IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. JOSE LUIS LEON, Defendant and Appellant.	No. S143531 Riverside County Superior Court No. RIF109916

APPELLANT'S REPLY BRIEF

Automatic Appeal from the Judgment of the Superior Court of the State of California for the County of Riverside

HONORABLE CHRISTIAN F. THIERBACH, JUDGE

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INTRODUCTION

As explained in appellant's opening brief, appellant's statements to the police should have been suppressed because the record – including the video tape of the May 2, 2003, interrogation and the unrebutted expert testimony of Dr. Francisco Gomez – demonstrates that appellant did not knowingly and intelligently waive his *Miranda* rights. (*Miranda v. Arizona* (1966) 384 U.S. 436.) Because the evidence that appellant was guilty of one count of first degree murder and another of first or second degree murder was otherwise weak, the erroneous admission of appellant's statements cannot be said to have been harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18, 24.)

The trial court also erred prejudicially at the guilt phase by instructing the jury pursuant to CALJIC No. 2.71.1, over defense counsel's

objection, that appellant's statement to Veronica Haft that no matter what happened, he would always love her, constituted a pre-offense statement of intent, plan, motive or design. The court erred at the penalty phase by refusing defense counsel's request to give exclusively CALCRIM instructions, or to give any of three specially-drafted instructions encompassed by CALCRIM No. 763.

The erroneous admission of appellant's statements to the police and the instruction with CALJIC No. 2.71.7, individually or cumulatively, warrants reversal of appellant's conviction. The refusal to give exclusively CALCRIM instructions at the penalty phase, or any of the three specially-prepared instructions requested by the defense, individually, cumulatively or in combination with defects in California's statutory capital sentencing scheme overall, warrants reversal of appellant's death sentence.

Finally, as respondent concedes, the trial court erred in imposing a $10,000 restitution, off the record, without affording appellant or his counsel the opportunity to explain that he would be unable to pay a fine greater than the $200 statutory minimum. Respondent agrees that, in the event appellant's conviction and sentence are affirmed, this Court should reduce the restitution fine to $200.[1]

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[1] In this brief appellant addresses specific contentions made by respondent where necessary in order to present the issues to the court fully and accurately. Appellant does not reply to those of respondent's contentions that are fully addressed in appellant's opening brief. In addition, the absence of a reply by appellant to any specific contention or allegation made by respondent, or to reassert any particular point made in appellant's opening brief, should not be construed to constitute a concession, abandonment or waiver of the point (*People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3, overruled on other grounds, *Price v. Superior Court*

(continued...)

ARGUMENT

I.

APPELLANT'S STATEMENTS TO THE POLICE SHOULD HAVE BEEN EXCLUDED AT TRIAL BECAUSE HE DID NOT KNOWINGLY AND INTELLIGENTLY WAIVE HIS *MIRANDA* RIGHTS

The totality of the circumstances regarding both the May 2, 2003, interrogation and appellant's "background, experience and conduct" show that appellant did not knowingly and intelligently waive his *Miranda* rights. (*North Carolina v. Butler* (1979) 441 U.S. 369, 374-375, quoting *Johnson v. Zerbst* (1938) 304 U.S. 458, 464.) Because this initial interrogation was videotaped, the facts surrounding the *Miranda* exchange are undisputed, and review is de novo. (*People v. Duff* (2014) 58 Cal.4th 427, 551, citing *People v. McWhorter* (2009) 47 Cal.4th 318, 346.) The video shows appellant was distraught and inattentive when Officer Rasso began reciting the *Miranda* advisements and merely nodded as Rasso continued reading. (People's Ex. 93, 3:02-3:27.) Dr. Gomez's expert testimony regarding appellant's limited intellectual functioning, mental disorder, dependent personality traits, poor acculturation and inexperience with any criminal justice system was unrebutted and confirms that appellant did not understand or knowingly and intelligently waive his *Miranda* rights. The undisputed violation of appellant's right to consular notification, under the Vienna Convention on Consular Relations and Penal Code section 834c, further undermines the validity of appellant's purported *Miranda* waiver.

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[1] (...continued)
(2001) 25 Cal.4th 1046, 1064-1065), but rather reflects appellant's view that the issue has adequately been presented and is fully joined.

A. The Record Shows That Appellant Did Not Knowingly and Intelligently Waive His *Miranda* Rights

As noted in appellant's opening brief (AOB at pp. 41-42)[2], the video of the May 2, 2003 interrogation shows appellant was crying and distracted when Officer Rasso began reciting the *Miranda* advisements; that after turning to reach for a tissue appellant nodded periodically, still upset and unfocused, slumped in his chair, as Officer Rasso kept reading; and that Officer Rasso read the advisements straight through, without stopping at each one to ask appellant whether he understood. (People's Ex. 93, 3:02-3:46.) When Officer Rasso then asked appellant whether he had understood the rights he had read and pressed for a yes or no answer, appellant said yes, and in the same breath asked either, "[a]nd does my girlfriend already know?" or "[a]nd how is she, do you know?" (Seventh Supp. CT 31; 9 CT 2402.)[3] Officer Rasso ignored the question and elicited appellant's agreement to talk to him. (*Ibid.*) The video also shows that appellant signed the *Miranda* form Officer Rasso handed him without reading it, as Officer Rasso acknowledged. (People's Ex. 93, 4:14-4:22; B RT 572.) The unrebutted testimony of Dr. Francisco Gomez, the forensic psychologist who reviewed the tapes and transcripts of all of appellant's statements and conducted a comprehensive psycho-social assessment, would confirm that appellant lacked the cognitive, intellectual, cultural and verbal ability to

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[2] In this brief, the following abbreviations are used: "AOB" refers to appellant's opening brief; "RB" to respondent's brief; "CT" to the Clerk's Transcript; "Supp. CT" to the Supplemental Clerk's Transcript; and "RT" to the Reporter's Transcript.

[3] As explained at p. 24, fn. 7, of appellant's opening brief, the translations differed.

understand and knowingly waive his *Miranda* rights.

Respondent argues, first, that appellant "was properly advised of his rights under *Miranda*." (RB at p. 34.) For this respondent relies principally on the testimony of Officer Rasso, who said that he read a *Miranda* form aloud slowly and clearly, in a dialect of Spanish appellant understood; that appellant appeared to understand him; that he "went through each warning and made sure Leon understood his rights;" and that appellant "said he understood the rights" and signed the *Miranda* form. (RB at p. 34, citing B RT 559, 561-562.) Officer Rasso's testimony proves little. As noted, both the video and the transcript show Officer Rasso read the *Miranda* advisements straight through without stopping to confirm that appellant had understood each one individually. (People's Ex. 93, 3:06-3:42.) As explained in appellant's opening brief (AOB at pp. 34-35), this is among the factors that should be considered in assessing whether appellant's waiver was knowing and intelligent. (*United States v. Garibay* (9th Cir. 1997) 143 F.3d 534, 538-539, citations omitted.) Dr. Gomez confirmed that appellant would have had difficulty following a litany. (B RT 592.) Respondent fails even to address this point. Moreover, the issue here is not whether Officer Rasso accurately recited the *Miranda* advisements, in Spanish, or whether appellant eventually said "yes," but whether appellant in fact understood what was happening – i.e., whether his purported waiver of his *Miranda* rights was knowing and intelligent. The video shows it was not, and Dr. Gomez's testimony explains why.

Respondent also argues that the trial court's decision should be upheld because, in addition to hearing testimony at the suppression hearing, the court "was afforded the ability of observe the interview wherein Leon was advised of and waived his *Miranda* rights," and to review the

transcript. (RB at p. 32.) Preliminarily, respondent ignores that the record suggests the court only watched a portion of the May 2, 2003 video. (See AOB at p. 32, fn. 9.) More importantly, respondent cites the transcript of the interrogation, *not* the video, for the proposition that by nodding and saying "Uhm hm" appellant had "affirmed his understanding" of the *Miranda* advisements. (RB at p. 33.) This ignores appellant's demeanor – that he was crying, visibly distraught and inattentive – and begs the very question at hand – whether the fact that appellant nodded meant he understood. Dr. Gomez explained why nodding did not mean comprehension: because appellant "nodded yes to everything, just nodded" at many junctures; that he was simply going along naively with what he understood was expected of him by law enforcement officials; and that he was not intellectually capable of understanding the meaning or import of what Officer Rasso had said. (B RT 592-594.)

Respondent nonetheless urges that "[appellant's] demeanor throughout the interview" supported the trial court's finding that he validly waived his *Miranda* rights. (RB at p. 35.) Without citing the video, respondent simply asserts that there is no "visual or auditory evidence" indicating appellant "was not cognizant of his situation and 'fully' aware of his surroundings and what was being communicated to him;" that appellant's "emotional response" to the news of the homicides "did not appear to impact his ability to listen and comprehend" what Officer Rasso was saying; and that appellant "maintained mental acuity" during the advisements and "respond directly to the statements." (RB at p. 35.) Again without citing the video itself, respondent concludes that an "objective observation" of the evidence shows appellant understood the *Miranda* advisements, adding that Officer Rasso believed he did. (*Ibid.*)

As noted, the beginning of the video, which Officer Rasso did not review (B RT 564), shows appellant crying, distraught and inattentive, reaching for a tissue as Officer Rasso starts reciting the *Miranda* advisements. (People's Ex. 93, 3:02-3:27, 4:21-4:26.) This is "visual and auditory evidence" that appellant was not "cognizant" of the situation. Moreover, respondent again simply declares as given what in fact is at issue: whether appellant actually had the requisite "mental acuity" or ability to comprehend the *Miranda* advisements Officer Rasso read to him. Dr. Gomez testified, based on hours of clinical interviews with appellant, extensive psychological testing, and third party interviews, that appellant in fact lacked the intellectual ability to understand *Miranda* advisements, particularly as they were conveyed to him by Officer Rasso. (B RT 577-587, 591-594.) That testimony was unrebutted.

Respondent urges that the trial court appropriately "gave little weight" to Dr. Gomez's testimony because appellant knew enough to "concoct a story" to explain why he had gone to the Ragland residence. (RB at p. 35.) The trial court in fact appears to have given Dr. Gomez's testimony virtually *no* weight, given its assertion that there was "not even a scintilla" of evidence to suggest appellant did not knowingly and intelligently waive his *Miranda* rights. (B RT 616.) Moreover, as noted in appellant's opening brief (AOB at p. 46), the issue is whether appellant validly waived his *Miranda* rights; not whether he initially denied Officer Rasso's accusations, and Dr. Gomez explained that someone who is intellectually limited, like appellant, may still lie, even in the face of contradicting information. (B RT 602-603, 608-609, 593-594.)

Respondent argues that Dr. Gomez's testimony is "of limited value" because "he did not claim appellant was mentally retarded, had a mental

disorder, or was even a special education pupil," but instead opined, based on the tests he administered, that appellant was intellectually low functioning and had difficulty with reading comprehension and memory. (RB at pp. 36, 35.) Respondent mischaracterizes Dr. Gomez's testimony and minimizes its significance. As Dr. Gomez explained, an "adjustment disorder with depressed mood anxiety" is an Axis 1 *mental disorder* within the meaning of the then-current version of the Diagnostic and Statistical Manual of Mental Disorders (DSM IV-TR), just as his borderline intellectual functioning was recognized as an Axis 2 psychological disorder, and his dependent traits were recognized under Axis 3. (B RT 591.) Further testing would have been needed to rule out mental retardation. (*Ibid.*) Moreover, whether or not appellant was ever "even" a "special education pupil," it was established that he failed sixth grade at the school he attended in an insular Mexican village, where he lived with protective parents until moving to the United States with his mother. (B RT 583, 585, 586.) In any event, the question is not whether appellant is mentally retarded, has a particular mental disorder or attended special education classes, but whether, based on the circumstances that do pertain to his character and background, it can be said that he knowingly and intelligently waived his *Miranda* rights.

Respondent's assertion that Dr. Gomez based his opinion that appellant was intellectually low functioning "solely on self-reporting" (RB at p. 36) is contradicted by the record. Dr. Gomez interviewed appellant's parents, because "he's always been in the care of his parents," and had come to the United States with his mother. (B RT 587.) Moreover, Dr. Gomez's forensic assessment included a test for malingering. (B RT 580.) Appellant scored in the normal range and was not being deceptive. (B RT

577, 578-580.)

The assertion that Dr. Gomez "did not consider many aspects of [appellant's] life showing his ability to participate and navigate society" (RB at p. 36) is also contradicted by the record. Dr. Gomez clearly did take into consideration appellant's ability to function in society, acknowledging, for example, that "how [appellant] secured jobs in the U.S." was "information you want to find out about" because it discloses "initiative" and the "the willingness to get out into society." (B RT 587.) Dr. Gomez took into account that appellant had gotten his jobs through friends or had had his girlfriend go with him to help him get jobs, which consisted mainly of unskilled farm labor. (B RT 588.)

Respondent's reliance on other "examples raised by the prosecutor" that Dr. Gomez purportedly failed to consider – that during the crime scene re-enactment appellant acknowledged writing "Austin is a bad student" (on a mirror), that he took English as a second language (ESL) and that he was able to rent apartments – is baseless. Dr. Gomez acknowledged, on cross-examination, that "Austin is a bad student" is indeed grammatically correct; he was not asked whether this was significant and volunteered no opinion on the subject. (B RT 604.) As for appellant taking ESL classes, Dr. Gomez testified it was appellant's girlfriend who had taken him, and that he had gone only once. (B RT 604.) The prosecutor presented no evidence to the contrary and asked no further questions on the subject. Dr. Gomez had already noted that appellant had not even mastered "survival English," even though he had been incarcerated for two years. (B RT 583.) When asked by the prosecutor whether he was aware that appellant was able to find himself two different apartments to rent, Dr. Gomez replied that he was not (B RT 604); no evidence was presented that appellant in fact had done so.

Respondent asserts, with no citation to the record, that "[appellant's] responses and explanations revealed that he engaged in a sophisticated thought process and had the cognitive ability to lie in a manner that matched the evidence." (RB at p. 36.) The assertion is speculative, conclusory and unfounded. The only evidence before the trial court regarding appellant's "thought processes" and "cognitive ability" – the videotaped interrogations and Dr. Gomez's clinical assessment – discloses nothing "sophisticated" about appellant whatsoever. As noted, he tested at the borderline mental retardation level of intellectual functioning, grew up in a Mexican village, had no experience with the criminal justice system and asked, at the conclusion of the first interview, whether he was going to be executed "today or tomorrow." (9 CT 2510.) As noted in appellant's opening brief (AOB at p. 46) and above, the fact that *after* appellant agreed to talk to Officer Rasso he initially denied any involvement in the homicides is not probative of whether he understood at the outset that he had the right not to speak to the police at all. And, again, Dr. Gomez explained why the fact that appellant lied did not undermine his finding, based on his clinical assessment, psychological testing and third party interviews, that appellant in fact lacked the intellectual and cognitive capacity to understand and waive his *Miranda* rights. (B RT 602-603, 608-609, 593-594.) In other words, appellant may have known enough to know he was in trouble, and so denied entering the Ragland residence, yet not have had the intellectual ability to understand *Miranda* advisements. Respondent fails even to address, much less refute, these arguments. Finally, respondent's assertion that appellant "lied in a manner that matched the evidence" is nonsensical on its face. (From respondent's perspective, if appellant "lied" in denying he committed the homicides, that would not "match" whatever evidence

there was that he had.)

Respondent's reliance on *People v. Whitson* (1998) 17 Cal.4th 229 is misplaced. As this Court noted in *Whitson*, the question whether a *Miranda* waiver is valid turns on "the particular facts and circumstances surrounding *that case*, including the background, experience and conduct of the accused." (*Id.* at p. 246, citations omitted, italics added.) The particular facts and circumstances before the court in *Whitson* – where the defendant was charged with murder when he ran a red light and crashed into another car – distinguish the case from appellant's. First, in *Whitson* the videos of the second and third interviews of the defendant confirmed the police officers' uncontradicted testimony that the defendant had given "clear and responsive" answers to their questions. (*Id.* at p. 249.) Here the videotape of appellant's May 2, 2003 interrogation plainly shows appellant was distraught and inattentive when Officer Rasso read the *Miranda* advisements. (People's Ex. 93, 3:02-3:27, 4:21-4:26.)

Moreover, it appears that in *Whitson* the defendant was advised of his *Miranda* rights one at a time, and he "affirmatively responded that he understood *each* of his rights *as they were read to him* . . . ." (*People v. Whitson*, *supra*, 17 Cal.4th at p. 237, italics added.) Here, as noted, Officer Rasso read the *Miranda* advisements straight through. (People's Ex. 93, 3:02-3:46.) Further, while in *Whitson* the defense had presented a psychologist who "characterized defendant 'as having anywhere between a mentally retarded to borderline intelligence'" (*sic*) (*id.* at p. 240), here Dr. Gomez testified not only that appellant was borderline mentally retarded, but that *as a result* of this impairment – coupled with his poor acculturation, sheltered childhood in Mexico and the lack of experience with any criminal justice system – appellant was not capable of understanding the *Miranda*

advisements or knowingly and intelligently waiving them. Finally, the defendant in *Whitson* had previously been *Mirandized* incident to an earlier encounter with the police (*Id.* at pp. 249-250), whereas appellant had no such prior experience, but rather, as Dr. Gomez explained, was ignorant and naive (B RT 585-586).

Respondent errs in asserting that appellant relies on his "below-average intelligence" as "conclusive proof" that he was incapable of intelligently waiving his *Miranda* rights. (RB at p. 36.) First, it is undisputed that appellant is not merely of "below average" intelligence, but that he scored in the mildly mentally retarded or borderline intellectual functioning range on every psychological test Dr. Gomez administered. (B RT 581, 582.) Second, appellant has consistently argued, here and in the trial court, that it is the totality of the circumstances regarding appellant's character and background, and the interrogation, not merely appellant's intellectual deficits, that invalidate his *Miranda* waiver. (See, e.g., AOB at pp. 22-23, 29-30, 33-35.) Third, appellant is not relying on his intellectual impairment as "conclusive proof" that his *Miranda* waiver was invalid. The issue is whether the prosecution met *its* burden to establish that appellant knowingly and intelligently waived his *Miranda* rights.

Thus, respondent's assertion that a confession "is not inadmissible as a matter of law *merely* because the accused was of subnormal intelligence" (RB at p. 36, italics added) is beside the point, and the three court of appeal cases respondent cites for this proposition are distinguishable in any event. In *People v. Jenkins* (2004) 122 Cal.App.4th 1160, first, the defendant had a "low IQ," but tested "reasonably well" on portions of a psychological test designed to measure the subject's understanding of *Miranda* rights and did "quite well" explaining the right to remain silent. (*Id.* at p. 1172.)

Moreover, in *Jenkins* the defendant had been read his *Miranda* rights *seven* times before and had invoked his right to remain silent on four of those occasions. (*Ibid.*) He was "street smart." (*Ibid.*) Apart from the low IQ, none of this is true for appellant.

In re Norman H. (1976) 64 Cal.App.3d 997, is similarly distinguishable. Although the defendant in that case had a very low IQ, he affirmatively testified that he understood his rights, knew something about the criminal justice from talking with his brother-in-law, and, because he was not the actual killer, thought it would be to his advantage to implicate a co-defendant. (*Id.* at pp. 1001-1002.)

People v. Watson (1977) 75 Cal.App.3d 384, finally, is even further from the mark. At the pretrial hearing on the admissibility of the defendant's confession "no evidence was introduced bearing upon [the defendant's] asserted subnormal level of intelligence or psychiatric infirmity." (*Id.* at p. 396.) Such evidence was presented for the first time as part of the defendant's case-in-chief at trial. (*Id.* at pp. 396-397.) Moreover, in *Watson* the evidence regarding the defendant's mental impairment was in conflict: in rebuttal the prosecution called a psychiatrist who had diagnosed the defendant as "having sexual deviant interests and suffering from drug abuse with schizoid features, but had found "no mental disease or defect that would have prevented an understanding of the nature and consequences of his actions." (*Id.* at p. 397.) Here Dr. Gomez's comprehensive pretrial testimony regarding appellant's intellectual limitations and cognitive impairment was unrebutted.

B. The Denial Of Appellant's Right To Consular Notification Is Another In the Totality Of Circumstances Undermining the Validity Of Appellant's *Miranda* Waiver

The trial court concluded appellant was not prejudiced by not having "somebody from Mexico" tell him to "keep his mouth shut," because he was properly advised of his *Miranda* rights. (B RT 629.) However, as explained in appellant's opening brief (AOB at pp. 46-49), appellant does not claim on appeal that the violation of his right to consular notification in itself renders his statements to the police inadmissible, but rather that the denial is another factor in the totality of circumstances undermining the validity of appellant's *Miranda* waiver. As this Court has recognized, a defendant can assert the violation of his right to consular notification as part of challenge to the voluntariness of his confession. (*People v. Enraca* (2012) 53 Cal.4th 686, 757, quoting *Sanchez-Llmas v. Oregon* (2006) 548 U.S. 331 at p. 350.) Respondent nonetheless argues that to demonstrate the violation "had [any] bearing" on the validity of appellant's *Miranda* waiver appellant must "show prejudice" (RB at p. 37), and that he has failed to do so because he has not shown that if the Mexican consulate had been notified, help would have come in time and appellant would have heeded the consular representatives' advise (RB at pp. 38-39). The point, again, is that the fact that appellant did not have the benefit of consular assistance, as such, is one of the factors that undermine confidence in the validity of his *Miranda* waiver, as is the fact that he had no prior experience with the criminal justice system, in Mexico or the United States. Requiring appellant to show what would have happened had his right to consular notification been respected is like requiring him to show what he would have done in this case if he had had prior experience with the criminal

justice system and had previously been advised of his *Miranda* rights.

Moreover, unlike in *People v. Enraca*, *supra*, 53 Cal.4th 686, where the defendant confessed while he was being booked, here appellant did not confess until his second interrogation, on May 3, 2003, fully a day after he was arrested and first interrogated. (*Id.* at p. 758.) If appellant had promptly been advised of his right to consular notification, and the consulate had been notified of his arrest, there likely would have been ample time for a local consular representative to meet with appellant,[4] and there is certainly no reason to doubt that appellant would have heeded his or her advice – i.e., that he "keep his mouth shut," in the words of the trial court.

C. The Erroneous Admission Into Evidence Of Appellant's Post-Arrest Statements To the Police Was Prejudicial

As explained in appellant's opening brief (AOB at pp. 49-51), the erroneous admission of appellant's video-taped statements was highly prejudicial, because of the inherently "probative and damaging" nature of a confession (*Arizona v. Fulminante* (1991) 499 U.S. 279, 296; because the prosecutor focused on appellant's confession in closing argument (9 RT 1718-1729); because the jurors asked to watch the taped confession again during deliberations (10 CT 2735-2736); and because, absent appellant's statements, the evidence was not sufficient to establish appellant was guilty beyond a reasonable doubt of at least one count of first degree murder and a second count of first or second degree murder, which the prosecutor had the burden to prove in order to establish the multiple murder special

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[4] Appellant announced early in the May 2, 2003 interrogation that he was a Mexican national. (9 CT 2419.)

circumstance (Pen. Code, § 190.2, subd. (a)(3)).

Respondent suggests initially that "while defendant's interview was incriminating, he nevertheless maintained he acted in self-defense." (RB at p. 39.) The notion that appellant's confession to killing Hope and Austin *supported* the defense case at trial borders on the absurd. Had the statements properly been excluded, the defense would have had no reason to concede appellant was guilty of manslaughter as to Hope, much less that he was guilty of the murder of Austin.

Respondent argues next that even without appellant's statements there was "overwhelming evidence" that appellant "murdered Hope and Perez with the requisite intent and mental state for first degree murder, and the attempted murder of Marion." (RB at pp. 39-40.) Not so. Respondent maintains, first, that the evidence of appellant's guilt includes "the manner in which [appellant] approached the Ragland home, i.e., on foot, having parked his vehicle outside of the gated community, *and entering the home undetected with gloves and ski mask.*" (RB at p. 40, citing 4 RT 1291; 5 RT 1321-1322; 6 RT 1489-1490;[5] italics added.) Yet, there is no evidence appellant entered the Ragland residence "with," much less wearing, a ski mask or gloves, or that he was "undetected" that evening. As respondent in fact notes, appellant, far from "undetected," "was seen" waiting by the gate and "was seen" the evening of the homicides, including at the Ragland

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[5] As in respondent's Statement of Facts, the record cites here are to Osvaldo Magdaleno's testimony that he saw appellant waiting at the gate (4 RT 1291); to Jenyffer Soto's testimony that she recognized appellant when she saw him by the gate as she drove out (5 RT 1321-1322); and to forensic technician Daniel Verdugo's testimony that a ski mask and partially used box of rubber gloves were found in appellant's car (6 RT 1489-1490). (RB at p. 40.)