4th at p. 360.) Nor may police continue with the interrogation in an attempt to confuse a suspect about the nature of his constitutional rights.

The Dissent

We agree with our dissenting colleague that the law does not prohibit an officer from clarifying a suspect's response when nuances in the response render it ambiguous or equivocal. Our disagreement arises in our colleague's application of this legal principle to the facts before us. We also conclude our colleague's reliance on *People v. Williams* (2010) 49 Cal.4th 405 (*Williams*), is misplaced.

In *Williams, supra,* 49 Cal.4th 405, after the officer advised defendant of his *Miranda* rights, the officer asked defendant if he understood the rights that had been explained to him, and defendant replied in the affirmative. The officer asked defendant if he wished to give up his right to remain silent. Again, defendant answered in the affirmative. The officer asked if defendant wished to give up "the right to speak to an attorney and have [an attorney] present during questioning?" Defendant answered with a question, "You talking about now?" The officer responded, "Do you want an attorney here while you talk to us?" Defendant answered, "Yeah." The officer responded, "Yes you do." Defendant replied, "Uh huh." The officer asked, "Are you sure?" Defendant answered, "Yes." A second officer interjected, "You don't want to talk to us right now." Defendant answered, "Yeah, I'll talk to you right now." The first officer stated, "Without an attorney." Defendant responded, "Yeah." (*Williams, supra,* 49 Cal.4th at p. 426) An officer later testified that at the outset, defendant seemed to understand his rights but was confused concerning the availability of counsel. The officer attempted to resolve the confusion, and defendant appeared to understand the officers' explanation and displayed eagerness to speak with them. (*Williams, supra,* 49 Cal.4th at p. 423.)

In rejecting defendant's claim the officers violated his *Miranda* rights, our Supreme Court reasoned, "In the present case, defendant had indicated to the officers that he understood his rights and would relinquish his right to remain silent. When asked whether he also would relinquish the right to an attorney and to have an attorney present during questioning, defendant responded with a question concerning timing. In light of

defendant's evident intent to answer questions, and the confusion observed by [the officer] concerning when an attorney would be available, a reasonable listener might be uncertain whether defendant's affirmative remarks concerning counsel were intended to invoke his right to counsel. Furthermore, under the circumstances, it does not appear that the officers were 'badgering' defendant into waiving his rights; his response reasonably warranted clarification. [Citations.]" (*Williams, supra,* 49 Cal.4th at p. 429.)

We find *Williams* inapposite for a number of reasons. Unlike defendant in *Williams*, Sauceda-Contreras did not clearly indicate he would relinquish his right to remain silent before the colloquy occurred between him and Trapp. Immediately after advising Sauceda-Contreras of his rights and confirming that he understood those rights, Trapp asked a single question: "Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?" Unlike in *Williams*, Sauceda-Contreras did not respond with a question. Rather, he responded, "If you can bring me a lawyer, that way I I [*sic*] with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." Our dissenting colleague suggests Sauceda-Contreras's response was in fact two questions. "He asked whether a lawyer could be brought and he *impliedly* also asked whether one could be provided *right now*." (Italics added.) Our dissenting colleague then applies the reasoning in *Williams*.

Suffice it to say, we do not interpret Sauceda-Contreras's response as posing the questions our colleague suggests. Nor do we conclude Trapp interpreted the response as an interrogatory. Trapp did not attempt to explain whether a lawyer could be brought to the interrogation or when a lawyer would be provided should Sauceda-Contreras wish to speak with one before questioning. Rather she stated, "Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak with him right now without a lawyer present?" Having failed to initially secure a waiver, the officer simply asked the question more

forcefully, by suggesting Sauceda-Contreras did not understand the rights he had just demonstrated he understood. The facts here simply do not support an application of the *Williams* rationale.

Our dissenting colleague suggests the majority's analysis would compel a different result in *Williams, supra,* 49 Cal.4th 405. Not so. In *Williams*, after validly waiving his right to remain silent, the officer asked defendant if he wanted to give up "the right to speak to an attorney and have him present during questioning." Defendant answered with a question. The officer responded in an attempt to eliminate defendant's apparent confusion concerning the availability of counsel. Such an exchange is not prohibited because it is an attempt by the officer to provide clarification.

The dissent makes much of Sauceda-Contreras's use of the word "if." Our dissenting colleague suggests the use of the word "if" renders Sauceda-Contreras's response ambiguous and likens it to the circumstance of a defendant saying he wants an attorney "if" he is going to be charged with a crime. We disagree. Here, Trapp asked a compound question calling for a waiver of both the right to silence and the right to counsel. Sauceda-Contreras responded by asking for a lawyer to be brought to him. Had Trapp found the response ambiguous, we would expect her to have followed up with clarifying questions. She did not. The only objectively reasonable inference that can be drawn from Sauceda-Contreras's response is that he was invoking his right to counsel and would only speak with the detectives if he was provided with a lawyer who could represent him during the questioning.

Finally, the dissent concludes Sauceda-Contreras was not subjected to the badgering evident *Smith, supra,* 469 U.S. 91. The *Smith* Court affirmed "*all* questioning must cease after an accused requests counsel. [Citation.]" (*Id.* at p. 98.) The Court opined absent a rule requiring questioning to cease after an accused requests counsel, "the authorities through "badger[ing]" or "overreaching"—explicit or subtle, deliberate or unintentional—might otherwise wear down the accused and persuade him to incriminate

himself notwithstanding his earlier request for counsel's assistance. [Citations.]" (*Ibid.*) We note the *Williams* court also referenced badgering, and distinguished badgering by the police from seeking reasonably warranted clarification. Both courts held badgering is prohibited, but we do not read either *Smith* or *Williams* to hold a *Miranda* violation cannot occur absent badgering by the authorities.

Harmless Error Analysis

When a statement obtained in violation of *Miranda* is erroneously admitted into evidence, the conviction may be affirmed if the error is harmless beyond a reasonable doubt. Applying the standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24, we conclude the error was not harmless beyond a reasonable doubt. (*Peracchi, supra,* 86 Cal.App.4th at p. 363.) We note the Attorney General fails to respond to Sauceda-Contreras's contention he was prejudiced by admission of the interviews.

Here, the evidence of Sauceda-Contreras's guilt absent his statements was not overwhelming. The jury heard Mendoza's sister testify that Sauceda-Contreras had threatened Mendoza, but she was not the most credible witness as she did not report the threats to law enforcement officers when they interviewed her. There was evidence Sauceda-Contreras's neighbors heard arguing and a loud thump like someone hitting a wall the day *before* Mendoza's body was found burning in the large, metal trashcan. Although the jury heard Sauceda-Contreras testify he set Mendoza ablaze, Juguilon, the forensic pathologist, could not confirm the manner or cause of death because of the severe thermal injuries. Juguilon stated he was fairly confident Mendoza was dead before she was burned, but he ruled out blunt force trauma and natural causes as being the cause of death. Juguilon testified that because of the severe burning to the head and neck he could not determine whether Mendoza was strangled but he could not rule it out. Juguilon also testified Mendoza had lethal doses of methamphetamine in her system, but the thermal injuries could have affected the levels.

Excluding Sauceda-Contreras's statements, evidence of his guilt consisted of a couple threats and him burning Mendoza's body. Without evidence of a definitive cause of death considering the high level of methamphetamine in Mendoza's system, our confidence in the jury's guilty verdict is seriously undermined. Thus, based on the state of the evidence, we cannot conclude beyond a reasonable doubt that had Sauceda-Contreras's statements to Blazek and Trapp been excluded, the jury would have convicted him of murder.

DISPOSITION

The judgment is reversed.

O'LEARY, ACTING P. J.

I CONCUR:

IKOLA, J.

ARONSON, J., Dissenting.

The majority bases its decision to overturn the judgment on *Smith v. Illinois* (1984) 469 U.S. 91 (*Smith*), which, following *Edwards v. Arizona* (1981) 451 U.S. 477, prohibits officers from interrogating a suspect who has "'clearly asserted'" the right to counsel. (*Smith*, *supra*, 469 U.S. at p. 95.) The rule is designed to prevent officers from "'badgering'" the suspect and attempting to "wear down the accused and persuade him to incriminate himself notwithstanding his earlier request for counsel's assistance." (*Id.* at p. 98.) Here, Sauceda-Contreras sought the aid of counsel so he could tell the officers "everything that I know and everything that I need to tell you." (Maj. opn. *ante*, at p. 15.) The majority concludes the officer violated Sauceda-Contreras's rights under *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) when she then asked whether he would speak to the investigating officer without a lawyer present. I respectfully disagree with the majority's analysis.

Edwards and *Smith* do not prohibit an officer from clarifying a suspect's response where "nuances in the request itself render it ambiguous or equivocal." (*Smith*, *supra*, 469 U.S. at p. 100.) Under these circumstances, "the protective purposes of the *Miranda* rule [are] not impaired if the authorities are permitted to pose a limited number of followup questions to render more apparent the true intent of the defendant." (*People v. Williams* (2010) 49 Cal.4th 405, 429 (*Williams*).) Here, the officer was entitled to follow up with Sauceda-Contreras because, objectively, his statement called for a response. In asking, "If you *can* bring me a lawyer . . . ," Sauceda-Contreras asked the officer a question. (Italics added.) Indeed, Sauceda-Contreras asked the officer two questions. He asked whether a lawyer could be brought to him, and he impliedly also asked whether one could be provided *right now*, given the officer had asked him if the detective "can speak with you right now?" (Maj. opn. *ante*, at p. 15.) The majority concludes the officer should have terminated the interview without answering Sauceda-Contreras's questions but, objectively, those questions called for a response.

The officer did not err in answering those questions in the negative. As the Supreme Court has explained, "*Miranda* does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during questioning, and that an attorney would be appointed for him if he could not afford one." (*Duckworth v. Eagan* (1989) 492 U.S. 195, 204, fn. omitted.) "If the police cannot provide appointed counsel, *Miranda* requires only that the police not question a suspect unless he waives his right to counsel." (*Ibid.*; *Williams*, *supra*, 49 Cal.4th at p. 429 ["authorities are not required to have an attorney on call for the purpose of custodial interrogation"].) True, the officer did not respond expressly that she could neither provide an attorney, nor provide one right away. But the answer was implicit in the officer's reiteration that "what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?" (Maj. opn. *ante*, at p. 15.)

Here, the record does not suggest the officer could provide counsel at the stationhouse, assuming Sauceda-Contreras qualified for appointed counsel, nor that she could do so immediately. (Compare *Williams*, *supra*, 49 Cal.4th at pp. 430-431 [distinguishing scenario where "in fact, there were attorneys available 24 hours a day to a suspect who invoked the right to counsel prior to interrogation"].) Up to this point, Sauceda-Contreras had not stated he wanted to remain silent or that he did not want to talk with the officers. Consequently, the officer's question sought to resolve whether Sauceda-Contreras wanted to invoke his right to cut off questioning altogether or waive his right to counsel and proceed with the interview. (See *Michigan v. Mosley* (1975) 423 U.S. 96, 103-104 [right of cut off questioning allows suspect to "control the time at which questioning occurs, the subjects discussed, and the duration of the interrogation"].)

Williams, *supra*, 49 Cal.4th 405, is instructive. There, police officers advised the defendant, a homicide suspect, of his *Miranda* rights. After the defendant declared he understood his rights, Officer Knebel asked, "'Do you wish to give up your right to remain silent?' Defendant answered: 'Yeah.' Knebel asked: 'Do you wish to give up the right to speak to an attorney and have him present during questioning?' Defendant answered with a question: 'You talking about now?' Knebel responded: 'Do

you want an attorney here while you talk to us?' Defendant answered: 'Yeah.' Knebel responded: 'Yes you do.' Defendant returned: 'Uh huh.' Knebel asked, 'Are you sure?' Defendant answered: 'Yes.' [Officer] Salgado stated: 'You don't want to talk to us right now.' Defendant answered: 'Yeah, I'll talk to you right now.' Knebel stated: 'Without an attorney.' Defendant responded, 'Yeah.'" (*Id.* at p. 426.)

Officer Knebel then explained that if the defendant wanted the assistance of an appointed attorney he would have to wait two days. The defendant chose to immediately proceed with the interview. "Knebel inquired: 'Ok, do you want to talk now because you're free to give up your right to have an attorney here now?' Defendant responded: 'Yes, yes, yes.'" (*Williams*, *supra*, 49 Cal.4th at p. 426.) The defendant made numerous admissions in the ensuing interviews, culminating in a confession that he robbed and kidnapped the victim, but blamed the shooting on his accomplice. (*Id.* at p. 419.)

Under the majority's analysis, the officers violated the defendant's *Miranda* rights when they continued to question the defendant after the following exchange between Knebel and the defendant: "'Do you want an attorney here while you talk to us?' Defendant answered: 'Yeah.' Knebel responded: 'Yes, you do.' Defendant returned: 'Uh huh.' Knebel asked, 'Are you sure?' Defendant answered: 'Yes.'" (*Williams*, *supra*, 49 Cal.4th at p. 426.) This unambiguous colloquy *followed* the ambiguity introduced by the defendant's question concerning the timing of when a lawyer could be provided: "You talking about right now?" Thus, when read in strict sequential order as the majority does in applying *Smith* here, the *Williams* defendant's unambiguous and twice-repeated ("Yeah," "uh huh") demands for a lawyer in the colloquy above *required* that the interview cease immediately. In other words, because the defendant in *Willams* unambiguously asked to have a lawyer present during questioning, the majority's analysis in our case would have compelled in *Williams* the suppression of the defendant's subsequent statements because Officer Knebel continued to ask questions, including the entreaty, "Are you sure?"

The California Supreme Court, however, concluded that the defendant in *Williams* knowingly, intelligently, and voluntarily waived his right to counsel. Here, the majority does not reach that question, but instead concludes the officer should have terminated the interview despite Sauceda-Contreras's questions about whether and when the officer could provide an attorney. In effect, the majority inserts the word "only" into the transcript so that Sauceda-Contreras's implicit questions are transformed into a statement to the officer that he would speak to the detective *only* "[i]f you can bring me a lawyer . . . ." (Maj. opn. *ante*, at p. 15.) Sauceda-Contreras did not say that. In my view, the majority overstates its position in reaching the conclusion this is the only objectively reasonable interpretation of the words Sauceda-Contreras used. To the contrary, Sauceda-Contreras's statement objectively called for a followup response. As in *Williams*, the officer's response and the colloquy as a whole between defendant and the officer — rather than just an initial segment — bear on whether it was reasonable for the officer to clarify Sauceda-Contreras's conditional response.

In *Williams*, the Court noted defendant had "evinced willingness to waive his right to silence" and when he understood he either could wait for an attorney or talk with the officers immediately, "defendant had not the slightest doubt that he wished to waive his right to counsel and commence the interrogation." (*Williams*, *supra*, 49 Cal.4th at pp. 426-427.) Similarly, Sauceda-Contreras evinced a willingness to waive his right to silence when he agreed to an attorney-assisted interview so he could tell the officers "everything that I need to tell you." (Maj. opn., *ante,* at p. 15.)

The Court in *Williams* found the officers did nothing impermissible in continuing their dialogue with the defendant after he initially asked for an attorney, finding the subsequent discussion clarified "'the suspect's comprehension of, and desire to invoke or waive his *Miranda* rights.'" (*Williams*, *supra*, 49 Cal.4th at p. 428.) The subsequent dialogue between the defendant in *Williams* and the interrogating officers, like that between Sauceda-Contreras and his interviewers, presented both defendants with the same choice: Whether they immediately wanted to speak with the officer or wait for counsel.

The officers in *Williams* explained an attorney could not be provided right away in more painstaking detail than the officer's response here. (See *Williams*, *supra*, 49 Cal.4th at p. 426.) But given that Sauceda-Contreras's conditional implicitly *asked* the officer to respond to his questions, there seems little objective basis to conclude she had to terminate the interview immediately, without a response.

Here, Sauceda-Contreras stated he wanted to speak with the officers "if" they could "bring me a lawyer." (See *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1126 [suspect's request for an attorney "if" he was going to be charged rendered statement ambiguous and equivocal].) The majority concludes the only inference to draw is that Sauceda-Contreras would not speak to investigators without an attorney present. But considering the context and phrasing of the conversation, it is not at all clear this is the only option Sauceda-Contreras would select. Indeed, at this point, he had not exercised his right to cut off questioning, but instead invited a response. He therefore may have preferred to waive his right to counsel and selectively answer some or all of the officer's questions. As in *Williams*, defendant's continued engagement via a question about when an attorney might be provided "suggests to us that his willingness to waive the assistance of counsel turned on whether he could secure the presence of counsel immediately." (*Williams*, *supra*, 49 Cal.4th at pp. 426-427.) In my view, the majority depart from *Williams* in reaching a different conclusion here.

Here, merely asking Sauceda-Contreras whether he would waive the right to counsel to speak with officers "right now" hardly amounts to the kind of badgering the *Smith* case was designed to forestall, and is more innocuous than the entreaties used by officers in *Williams* ("Are you sure?"). The officer confirmed with Sauceda-Contreras three times that he wanted to speak to the detective right away and without an attorney ("The decision is yours." "It's fine?" "Do you want to speak with him right now?"). (Maj. opn. *ante*, pp. 15-16.) Since *Williams* permits investigators "to pose a limited number of followup questions to render more apparent the true intent of the defendant" (*Williams*, *supra*, 49 Cal.4th at p. 429), I do not agree the officers violated Sauceda-

Contreras's *Miranda* rights. I therefore respectfully dissent.

ARONSON, J.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE SAUCEDA-CONTRERAS, Defendant and Appellant.	G041831 (Super. Ct. No. 07NF0170) **ORDER**

The petition for rehearing is DENIED.

O'LEARY, ACTING P. J.

I CONCUR:

IKOLA, J.

I am of the opinion the petition for rehearing should be GRANTED.

ARONSON, J.

DECLARATION OF SERVICE BY U.S. MAIL & ELECTRONIC SERVICE

Case Name: **People v. Sauceda-Contreras**
No.: **G041831**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On March 25, 2011, I served the attached **PETITION FOR REVIEW** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on March 25, 2011, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on March 25, 2011, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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