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. S191747

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

OPENING BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

ISSUES IN THE GRANT OF REVIEW

1. After defendant had been given his *Miranda*[1] rights, did his statement – "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" - constitute a clear invocation of his right to counsel that required questioning to cease and did not permit the interrogating officers to attempt to clarify what defendant meant?

2. Was any error in the admission of defendant's subsequent statements harmless beyond a reasonable doubt?

STATEMENT OF THE CASE

In an information filed by the Orange County District Attorney on November 2, 2007, defendant, Jose Sauceda-Contreras, was charged with murdering Martha Patricia Mendoza, in violation of Penal Code section 187, subdivision (a). (2 CT 308-309.)

Defendant's jury trial commenced on November 11, 2008. (2 CT 419.) On November 12, 2008, defendant's trial counsel made a verbal motion to suppress defendant's interview with police pursuant to *Miranda v. Arizona, supra*, 384 U.S. 436. Relying upon an English transcript of the interview that had been translated from Spanish, and viewing the DVD of the interview, the trial court denied the motion after it found defendant had been appropriately advised of his rights pursuant to *Miranda* and had knowingly and intelligently waived those rights. (2 CT 422; 1 RT 72.)

After the People rested their case, the trial court denied defendant's motion for a judgment of acquittal pursuant to Penal Code section 1118.1.

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

(2 CT 439.) On November 26, 2008, the jury found defendant guilty of murder in the first degree. (2 CT 453, 513.) On March 13, 2009, defendant was sentenced to 25 years to life in prison. (2 CT 568.)

Defendant's opening brief on appeal was filed on December 11, 2009. Among the issues raised on appeal were the claims that defendant's conviction should be reversed because the police ignored the "unequivocal invocation of his rights to counsel and silence" after he was advised of his rights under *Miranda*. (AOB 25-43.) Defendant also argued insufficient evidence was introduced to prove he caused the death of Mendoza (AOB 56-65), and that his first degree murder conviction should be reduced because no evidence was presented that supported a finding of premeditation and deliberation. (AOB 66-80.)

In an unpublished opinion filed on February 16, 2011, Division Three of the Fourth Appellate District reversed defendant's first degree murder conviction. The majority of the panel found a *Miranda* violation occurred when the police officer acting as a Spanish language interpreter for defendant and a homicide detective repeated her question as to whether defendant was willing to talk to the detective "right now." The majority found defendant's initial response of, "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," was a clear invocation of his right to counsel, which the officer should have recognized, and therefore the officer should have immediately ended the custodial interview. (Opn. at p. 19.) The majority also found the admission of the interview was not harmless error because without defendant's incriminating statements, "the evidence of his guilt consisted of a couple of threats and him burning Mendoza's body." (Opn. at pp. 22-23.)

The third Justice on the panel, Justice Aronson, filed a dissenting opinion in which he found defendant's initial response had actually been a

question as to whether the police could bring him an attorney "right now." Justice Aronson also found that since defendant had not indicated he wanted to remain silent or did not want to talk to the police, the officer had properly asked him a non-coercive follow-up question "to resolve whether [defendant] wanted to invoke his right to cut off questioning altogether or waive his right to counsel and proceed with the interview." (Dis. at pp. 1-2.)

Respondent filed a petition for rehearing with the Court of Appeal on March 3, 2011, and offered a third possible interpretation or meaning for defendant's initial response. Based upon the wording of that response, defendant may have believed the presence of an attorney was required in order for him to be able to talk to the detective. (Petn. Rehg. at p. 2.)

The Court of Appeal denied the petition for rehearing. Justice Aronson was of the opinion the petition for rehearing should have been granted. (Order filed March 17, 2011.)

On June 8, 2011, this Court granted respondent's petition for review.

STATEMENT OF THE FACTS

A. The Discovery Of Martha Mendoza's Burning Body

On January 10, 2007, Alondra Gaona Gutierrez was living with her family in a house in the City of Anaheim. At 10:30 or 11:00 that morning, Gutierrez smelled the odor of burning hair. About ten minutes later, Gutierrez smelled the odor of burning flesh. (1 RT 111-113.) Gutierrez called out to her husband, Pascuel Rivera Rodriguez, who was working in the garage, as she started searching for the source of the fire. Gutierrez climbed a short ladder on a child's play set in their back yard and saw smoke rising from the other side of the back fence. She then climbed a taller ladder on the opposite side of the play set that allowed her to see over the fence and into the back yard of the yellow house directly behind her

house. Gutierrez saw a large metal can with what looked like a black ball protruding from it. Flames and smoke were coming from the can. A man standing next to the can was pouring liquid onto the fire, which made the flames rise higher. Gutierrez saw the man bend something that looked like an arm back down into the can. (1 RT 114-116, 137.) There was a mattress propped against a wall on one side of the can, and a large yellow cover to a hot tub on the other side of the can. Gutierrez called out to her husband again and told him to hurry. When her husband got to the back yard, he climbed up the ladder and looked over the fence. They decided to call the fire department. (1 RT 117-120.)

One day earlier, at approximately 2:00 in the afternoon, Gutierrez had heard a man and a woman at the same house arguing with each other. Gutierrez heard the woman say something to the man about how if he did not have money to give her, to let her go get the money herself. (1 RT 120-122.) Gutierrez next heard what sounded like a person hitting a wall, followed by the sound of a woman weeping for five or ten minutes. After she heard what sounded like someone hitting a wall, Gutierrez heard the woman say something like, "if this was all that he had to give her more until he got tired." That was all Gutierrez heard because she had to leave to pick her daughter up from school. (1 RT 122-124.)

When Gutierrez was interviewed by the police, she told them she had heard a woman, who was speaking in Spanish, say, "'Fucker, if you don't want me to go out, if you don't want me to go out, you go and bring me that money to pay . . .'" She also told the police she later heard a woman weeping. Gutierrez was not able to hear the words the man was saying "because they were low." (1 RT 129-131.) Gutierrez told police it sounded like the woman was outside. (1 RT 134-135.)

Rodriguez smelled the odor of burnt hair when he was in his garage, before he ran to the backyard when his wife called for him. He climbed the

ladder on the play set and looked over the fence into the neighbor's back yard. He saw a man pouring something from a two gallon container into a burning metal trash can on a concrete patio. He estimated the metal trash can was 30 feet from his location. (1 RT 137-139.) Rodriguez watched the man for two or three minutes. Every time the liquid was poured into the can, the flames rose higher and forced the man to move back. He also saw a mattress on one side of the can, and a hot tub cover on the other side. (1 RT 140-141.)

Rodriguez decided to get the address of the house for the fire department, so he got into his truck and drove around the block to North Winter Street. As he was getting the address, he saw the man in the back yard peeking out at him from behind a car, which was parked on the side of the house. (1 RT 142-144, 146.) Rodriguez drove back to his own house and called 9-1-1. He told them the fire was behind his neighbor's house, but the fire truck arrived at his house instead. After Rodriguez directed them to the location of the fire, he climbed back up the ladder to watch what was happening. When the firemen arrived at the North Winter Street house, the man put the mattress on top of the burning trash can. Rodriguez identified defendant as the man he had seen pouring liquid into the trash can and peeking out at him from behind the car. (1 RT 147-148.) One day earlier, Rodriguez heard a man and woman at the same house arguing with each other. They were calling each other bad names, so he ushered his children into the house. (1 RT 148-151.)

City of Anaheim Firefighter Kevin Harris was part of a four-person crew dispatched to the fire. They arrived in a fire truck with its lights and siren activated. (1 RT 151-154.) When the fire truck stopped in front of the house at 940 North Winter Street, Harris and his fire partner, Andy Ingram, initially did not see any smoke. They walked past the car parked on the driveway on the side of the house, towards an open gate to the back

yard. (1 RT 155, 230.) When they got to the back corner of the house, they were met by defendant. Harris identified defendant in court. Harris and Ingram were both wearing "yellow color turnout clothing" and fire helmets. (1 RT 155-156.) Harris asked defendant if there was a fire. Defendant told them there was no fire. Harris could see a trash can on the patio with smoke coming from it. When Harris asked defendant what was burning, defendant responded by saying, "'Nothing. No problem. No problem, sir.'" (1 RT 156-157.)

A mattress was leaning over the trash can. In addition to seeing smoke coming from the can, Harris could smell something burning and the odor of gasoline. (1 RT 157.) Harris and Ingram tried to go to the trash can to see what was burning, but they were blocked by defendant. At one point, defendant put his hands out in front of him, and either put them on Harris's chest or held them up in such a way as to prevent him from approaching the can. Harris stopped, but from his location a few feet from the can, he was able to see a flickering flame inside the part of the can not obscured by the mattress. (1 RT 158-159.) At that moment, Fire Captain Strickland came to the back yard and Harris told him they needed police assistance. Strickland let him know they had already been called. (1 RT 160.)

The fire fighters started walking back towards the fire truck, and defendant walked out with them. Speaking in broken English, defendant told them his name and said he was just cooking a pig in the back yard. (1 RT 160, 180.) He said he had lived in the house for several years and was cooking the pig for a large party he was planning. Defendant said he used to cook a pig in the ground in Mexico, but since he could not cook it that way in the United States, he was cooking it in a trash can. He also claimed to have bought the pig in Indio. (1 RT 161-162.) The fire fighters had not told defendant the police were on their way, and it may have appeared to

him that they were about to leave. Defendant stood in his front yard, talking to the fire fighters for five to ten minutes, until the police arrived. (1 RT 162-163.)

Captain Strickland spoke to the police officer before the officer made contact with defendant. At that point, Harris and Ingram returned to the back yard to see what was burning. Ingram moved the mattress and they found a charred towel draped over the top of the can. When Harris lifted the towel, they saw a human skull and a burnt body. The towel and mattress were put back as they were and they left the yard. (1 RT 164-165.) They did not touch or move anything else in the back yard. When they got to the front yard, Harris made eye contact with the police officer standing next to defendant and signaled to him to put handcuffs on him, which the officer did. (1 RT 167-168.)

B. DNA and Other Physical Evidence

Photographs taken of the house and yard at 940 North Winter Street depicted a Honda parked in the driveway on the side of the house, and a sliding glass door in a bedroom adjacent to the back yard. (1 RT 230-231.) In the back yard, the large metal trash can was partially covered with a box spring, not a mattress, and there was a charred piece of wood next to it on the ground. A pair of workmen's gloves was next to the box spring, and there was another pair of workmen's gloves nearby. A small, charred sauce pan, a metal rod, and a white bucket containing a liquid that smelled like gasoline were next to the metal trash can. Half of a Bud Light can was floating in the liquid. (1 RT 232-236.)

When Anaheim Police Forensic Specialist Terry Powers-Raulston moved the box spring and towel from the trash can, she saw a charred body. The head was above the top rim of the can, and there was a brick propping the body away from one side of the metal can. One brick was missing from a small brick walkway next to the nearby garage. (1 RT 239-241.) Three

large rubber trash bins were on the driveway, next to a wall. Inside one of the bins was a partially melted plastic bottle that smelled like gasoline and had a hair attached to it. (1 RT 243-244.) The garden hose in the back yard had a valve at the end that could be turned to control the flow of water. The handle on the spigot to which the hose was attached was fully open. (1 RT 281.)

Powers-Raulston and another Forensic Specialist processed the interior of the house that evening. Investigating officers directed their attention to a bedroom with a sliding glass door and a bathroom. (1 RT 269-273.) The bedroom was in disarray and the drapes covering the sliding glass doorway were tied in a knot. The mattress was slightly off the box spring and all of the sheets and blankets had been removed from the bed. Some blankets were on a chair in the corner. (1 RT 231, 249.)

The bathroom they processed was directly across the hall from the bedroom. (1 RT 248.) The knob to the door of the bathroom was in the unlocked position and Powers-Raulston did not see any evidence of the door having been forced or pried open, such as scratched paint or pry marks. (1 RT 254, 277-278.) The shower curtain was extended across the bath tub. (1 RT 253; 2 CT 519.) There was a cup inside the bath tub and a small ball of hair was on one corner of the tub. (1 RT 253, 257; 2 CT 520.) A red stain was visible on the bathroom floor. (1 RT 255-256.) Swabs were collected from various places in the bathroom, especially around the tub and sink. While they were processing the scene, the bathtub spout fell from the wall to the lip of the tub. (1 RT 261-262.)

Lastly, the Honda was taken to a tow yard and the steering wheel was swabbed for DNA. (1 RT 267-268.)

The clothing defendant was wearing that day was collected and logged into evidence. (1 RT 209-210.) A dark belt defendant had been wearing on his jeans showed visible wearing near the buckle. There was an

indented line going across the belt that was approximately 11 inches from the end of the buckle. (1 RT 213-214.) Four swabs were taken from the inside of the belt for DNA testing. One swab was taken from next to the buckle. Then belt was divided into three sections and a swab was taken from the inside of each of the three sections along the entire length of the belt. (1 RT 214-216.)

Photographs taken of defendant that day documented injuries to the upper left side of his head, as well as to his nose, upper lip, neck, chest, and left and right hands. (1 RT 219-221; 2 CT 516 [People's Exhib. Nos. 9 A-F].) Gasoline was detected on the blue jeans defendant had been wearing that day. (2 RT 310-311.) No accelerant was detected on swabs taken from defendant's hands. (2 RT 312.)

Forensic Scientist Annette McCall conducted the DNA analyses on the swabs collected in this matter and compared the results to the DNA profiles of defendant and Martha Mendoza.[2] (2 RT 379-386.) The chances of anyone other than defendant being the source of the DNA found on the steering wheel of the Honda was one in one trillion. (2 RT 386-387.)

A presumptive test of a swab from the floor of the bathroom was positive for blood. Testing established Mendoza was a major contributor to the mixed sample of DNA of the swab from the floor. A possible explanation for the mixed DNA sample could be other people walking barefoot on the floor. (2 RT 387-389.) There was too little DNA on one of the six swabs collected from the bathtub to measure, but the other five swabs all contained a mixture of DNA profiles. Defendant was a contributor to one of the swabs of the tub, and Mendoza was a possible

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[2] The parties stipulated the DNA profiles used as the known DNA profiles of defendant and Mendoza were in fact from defendant and Mendoza. (2 RT 436-437; 2 CT 437.)

contributor to another swab. Both defendant and Mendoza were eliminated as contributors to the four remaining swabs from the tub. (2 RT 389-391.)

The swab from the inside of the first segment of the belt closest to the buckle was a mixed sample. Mendoza was a major contributor to that sample, and defendant was a minor contributor. (2 RT 394-395.) There was insufficient DNA on the middle third of the belt to be tested. A mixed sample of DNA from the last third of the belt came from both defendant and Mendoza, who were "pretty much equal contributors." (2 RT 395-396.)

A sample of defendant's blood was drawn after he was arrested. The blood was negative for drugs and alcohol. (2 RT 438.)

C. Post Mortem of Martha Mendoza's Body

Dr. Anthony Juguilon, a board certified forensic pathologist contracted to perform autopsies for Orange County, conducted the post mortem examination of the body of Martha Mendoza on January 11, 2007, the day after the body was discovered. The body had been transported to the coroner's office inside the trash can. (2 RT 314-318.) After the body was moved from the can and placed on the autopsy table, Dr. Juguilon visually examined the outside of the body. Almost all of the skin had been burned away and "thermal injuries" extended down to the muscles, and, in some places, the bones. The bones of the right hand were mostly incinerated. Dr. Juguilon was able to determine the body was that of a female from the external examination, but it had been "fairly difficult" to do so. The "vast majority" of the scalp and skin on the head had been incinerated, and the scalp had thermal fractures that were typical in victims of fire. (2 RT 319-320.) There were also thermal fractures on the extremities and ribs. While burning generally made it more difficult to pinpoint a cause and manner of death, Dr. Juguilon "could say with a fair

degree of confidence" that Mendoza was dead before her body was burned. (2 RT 321-323.)

Mendoza had not died of natural causes. No stab wounds or gunshot wounds were found on the body, nor was there any evidence of blunt force trauma. (2 RT 323-324.) Dr. Juguilon looked for indicia of hanging or strangulation, such as a furrow on the skin of the neck, but he was unable to make any kind of determination because all of the tissue had been burned away. He could not look for petechial hemorrhages in the eyes because the eyes had also been severely damaged by the fire. There was no evidence of suicidal hanging, but that, and ligature strangulation, could not be ruled out. (2 RT 324-327.) The hyoid bone and the thyroid cartilage were undamaged. A broken hyoid bone and/or damage to the thyroid cartilage were commonly seen in manual strangulations, but not in ligature strangulations or hanging. (2 RT 352-354.)

Blood and tissue samples of the brain and liver were taken and sent to the lab for analysis. The blood, which had been collected from the heart, had too much thermal damage for any accurate tests to be performed. (2 RT 327, 329.) The tissue samples from the brain and liver were positive for methamphetamine and amphetamine. While the levels of the drugs were elevated, the tissues had been altered by the fire, which, in turn, altered the levels of the drugs. (2 RT 328-329.) Because of the thermal damage caused by the fire, Dr. Juguilon could not find the cause of death, so he listed it as undetermined. (2 RT 330-331.) Dr. Juguilon was also unable to make a determination as to the manner of death. (2 RT 345-346.)

The level of amphetamine in the brain was 1.3 milligrams, and the level of methamphetamine in the brain was 5.3 milligrams. In the liver, there were 2.0 milligrams of amphetamine, and 6.8 milligrams of methamphetamine. Since the methamphetamine levels were higher, the amphetamine detected in the organs was probably a metabolite of the

methamphetamine. In the absence of the thermal injuries, that amount of methamphetamine "likely could be the cause of death," because it was a fatal level. (2 RT 363-366.) However, because the thermal damage dramatically altered the toxicology results, it was impossible to determine the ante mortem level of methamphetamine in Mendoza's body. (2 RT 370.)

D. Defendant's Controlling Behavior Toward Martha Mendoza

Maria Rodriguez was the sister of Martha Patricia Mendoza. Defendant and Mendoza had been in a dating relationship with each other for six or seven years, and, at one point, had lived together in Long Beach. Maria had not visited them much in Long Beach because they usually visited Maria at her apartment in Bellflower. (1 RT 188-190.) Maria had heard defendant threaten Mendoza on more than one occasion. Mendoza had not lived with defendant during approximately the last nine months of her life. Once, when Maria's daughter graduated from Cal State Fullerton, they stayed out late at a family gathering, so Mendoza decided to spend the night at Maria's apartment. Defendant arrived at Maria's apartment later that night and kept knocking on the door. Mendoza got up and went out to speak to him. They argued, and defendant told Mendoza he would beat her up if she did not go with him. The next morning they discovered defendant spent the night on the stairway leading to Maria's apartment. (1 RT 191-193.) Another time, when defendant and Mendoza were at Maria's apartment in approximately March of 2006, defendant told Maria "he would not leave [Mendoza] alone, he would rather see her dead than lose her." (1 RT 194-195.)

E. Transcript of DVD of Defendant's Police Interview

Anaheim Police Officer Lisa Julissa Trapp, who was fluent in English and Spanish, acted as a translator for defendant and Anaheim Police

Detective Robert Blazek during an interview that began at 1:30 p.m. on January 10, 2007, following defendant's arrest. Officer Trapp had reviewed transcripts of that interview, which included defendant's responses in Spanish as well as English translations of those answers, and she found the transcripts accurately reflected the interview. The interview was recorded in three segments (Tape 1, sides A & B; Tape 2, side A), and redacted versions of the transcripts of the first and second segments were marked as Exhibits 59-A (3 CT 606-815), and 59-B (4 CT 817-985). (2 CT 520-521.) Copies of the redacted transcripts were passed out for the jurors to use while similarly redacted DVDs of the interview, which were admitted into evidence as People's Exhibits 60-A and 60-B, and were played in the courtroom. (2 RT 414-420, 423-426, 429; 2 CT 435-436, 521.) The third segment of the lengthy interview, which was marked as People's Exhibit 59-C (4 CT 986-1097), was not admitted into evidence. (2 CT 521.)

Defendant stated his date of birth was February 17, 1978, and that he had lived at 940 Winter Street for about a year and a half. (3 CT 607-608.) His brother, Jesus, owned the house and also lived there, as did another brother, Pedro and Pedro's wife and two children. His brothers were at work that day, and he expected Pedro's wife would soon be arriving home from school with the children. (3 CT 611-615.) Defendant worked two jobs; one at Mimi's Café in Long Beach and the other at the Lone Star Steakhouse. That day and the day before had been his days off. (3 CT 608-610, 618.)

Defendant said Martha Mendoza and her five children had lived with him in Long Beach about eight years earlier. Mendoza was always leaving the kids with him while she went off with other men and used drugs. (3 CT 619-620.) Defendant said that after he ended his relationship with Mendoza, she lost custody of her children. He had not seen her for about a

year and a half, when she recently appeared at the house. He did not know how she found out where he was living. Mendoza told him she wanted to get back together with him because he had a house and money, but he rejected her because, while he loved her, he knew she could never change. (2 CT 620-622.) Mendoza returned to his house the day before and they argued. That was when Mendoza scratched him. Afterwards, Mendoza calmed down and they went to a video store to rent a movie. Later on, he noticed she was acting nervous, like she needed drugs, but he told her he would not give her any money and to go to sleep. He said he called her "Flaca," which meant "skinny," and he told her he loved her, but could not be with her. (3 CT 623-624.)

In the morning, Mendoza still looked nervous and he again told her he would not give her any money because she would only use it to buy drugs. Mendoza told him she had lost everything, including him and her kids. She said no one loved her any more, not even her kids or her mother, and that she did not want to be on the streets anymore. Then Mendoza made defendant promise that when she died, he would burn her body and keep her ashes with him and take care of them as if she was still living. (3 CT 625-628.) Defendant told her she was crazy and he began gathering his sheets and clothing to take to the laundry. When he realized he had not seen Mendoza for a while, he started looking for her. He found her lying in the bathroom. He thought about calling the police, but then he remembered her words, so he burned her body so he would never leave her or forget her. (3 CT 628-632.)

When the detective asked what time Mendoza had arrived at the house, defendant said about 8:00 a.m. the previous morning, and she spent the whole day and night with him. No one else in the house knew she was there because he had his own room and the bathroom he used was right across the hall. (3 CT 650-654.) Mendoza had not used any drugs during

that time because they were together and he would not let her. Crystal meth was her drug of choice. (3 CT 657-658.) They went to bed about 9:00 p.m. the night before, awoke around 8:00 that morning, and could hear the others in the house getting ready and leaving the house. Mendoza was acting nervous again, and that was when they had the discussion about him burning her body and taking care of her ashes. Mendoza left the bedroom and defendant thought she was going to take a shower because she was naked. (3 CT 659-664.) Defendant was concerned about Mendoza stealing things because she had stolen expensive things from him before. When he went looking for her, the bathroom door was open a little bit, but he did not see her at first. Then he saw her lying in the bath tub and she was not breathing. He started hitting and shaking her, but "'she was really like, cold, cold, cold.'" Defendant estimated she had been out of his sight for an hour and a half before he found her. (3 CT 665-670.)

At that point in the interview, defendant said he knew who Mendoza bought drugs from and he told the police he could help them "bring in someone that's big." (3 CT 672-674.) Detective Blazek got defendant back on track by asking him how he got the visible scratches on his body. Defendant said Mendoza scratched him when they argued the previous day, in the early evening. His brothers were home at the time, but they did not know Mendoza was there because he had told her to be quiet. He added that his television was on and that his brothers always had their own televisions or music on. (3 CT 674-679.) The argument was over money. Mendoza wanted defendant to give her $200. She saw defendant's I-Pod and said he bought nice things for himself, but did nothing for her. (3 CT 717-720.)

When defendant was asked if there was any medicine in the bathroom, he said there was only Alka Seltzer, so he did not know how Mendoza had killed herself. He said he saw some white bubbles coming

from her mouth and she was very cold. When Detective Blazek said it takes a lot more than an hour for a body to get cold, defendant said that sometimes Mendoza would be sweating, while there were other times when she was very cold. (3 CT 683-686.) Defendant said he loved Mendoza very much and he had no one else other than her because his brothers had their own problems. After he found her in the tub, he started yelling at her to wake up. He took her out of the tub and hugged her. Then he started talking to her and telling her, "You're not going to go anywhere or do bad things. You're going to be here with me." (3 CT 700-704.)

Defendant took Mendoza's body outside "right away." (3 CT 729.) He put some wood in the bottom of a metal can before he put her body in the can. (3 CT 704-705.) The gasoline had been in a can, but he had poured it into a different container and used the little black pot to pour the gasoline over the body. He ignited the fire with a match. (3 CT 750-753.) When Mendoza's body started to burn, he changed his mind and tried to pull her out, but "that's when it got really big." (3 CT 705.) He did not burn his hands because he was wearing gloves. (3 CT 756-757.) When he heard the sirens, he knew the police were coming, so he tried to conceal Mendoza's body with a mattress that had been in the backyard. Defendant also admitted lying to the firemen about cooking meat. (3 CT 708-709.)

Defendant denied hitting or choking Mendoza. (3 CT 734.) After Detective Blazek told defendant the neighbors had heard him arguing with Mendoza the day before, defendant said that must have been in the afternoon, but it was "hardly anything." (3 CT 758-759.) Detective Blazek pressed him on the point and said it was more than that because the neighbors heard her yelling and screaming, and had also heard him yelling. Defendant said he used to live with Mendoza, so he knew how loudly she could yell and scream. Defendant denied yelling at Mendoza during the argument and said he only told her to shut up and that he would not give

her money. (3 CT 762-764.) He denied hitting Mendoza during that argument. Compared to other arguments he had with Mendoza in the past, he considered yesterday's argument "a small one." (3 CT 766-768.)

Detective Blazek asked defendant why he waited an hour and a half before he went looking for Mendoza if he was concerned about her stealing from him. Defendant said he had looked for her before that, but had not seen her in the house so he thought she had just left. (3 CT 780-782.) When Detective Blazek asked him why he had not called 9-1-1 when he found her body, defendant said, "She told me not to do it." (3 CT 788.) Defendant said the police had never helped him before, and he was afraid of going to jail because she had died in his house. (3 CT 792-794.) He just wanted to keep Mendoza's ashes, and he had not known there were places where bodies could be cremated and the ashes returned. (3 CT 798-799.)

Detective Blazek asked defendant about the car in the driveway. Defendant said it was his brother's car, that he did not drive, and that the car had been parked there since yesterday. (4 CT 818- 821.) After Detective Blazek told him a neighbor had seen him back the car into the driveway at 10:30 that morning, defendant admitted moving the car. He said he used the car to block the back entrance so his brothers would have to enter through the front door and not be able to see what he was doing in the back yard. (4 CT 822-823.) Defendant later said he moved the car after he set Mendoza's body on fire. (4 CT 879-880.) Defendant was desperate because he thought if he called the police, they would believe he was responsible for Mendoza's death. That was why he decided to do what she had asked. The gasoline had been stored in a plastic container, but that container had been burned by the fire. He had used the little charred pot to add more gasoline to the fire. (4 CT 823-826.)

After defendant was told that his story did not make any sense, defendant suddenly said Mendoza had killed herself, with the same belt he

was wearing, because he had "scorned her real badly." That was "the real truth." (4 CT 882, 886.) Defendant said he had seen Mendoza selling her body on the streets of Long Beach and he humiliated her. He had yelled and sworn at her, and that was what the neighbors had heard the day before. Defendant was angry with her, so he said terrible things about her, called her trash, and told her to leave. (4 CT 883-885.) He told Mendoza she was a drug addict who had ruined his life for eight years, as well as the lives of his parents and family. (4 CT 898-899.)

During the night, they had sexual intercourse. (4 CT 927.) The argument that morning started when Mendoza said she wanted to move in and live with defendant. He told her no because she would never change and he could not even leave her in his room because he knew she would steal something. (4 CT 928-929.) Mendoza had threatened to have defendant deported to Mexico many times in the past. That morning, she called him a "wetback" and said if he did not get back together with her, she would make a call to have him and his whole family deported. They would lose the house and everything. (4 CT 912-913.) Mendoza said she was "'going to sour [his] life until [he lost] everything.'" (4 CT 923.) Defendant told her how terrible she had been to him and how he felt about her, then he turned around and she left the room. He heard her crying in the bathroom, and he just let her cry. (4 CT 919-921.)

Defendant said he gathered his laundry together and started cleaning things around the house. A lot of time went by, and he did not hear any noise from the bathroom. He knocked on the locked bathroom door, and went outside in front and knocked on the bathroom window. (4 CT 931-934.) Defendant went back inside and managed to open the bathroom door by putting a key into "the very corner," which would have left pry marks on the door near the lock. He discovered Mendoza had choked herself to death with his belt. (4 CT 934-936.)

Detective Blazek asked defendant to describe exactly how Mendoza had hanged herself. Defendant said she was lying in the tub, with his belt wrapped around her neck and looped over the lower spout, and she was holding the long end of the belt with her hands. (4 CT 947-952.)

Defendant said Mendoza had told him where she had left some things for her children. (4 CT 926.) After she killed herself, defendant decided he would give those things to her children and tell them "she went somewhere far away." He said he could not believe he had actually burned her body, but he insisted he never would have killed her. (4 CT 937-938.)

ARGUMENT

I. AFTER BEING ADVISED OF HIS *MIRANDA* RIGHTS, DEFENDANT'S INITIAL RESPONSE WAS NOT IMMEDIATELY UNDERSTOOD TO BE AN INVOCATION OF ANY OF THOSE RIGHTS, SO THE OFFICER PROPERLY ASKED A NON-COERCIVE FOLLOW-UP QUESTION TO CLARIFY THE RESPONSE; MOREOVER, NO SUBSTANTIVE QUESTIONS WERE PUT TO DEFENDANT UNTIL AFTER HIS POSITION WAS MADE CLEAR AND HE VALIDLY WAIVED HIS *MIRANDA* RIGHTS

As defendant was being advised of his rights under *Miranda*, he answered in the affirmative each time he was asked if he understood the right that had just been read to him. When defendant was asked if he was willing to give up those rights and talk to the detective, his initial response was, "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." Not understanding what defendant meant by that response, Officer Trapp asked defendant the direct and non-coercive question as to whether he was willing to talk to the detective right now without an attorney. Defendant responded, "Oh, okay that's fine," before answering three more short questions in which he repeatedly agreed to the interview. Under the totality of the circumstances, defendant's initial statement was ambiguous, so the police officer asked a non-coercive follow-up question to clarify his

response. No substantive questions were put to defendant until his intent was made clear and he validly waived his *Miranda* rights and agreed to talk to the detective. Therefore the trial court, after watching the DVD of the interview and reading a transcript of the interview with an English translation, properly admitted the DVD of the interview into evidence at trial after it found defendant had been advised of his rights under *Miranda* and had knowingly and intelligently waived them.

A. The *Miranda* Advisal and Defendant's Repeated Waiver of Rights

After defendant was arrested, he was taken to an interview room at the Anaheim Police Department. (1 RT 209.) At the very beginning of DVD of his recorded interview with Detective Blazek, Officer Trapp, slowly and clearly advised defendant of his *Miranda* rights in Spanish. After she read each right to him, she asked defendant if he understood that right (e.g., "You have the right to remain silent. Do you understand?"), and defendant answered in the affirmative. (2 CT 574.) Officer Trapp continued to advise defendant of his rights as follows:

> [Officer Trapp]: Whatever you say can be used against you in court. Do you understand?
>
> [Defendant]: Yes.
>
> [Officer Trapp]: You have the right to have a lawyer present before and during this interrogation. Do you understand?
>
> [Defendant]: Yes I understand.
>
> [Officer 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?
>
> [Appellant]: Yes I understand.
>
> [Officer Trapp]: Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?

[Defendant]: 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.

[Officer 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 to him right now without a lawyer present?

[Defendant]: Oh, okay that's fine.

[Officer Trapp]: The decision is yours.

[Defendant]: Yes.

[Officer Trapp]: It's fine?

[Defendant]: Ahuh, it's fine.

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

[Defendant]: Yes.

(2 CT 574-576.)

After that, Detective Blazek started asking defendant questions, beginning with his name and date of birth. (3 CT 606-607.) The portion of the recording where defendant was advised of his rights and waived same was redacted from the DVD and transcript of the interview used during the trial. (2 CT 571-576; 3 CT 606-607 [Exhibit Nos. 59-A and 60-A].)

B. Trial Court Proceedings

After the jurors were selected and sworn, but before any evidence was introduced, defendant's trial counsel made a verbal motion to exclude defendant's statements to the police from evidence. (1 RT 50-67.) Defendant's trial counsel argued a waiver of *Miranda* rights had to be "unequivocal and unambiguous," and defendant had clearly indicated that he wanted the police to bring him an attorney and wanted an attorney to represent him. Appellant's trial counsel argued Officer Trapp's response to defendant that "maybe [he] didn't understand [his] rights correctly," had been said to overcome the invocation of his rights. Counsel further argued

that given appellant's lack of education and limited ability to speak English, his waiver of rights could not have been knowing and voluntary, so the interview should be excluded from evidence. (1 RT 69-71, citing *Davis v. U.S.* (1994) 512 U.S. 452, 459-460 [114 S.Ct. 2350, 129 L.Ed.2d 362] and *Edwards v. Arizona* (1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378].)

The People submitted the matter on the DVD and transcript of defendant's interview with police. (1 RT 71.)

The trial court stated it had watched the DVD of the interview and found the transcript accurately relayed what had been said during the interview. The trial court ruled,

> And the Court would note that I was able to view the defendant in his interactions with the interpreting officer and the detective 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 the defendant was appropriately Mirandized and there was a knowing, intelligent waiver of his Constitutional rights.

(1 RT 72.)

C. The Trial Court Properly Admitted the DVD into Evidence

The *Miranda* admonition 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.) This prophylactic remedy is intended to prevent coercive interrogations from happening by ensuring an arrestee understands his rights, and is willing to waive those rights, before being interviewed by law enforcement. (*Id.*, at 478-479.)

As the United States Supreme Court has explained,

> [T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. "[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process." *A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted.* Although *Edwards*[3] provides an additional protection—if a suspect subsequently requests an attorney, questioning must cease—*it is one that must be affirmatively invoked by the suspect.*

(*Davis v. U.S.* (1994) 512 U.S. 452, 460-461[114 S.Ct. 2350, 129 L.Ed.2d 362] (citations omitted, emphasis added).)

"Whether defendant invoked his right to counsel is a factual question, which is reviewed by this court for substantial evidence or clear error." (*People v. Clark* (1993) 5 Cal.4th 950, 990, citing, inter alia, *People v. Hayes* (1985) 38 Cal.3d 780, 784; *People v. Bestelmeyer* (1985) 166 Cal.App.3d 520, 526.)

"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." (*People v. Williams* (2010) 49 Cal.4th 405, 427, citing *Smith v. Illinois* (1984) 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488.) In situations where a suspect initially waives his *Miranda* rights, then subsequently, during the course of the interview, makes a comment or statement that could be construed to be an invocation

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[3] *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [101 S.Ct. 1880, 68 L.Ed.2d 378].

of *Miranda*, law enforcement may[4] ask questions to clarify what the suspect wants to do. (*People v. Williams, supra,* 49 Cal.4th at 428, citing, inter alia, *People v. Farnam* (2002) 28 Cal.4th 107, 181; *People v. Johnson* (1993) 6 Cal.4th 1, 27; *People v. Clark, supra,* 5 Cal.4th at p. 991, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

As this Court has observed,

> 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, (supra)* (2010) 49 Cal.4th at 427.)

While the question as to whether a knowing and voluntary waiver has been made concerns the defendant's state of mind, "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." (*People v. Williams, supra,* 49 Cal.4th at

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[4] Neither this Court, nor the United States Supreme Court, has ever made clarifying questions in such instances a requirement, and have instead held that "'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. Johnson* (1993) 6 Cal.4th 1, 27; *People v. Clark, supra*, 5 Cal.4th at 991.) However, some federal district courts have adopted a broad "clarification" rule that, when faced with an ambiguous or equivocal assertion of *Miranda* rights, *requires* officers to clarify the statement before continuing with the interview. (See, e.g., *United States v. Rodriguez* (9th Cir. 2008) 518 F.3d 1072, 1077; *Nelson v. McCarthy* (9th Cir. 1981) 637 F.2d 1291, 1296; *United States v. Mendoza–Cecelia* (11th Cir.1992) 963 F.2d 1467, 1472.)

428.) This Court noted the United States Supreme Court's holding that, in situations involving a possible post waiver invocation of *Miranda* rights, "this is an objective inquiry, identifying as ambiguous or equivocal those responses that 'a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel.'" (*People v. Williams, supra,* 49 Cal.4th at p. 428, quoting *Davis v. United States, supra*, 512 U.S. at p. 459, 114 S.Ct. 2350, relying upon *Connecticut v. Barrett* (1987) 479 U.S. 523, 529, 107 S.Ct. 828, 93 L.Ed.2d 920 [a decision analyzing a response to an initial admonition]; see also *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1124, 23 Cal.Rptr.3d 295, 104 P.3d 98.)

This Court has determined the same objective inquiry is also applicable to analyzing situations concerning ambiguous, possible invocations of rights during or immediately following the *Miranda* admonition. (*People v. Williams, supra,* 49 Cal.4th at p. 428, citing *People v. Farnam, supra*, 28 Cal.4th at p. 181.) As this Court 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 p. 429, italics in the original.)

Such was the circumstance in the instant matter. Defendant's initial response of, "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" (2 CT 575), was not a clear and unambiguous invocation of his right to have an attorney present during the police interview. The context of Officer Trapp's first question after defendant's statement, where

she speculated that he may not understand his rights and asked him if he was "willing to speak to [the detective] right now without a lawyer present," demonstrates she was attempting to clarify his intention. Defendant responded, "Oh, okay that's fine." (2 CT 575.) Officer Trapp's next three follow-up questions, "The decision is yours," "It's fine?" and "Do you want to speak to him right now?"(2 CT 575-576), all of which Defendant answered in the affirmative, were not coercive or deceptive. Defendant's responses consistently indicated that he freely and knowingly waived his *Miranda* rights and agreed to talk to the detective.

With respect to the "*Miranda* admonition; a response that is reasonably open to more than one interpretation is ambiguous, and officers may seek clarification." (*People v. Williams, supra,* 49 Cal.4th at p. 428, citing *United States v. Rodriguez, supra*, 518 F.3d at p. 1080.) "When the person under interrogation makes an ambiguous statement that could be construed as a request for counsel, the interrogators may clarify the suspect's comprehension of, and desire to invoke or waive, the *Miranda* rights." (*People v. Clark, supra*, 5 Cal.4th at p. 991.) This Court went on to explain,

> The colloquy regarding defendant's rights consisted of such permissible clarification. The interrogators did not ask defendant substantive questions until defendant's position was clarified and a valid waiver was obtained. Moreover, no coercive tactics were employed in order to obtain defendant's *Miranda* waiver.

(*People v. Clark, supra*, 5 Cal.4th at p. 991; accord *People v. Farnam, supra*, 28 Cal.4th at p. 181.)

This was precisely what happened in the instant matter. Officer Trapp clarified defendant's confusing response by directly asking him if he was "willing to speak to [the detective] right now without a lawyer present." (2 CT 575.) After defendant understood the question being put to him, he answered in the affirmative and agreed to talk to the detective without an

attorney. Officer Trapp's follow-up questions were also non-coercive and made it clear to defendant that the decision as to whether to proceed with the interview was completely up to him. It was not until after defendant was advised of and validly waived his *Miranda* rights that the detective began asking him substantive questions about how he came to be burning a body in his back yard.

While Officer Trapp did not understand what defendant meant at the time of his initial response, the record in this matter includes the following three possible interpretations of the response:

1.) The majority of the appellate panel found defendant's response, standing alone, was an unambiguous and unequivocal invocation of his right to counsel. (Opn. at p. 16.) Having reached that conclusion, the appellate court found all questioning after that, even the non-coercive questions asked to clarify what defendant wanted to do, should have stopped immediately. (*Ibid.*)

2.) In his dissenting opinion, Justice Aronson found defendant's 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 defendant they could not provide him with an attorney "right now." (Dis. at pp. 1-2.) In other words, Justice Aronson found defendant's response was not an exercise "of his right to cut off questioning," but was instead a question inviting a response. (Dis. at p. 5.)

3.) Defendant, who spoke broken English (1 RT 180) and apparently had a limited education (see 1 RT 71), was under the impression he needed to have an attorney present in order to be able to talk to the detective. This

interpretation of defendant's response makes sense of all of the words he used in the sentence, "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." It is also consistent with his affirmative response after Officer Trap asked him if he was willing to talk to the detective "right now without a lawyer present."

After much analysis of each word of defendant's initial response, it is still not clear what he meant or was trying to say. While the response included, "[i]f you can bring me an attorney . . . and "someone to represent me," defendant also expressed his desire to tell the detective, "everything that [he knew] and everything that [he needed] to tell" him. Defendant said nothing about wanting to remain silent. Therefore, any objective listener in Officer Trapp's position would have found defendant's initial response, in its context, to be ambiguous.

In *Williams*, the suspect expressed his willingness to talk to investigators, but said he wanted the assistance of an attorney. When it was made clear to him that he would have to wait two days, until Monday, to have an attorney present during the interview, the suspect changed him mind about having an attorney present and repeatedly expressed his desire to immediately proceed with the interview. This Court found that after it was made clear 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.)

Just as in *Williams*, defendant represented that he understood his rights. When it was made clear to him with Officer's Trapp's next question that an attorney could not immediately be provided and they wanted to

know if he was willing to talk to the detective "right now without a lawyer present," defendant exhibited no hesitation in his willingness to immediately proceed with the interview. As this Court explained in *Williams*, "defendant made it very plain that he understood his rights and wished to proceed with the interrogation in the absence of counsel. In sum, the two or three questions posed by the officers at the outset of the interrogation merely clarified defendant's position regarding the circumstances under which he would invoke his right to counsel." (*People v. Williams, supra,* 49 Cal.4th at p. 429.) 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.)

The majority of the appellate panel attempted to distinguish the facts in *Williams* from the facts in the instant matter. It found this Court's holding in *Williams* inapposite because, unlike the suspect in *Williams*, defendant did not expressly waive his right to remain silent *before* he made the statement about an attorney. The majority also disagreed with the dissenting Justice's interpretation of the initial response as actually being a question as to whether an attorney could be brought to him that also impliedly asked whether one could be provided "right now." (Opn. at p. 19.) Instead, the majority found that after defendant's initial response, Officer "Trapp did not attempt to explain whether a lawyer could be brought to the interrogation or when a lawyer would be provided should [defendant] wish to speak with one before questioning." The majority concluded, "[h]aving failed to initially secure a waiver, the officer simply asked the question *more forcefully* by suggesting [defendant] did not understand the rights he had just demonstrated he understood." (Opn. at

pp. 20-21, emphasis added.) The majority also found Officer Trapp had presented defendant with a compound question that asked if he was willing to give up his right to silence *and* his right to an attorney. Defendant "responded by asking for a lawyer to be brought to him. *Had [Officer] Trapp found the response ambiguous, we would expect her to have followed up with clarifying questions. She did not.*" (Opn. at p. 21, emphasis added.)

However, the majority's conclusions were premised upon two faulty findings. The first flawed finding was that, after much consideration of each word, defendant's initial response should have immediately been understood by Officer Trapp to be an unambiguous request for counsel. As set forth above, since there are at least three ways to interpret defendant's initial response, which actually began with the conditional word "if," the response was by definition ambiguous and Officer Trapp's failure to immediately understand the response to be a request for counsel was objectively reasonable. Therefore, Officer Trapp properly asked the next question which clarified that the detective wanted to know if defendant was "willing to speak to him right now without a lawyer present." After defendant understood exactly what he was being asked, he responded, "Oh, sure. That's fine." (2 CT 575-576.)

The majority's second flawed finding was that the first follow-up question Officer Trapp put to defendant was not a clarifying question, but was instead asked with more force in order to secure the waiver she had failed to secure with her first question. The majority even faulted Officer Trapp for *failing* to ask clarifying questions. (Opn. at p. 21.) While the majority failed to specify exactly what Officer Trapp's clarifying questions should have been, its suggestion that she was intentionally trying to overcome defendant's will is undercut by her next three questions, specifically, "The decision is yours," "It's fine?" and "Do you want to

speak to him right now?" (2 CT 575-576.) Thus, contrary to the majority's sinister interpretation, the record clearly reflects Officer Trapp was trying to make sure defendant understood his rights and was freely waving them. This is consistent with the overall *Miranda* objective of only obtaining knowing and intelligent waivers of rights by making sure suspects are advised of what those rights are, while still allowing law enforcement to investigate criminal activity.

The majority also dismissed the dissenting Justice's point that, with the follow-up question, defendant was not subjected to badgering or over reaching. Instead, while acknowledging that badgering is prohibited, it simply stated that it does "not read either *Smith* or *Williams* to hold a *Miranda* violation cannot occur absent badgering by authorities." (Opn. at pp. 21-22.) The majority missed the point. As stated above, it is significant that "no coercive tactics were employed in order to obtain defendant's *Miranda* waiver." (*People v. Clark, supra*, 5 Cal.4th at p. 991.) The lack of coercion or deception is what made defendant's waiver of his *Miranda* rights *voluntary*. The detective did not ask any substantive questions of defendant until after he validly waived his *Miranda* rights. (*Ibid.*)

Finally, the majority completely ignored the trial court's findings on this issue. The trial court watched the DVD of the interview and read a transcript of the DVD with an English translation. It found defendant had been properly advised of his rights under *Miranda*, had knowingly and intelligently waived those rights, and repeatedly agreed to talk to the detective without having an attorney present. (1 RT 72.) The trial court was able to observe defendant's expressions and body language, and his ability to understand what was being said, including any delays or lack of delays in his responses. These observations also included "the tone and inflections of defendant's voice" (*People v. Clark, supra*, 5 Cal.4th at pp. 990-991), which may have conveyed a degree of certainty and assuredness

that would not be reflected in the written transcript. Put simply, the DVD allowed the trial court to see defendant's initial statement, and his willingness to talk to the detective without an attorney, in their context.

Accordingly, respondent submits this Court should reverse the Court of Appeal's holding on this point and rule that after determining defendant knowingly and intelligently waived his rights, the trial court properly admitted the DVD of his police interview into evidence at trial after the court determined there had been no *Miranda* violation.

II. IN LIGHT OF THE BALANCE OF THE EVIDENCE PRESENTED AT TRIAL, EVEN IF DEFENDANT'S POLICE INTERVIEW WAS IMPROPERLY ADMITTED AT TRIAL, THE ERROR WAS HARMLESS

Federal *Miranda* error, assuming it occurred, is subject to the "harmless beyond a reasonable doubt" standard propounded in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307–312 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Johnson* (1993) 6 Cal.4th 1, 32.) "The *Chapman* test is whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403 [111 S.Ct. 1884, 114 L.Ed.2d 432], quoting *Chapman v. California, supra*, 386 U.S. at 24.) "To say that an error did not contribute to the verdict is, rather, to find that error unimportant in relation to everything else the jury considered on the issue in question, as revealed in the record." (*Yates v. Evatt, supra,* 500 U.S. at 403.) Given the balance of the evidence introduced at his trial, particularly that he was caught burning Mendoza's body in his back yard while wearing a belt that had her DNA on the inner side of the belt, defendant would have still been convicted of first degree murder absent the DVD of his police interview.

As set forth in detail in the statement of facts, *ante*, while defendant's interview was incriminating because of his changing stories, inconsistencies, and lies, he nevertheless maintained he had not harmed Mendoza and would never have killed her. However, even without the police interview, the jury would have still known defendant was willing to risk destroying Mendoza's body in a dangerous manner to eliminate evidence against him, and was otherwise a deceitful and untruthful man. Aside from the DVD of the interview, the evidence of defendant's guilt included a history of controlling behavior towards Mendoza, part of an argument between them overheard a day earlier, numerous scratches on defendant's face, neck, chest, and hands, incriminating physical evidence on his belt, and the manner in which he was attempting to destroy her body.

Defendant put the metal trash can on the cement patio in his back yard. (1 RT 139.) He put Mendoza's body inside the trash can and used a brick from a nearby walkway to prop the body away from the side of the can so it would burn on all sides. (1 RT 240-241.) He had positioned a hot tub cover and a mattress near the can to use to obscure the burning trash can if necessary. (1 RT 117-118, 141.) Since he was using gasoline from a bucket near the trash can (1 RT 241), it was reasonable for the jurors to conclude defendant doused the body with gasoline before he ignited the fire. Rodriguez watched defendant adding liquid to the flames from a two gallon container. Every time defendant added the liquid, the flames grew higher and forced him back. (1 RT 140) A partially melted plastic bottle, which smelled like gasoline and had hair attached to it, was found in one of the plastic trash bins in the driveway next to the fence. (1 RT 243-244.) This proved defendant was initially using the large plastic bottle to add gasoline to Mendoza's burning body, and was forced to switch to the small, charred sauce pan found next to the burning trash can, or the half of a beer can found floating in the bucket of gasoline, when the large plastic bottle

started to melt. (1 RT 232-233.) When Rodriguez drove to defendant's house to get the address to give to the fire department, he saw defendant acting suspiciously by peaking out at him from behind the car parked next to the house. (1 RT 146.) After the fire fighters arrived at defendant's house, Rodriguez watched defendant as "he grabbed the mattress and threw it on top of the can." (1 RT 147.)

Defendant physically prevented the firemen from entering his back yard by standing in front of them and holding his hands out, even touching fire fighter Harris on his chest. (1 RT 158.) Defendant initially said there was no fire, even though the fire fighters could see and smell smoke rising from the metal can. (1 RT 157.) As the fire fighters left the back yard and headed towards the front of the house until police arrived, defendant went with them and said he was cooking a pig in the can because he could not cook the pig in the ground like he used to do in Mexico. He added that he was planning to have a large party, and claimed to have bought the pig in Indio. (1 RT 160-162.) Thus, even without the DVD of the interview, the jury would have known defendant was willing to destroy evidence and lie to government officials to protect himself.

Mendoza's sister, Maria Rodriguez, testified she had heard defendant threaten Mendoza "more than once." (1 RT 191.) She described an incident that happened when Mendoza was spending the night at her apartment after a family gathering. Defendant arrived later that night and threatened to beat Mendoza if she refused to leave with him. The next day, they discovered defendant had slept on the staircase outside the apartment. (1 RT 193-194.) Maria also testified about a statement defendant made to her around March of 2006, about how he would rather see Mendoza dead than lose her. (1 RT 195.) Maria's testimony about defendant's possessive and controlling behavior towards Mendoza was consistent with the part of an argument between a man and a woman overheard by a neighbor the day

before Mendoza's burning body was found. Alondra Gutierrez testified she heard a woman's voice say, "if he was unable to get money to give her, or to let her go so she could get the money." (1 RT 122.) She next heard what sounded like a body being slammed into a wall, then the woman saying something like, "if this was all that he had to give her more until he got tired," and the sound of a woman weeping. (1 RT 123-124.) The jurors could have relied upon this evidence to conclude the man was physically preventing the woman from leaving the residence, which was consistent with a violent domestic relationship. There were also indications of a struggle inside the house. Defendant's bedroom was in disarray, the mattress was slightly off the box spring (1 RT 249), and some of Mendoza's blood was found on the floor in the bathroom. (1 RT 255-256; 2 RT 387-389.) In his closing argument, the prosecutor noted all of this evidence and described defendant as "an abusive, controlling individual." (3 RT 511-512.)

The pathologist could not determine if Mendoza had been strangled because of the extensive damage to her body caused by the fire. (2 RT 323-327.) However, Mendoza was a "major contributor" of the DNA found on the inside third of defendant's belt, nearest to the buckle. (2 RT 394.) Defendant's belt also had a noticeable indentation across it that was 11 inches away from the buckle. (1 RT 214.) During his closing argument to the jury on November 20, 2008, the prosecutor pointed out that even though almost two years had elapsed since Mendoza's death, the indentation across the belt was still clearly visible. He noted 11 inches was the approximate circumference of a thin person's neck, and there must have been "a tremendous amount of force applied to distort that leather so that it is still distorted today." (3 RT 522-523.)

Photographs were introduced at trial that depicted the injuries on defendant's face, head, and hands, and scratches on his body. (1 RT 220-

221.) At the preliminary hearing, Detective Blazek described the scratches as one scratch on the "right side of the neck down to the middle of his chest, and there's two smaller ones on each side of that." (1 CT 289.) The detailed descriptions in the Clerk's Transcript of the photographs documenting the injuries to defendant's body include "close-up view of a red scratch mark on neck and upper chest area," "abrasion on nose and upper lip area," abrasion to top of head," "injuries to top of right hand and a portion of the top of left hand," and "injuries to top of left hand and a portion of the top of right hand." (2 CT 516.) The prosecutor argued Mendoza inflicted the injuries on defendant's face, neck, chest, and hands "when he's pulling that belt tight around [her] neck and [she] is grabbing at the belt and scratching him and trying to get that thing off." (3 RT 513.)

The post mortem levels of methamphetamine and amphetamine in Mendoza's body were at lethal levels and, in the absence of the thermal injuries to the body, could have been identified as the cause of her death. (2 RT 363-366.) However, it was impossible to determine what the ante mortem levels had been because the extreme desiccation of the tissue caused by the intense fire dramatically altered the toxicology results. (2 RT 370.)

In light of the risky and incriminating manner in which defendant was attempting to destroy Mendoza's body, it would have been reasonable for the jurors to conclude defendant was burning her body to eliminate evidence that she had been murdered. If Mendoza had died from an accidental drug overdose as the majority suggested below (Opn. at p. 23), defendant would have had no motive to burn her body, and he presumably would not have had her DNA on the inside of his belt.

Thus, in light of all of the other evidence introduced at trial as set forth above, any alleged error in admitting the DVD of defendant's police interview was harmless beyond a reasonable doubt. The DVD of the

interview, in which defendant never wavered from his position that he had nothing to do with Mendoza's death, was "unimportant in relation to everything else the jury considered on the issue" of his guilt. (*Yates v. Evatt, supra,* 500 U.S. at 403.) Accordingly, assuming the trial court erred by admitting the DVD into evidence, the error was harmless.

CONCLUSION

Based upon the foregoing, respondent respectfully submits this Court should find the trial court properly admitted the DVD of defendant's police interview into evidence and reinstate his first degree murder conviction.

Dated: August 24, 2011

Respectfully submitted,

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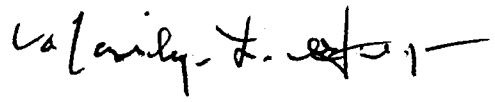

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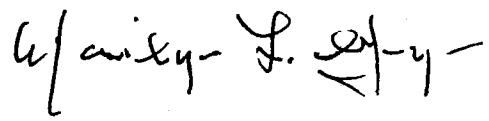
CERTIFICATE OF COMPLIANCE

I certify that the attached **RESPONDENT'S BRIEF** uses a 13 point Times New Roman font and contains 11,997 words.

Dated: August 24, 2011

KAMALA D. HARRIS
Attorney General of California



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

Case Name: **People v. Sauceda-Contreras**
No.: **S191747**

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 August 25, 2011, I served the attached **OPENING BRIEF ON THE MERITS** 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 August 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 August 25, 2011, at San Diego, California.

Carole McGraw
Declarant

Carole McGraw
Signature

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