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.	) Supreme Court No.) **S191747**)) Court of Appeal No.) G041831)) Superior Court No.) 07NF0170

Fourth Appellate District, Division Three
Orange County Superior Court, Honorable Richard F. Toohey, Judge

ANSWER BRIEF ON THE MERITS

SUPREME COURT
FILED

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ANSWER BRIEF ON THE MERITS

ISSUES PRESENTED

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?

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

RESPONDENT'S CONTENTIONS

1. 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.

2. 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.

APPELLANT'S CONTENTIONS

1. The Court of Appeal correctly found that police ignored Mr. Sauceda-Contreras's unequivocal invocation of his rights to counsel and to silence, in violation of his constitutional rights under *Miranda*.

2. The Court of Appeal correctly found admission of the statements was not harmless beyond a reasonable doubt.

3. In the alternative, this Court should remand the case to the Court of Appeal for consideration of the undecided issues on appeal.

STATEMENT OF THE CASE

On November 2, 2007, the Orange County District Attorney charged Jose Sauceda-Contreras with one count of the first degree murder of Martha Mendoza (Pen. Code, § 187, subd. (a)). (2 CT[2] 308-309.)

The court denied Mr. Sauceda-Contreras's motion to suppress his statements to police pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]. (2 CT 422; 1 RT 72.)

After deliberating for 18 hours over the course of five days on the one charge, a jury found Mr. Sauceda-Contreras guilty of first degree murder. (2 CT 308-309, 443, 453, 513-514; 3 RT 627-629.)

The court sentenced Mr. Sauceda-Contreras to 25 years to life in state prison. (2 CT 555, 568; 3 RT 637.)

In an unpublished opinion filed February 16, 2011, the Court of Appeal, Fourth Appellate District, Division Three, reversed the judgment, finding Mr. Sauceda-Contreras had clearly invoked his right to counsel under *Miranda*, but police had failed to scrupulously honor the invocation. (Typed opn., p. 19.) The court could not conclude beyond a reasonable doubt that, had Mr. Sauceda-Contreras's statements been excluded, the jury would have convicted Mr. Sauceda-Contreras of murder, noting "the Attorney General fails to respond to Sauceda-Contreras's contention he was

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[2]"CT" stands for the clerk's transcript. "RT" stands for the reporter's transcript.

prejudiced by the admission of the interviews." (Typed opn., pp. 22-23; see also typed opn., pp. 1-6 (dis. opn. of Aronson, J.).)

In respondent's petition for rehearing, respondent argued, for the first time, the admission of the statement was harmless and raised another possible interpretation of Mr. Sauceda-Contreras's invocation of counsel. The Court of Appeal denied the petition, with Justice Aronson again dissenting.

Respondent filed a petition for review and, on June 8, 2011, this Court granted the petition.

STATEMENT OF THE FACTS

PROSECUTION EVIDENCE

Jose Sauceda-Contreras, who worked two jobs at two different restaurants, had lived in Anaheim for about 18 months with his two brothers, sister-in-law, and niece and nephew. (3 CT 609-613, 616.) Before that, he had lived for four years in Long Beach with Martha Mendoza, his then-girlfriend of eight years. (3 CT 619, 631, 640.) Ms. Mendoza was a crystal methamphetamine addict, but Mr. Sauceda-Contreras does not use drugs or drink alcohol.[3] (1 RT 189-190, 3 CT 619, 656-658, 777, 4 CT 884.) Mr. Sauceda-Contreras had supported Ms. Mendoza, giving her a bank account and a car, but she spent all the money in his account and had been stopped with the car full of drugs. (3 CT 631, 633, 638-639.) She had stolen money from him. (3 CT 629, 714.) Ms. Mendoza sold herself on the streets; he had seen her coming out of motel rooms with men; she sometimes demanded money and then left with another man; her clients sometimes hit her. (3 CT 627, 633, 4 CT 882, 884, 922, 941-942.) Mr. Sauceda-Contreras had tried to take care of Ms. Mendoza's five children during her frequent absences, but the government had taken them away. (3 CT 620-621.) He was scared of finding another woman because she might be like Ms. Mendoza. (4 CT 884-886, 896-898.)

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[3]Mr. Sauceda-Contreras tested negative for alcohol or drugs. (2 RT 438.)

In June or July of 2007, Ms. Mendoza had found him again at the Anaheim house and came over two or three times a month, wanting to live with him again because he had a house and money. (3 CT 621, 645-646.) On January 9, 2007, Ms. Mendoza had showed up again, around 8:00 a.m. (3 CT 618, 623, 644, 650.)

The Events of January 9 and 10

Around 2:00 p.m. on January 9, Mr. Sauceda-Contreras's neighbors in Anaheim heard a man and woman arguing at his house. (1 RT 111, 120-121, 137, 147-151.) The woman yelled, "Fucker, if you don't want me to go out, if you don't want me to go, you go and bring me that money to pay" and words like "fucker" and "bastard," while the man spoke in a low voice. (1 RT 122, 126-132.) The woman said "if this was all that he had[,] to give her more until he got tired," followed by a bang which sounded like a person hitting a wall, after which the woman cried for about five to ten minutes. (1 RT 122-125, 132.)

The next day, around 10:30 or 11:00 a.m., the same neighbors called 9-1-1 after they smelled smoke, burning hair, and burning flesh[4] and saw Mr. Sauceda-Contreras on his patio pouring something liquid into a metal trash can and then running back as fire flared up. (1 RT 113-115, 117, 138-140, 142-145, 147-148.)

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[4]The couple reported only smoke, not any other burning smells, to the 9-1-1 operator and to responding firefighters. (1 RT 114, 147, 152-155.)

At the back corner of his house, firefighters met Mr. Sauceda-Contreras, who seemed agitated, nervous, and scared. (1 RT 155-156, 175.) Mr. Sauceda-Contreras told them there had been a fire, but it was out and there was no problem now. (1 RT 157, 174.) There was a mattress leaning over the trash can and the sight and smell of a little smoke and flame from the trash can. (1 RT 157, 159.) Mr. Sauceda-Contreras attempted to stop one firefighter from approaching the trash can. (1 RT 158.) Firefighters called police and waited with Mr. Sauceda-Contreras in the front yard. (1 RT 159-160.) Asked what was going on, Mr. Sauceda-Contreras said he was cooking a pig in the backyard, but in a trash can rather than in the ground as he would have done in Mexico. (1 RT 160-162, 179-180, 187.)

When police arrived, firefighters went to the trash can, took off the mattress leaning against it, and saw a burned body. (1 RT 163-165, 167, 232, 239-241.) Nearby were a charred sauce pan, a bucket with liquid that smelled like gasoline, a charred metal rod, and a workman's glove. (1 RT 232-233, 236, 244.)

Autopsy and Toxicology Results

The body was that of Martha Mendoza, Mr. Sauceda-Contreras's former girlfriend. (2 RT 317; 2 CT 437.) Board-certified forensic pathologist Anthony Juguilon, whose medical group provides autopsy services for Orange County, performed the autopsy, in which he determined

Ms. Mendoza was dead before her body had been burned. (2 RT 314-317, 322-323, 348.) Dr. Juguilon could not determine the cause of death, listing it as "undetermined" on the death certificate, although he could rule out trauma (blunt force, shotgun, stabbing) and found no natural causes. (2 RT 323-324, 330-332; People's Exhibit No. 58.) Dr. Juguilon could not determine the manner of death. Of the five accepted manners of death (natural, accident, suicide, homicide, and undetermined), it could have been accident, homicide, or suicide. (2 RT 333, 343-344.) Although the extensive thermal injuries (which had burned off skin, coagulated or dehydrated some organs, and sometimes extended into the muscles) hindered Dr. Juguilon's ability to render a cause of death, even in cases where a body is not burned, he sometimes cannot determine the cause of death. (2 RT 319, 321-322, 347.)

According to Dr. Juguilon, manual strangulation is the use of a hand to compress the airway, and ligature strangulation (which can be suicide, accident, or homicide) is the use of an implement to constrict the airway. (2 RT 371.) He could not rule out ligature strangulation, which would include suicidal hanging. (2 RT 327, 354-356.) However, there was no evidence of ligature strangulation, such as a cord or implement around the neck, there were no ligature furrows (due to absence of skin), and there were no petechial hemorrhages in the eyes, on the facial skin, or in the lining of the mouth, found sometimes in asphyxial deaths (because tissue

and eyes were absent due to fire damage). (2 RT 324-325, 327, 349-350.) In a nonsuicidal ligature strangulation, the findings could be very similar, the presence of hemorrhage could be very minimal, and, typically, there are no fractures of bones in the neck. (2 RT 326-327.) In a suicidal hanging, there are often minimal or no findings, that is, no blood and no fractures in the neck, although there are usually furrow marks and pectechial hemorrhages. (2 RT 324-326.)

The hyoid bone in the protected area behind the jaw is usually fractured in manual strangulation, but it is unusual for it to be broken in suicidal hanging or ligature strangulation. (2 RT 352.) The thyroid cartilage, adjacent to the hyoid bone, is sometimes fractured in manual strangulation, but it is unusual in ligature strangulation. (2 RT 354.) Here, the hyoid bone and thyroid cartilage were intact. (2 RT 353-354.)

There are several different layers of muscle in the neck. (2 RT 350.) In either strangulation or suicidal hanging, there may or may not be bruising in the neck muscles, depending on the amount of pressure used. (2 RT 350.) Here, the external or surface muscles were damaged thermally, but he did not find any hemorrhaging in the deeper muscles of the neck, either with the naked eye or microscopically. (2 RT 350-351, 357.)

Toxicological results from cross sections of the brain and liver showed elevated levels of amphetamine and methamphetamine. (2 RT 328, 358-360, 363, 372.) The level of methamphetamine in the liver, 6.8 mg,

was a fatal level for an intact body with no thermal injury and would have been the cause of death in the absence of thermal injuries. (2 RT 364-365.) Dr. Juguilon would be comfortable saying the cause of death was an overdose if the body had not been burned. (2 RT 368.) A microscopic examination showed no significant thermal changes in the liver, and the cross section analyzed was taken from deep within the liver. (2 RT 358-359.) Dehydration alters the tissue and the concentration of the toxic substance (2 RT 328-329), although Dr. Juguilon is not a toxicologist and could not say precisely what the heat would have done to the presence of methamphetamine in tissue, that is, whether it may have altered the toxicological results. (2 RT 329, 376.) The toxicology laboratory indicated the levels "may" have been altered by heat but could not say to what extent the fire might have done so or whether the levels were actually altered; the levels "might" be higher because of dehydration of the tissue. (2 RT 360, 366, 369-370, 373, 375.) Even if the level in the liver were adjusted downward to 4.5 mg or 5 mg, those amounts would still be considered fatal. (2 RT 366.)

Other Evidence

The mattress in Mr. Sauceda-Contreras's bedroom was askew, and all of the sheets and blankets piled on a chair. (1 RT 228, 248-249.) There were no pry marks on the bathroom door jamb and handle. (1 RT 254, 258, 276, 279.)

Mr. Sauceda-Contreras was wearing a well-worn leather belt. (1 RT 209-210, 212-213; People's Exhibit Nos. 8A, 62, 63.) The belt was warped, curved, and broken from wear. (1 RT 224-225.) A forensic specialist opined there was a diagonal impression 11 inches from the buckle. (1 RT 207, 214.)

The inside of the belt was swabbed, in three sections. (1 RT 215-217.) According to forensic scientist Annette McCall, the source of the DNA (e.g., blood) could not be determined. (2 RT 396.) The left third of the belt, near the buckle, showed a mixture of DNA from two people; Ms. Mendoza could not be excluded as a major contributor and Mr. Sauceda-Contreras could not be eliminated as a minor contributor. (2 RT 379-381, 2 RT 394-395.) The middle section contained insufficient material for testing. (2 RT 394, 395-396.) The right side showed a mixture of DNA from two people; Ms. Mendoza and Mr. Sauceda-Contreras could not be eliminated as equal contributors. (2 RT 394, 396.) DNA can be transferred to an item by touch or transfer, even by hand-to-hand touching. (2 RT 398-399, 405.) Ms. McCall could not say how or when DNA was deposited or how long it was present. (2 RT 405.)

A small smudge of blood from the bathroom floor showed Ms. Mendoza as a major contributor and excluded Mr. Sauceda-Contreras, with the DNA of multiple individuals present. (1 RT 255, 2 RT 386-389;

People's Exhibit Nos. 48, 49.) Ms. McCall performed no frequency estimate as to Ms. Mendoza. (2 RT 388.)

Photographs of Mr. Sauceda-Contreras showed minor injuries to his nose, upper lip, and chest (1 RT 219-220; People's Exhibit No. 9B), a small abrasion on his head (1 RT 220; People's Exhibit No. 9D), and small cuts on both hands (1 RT 220-221; People's Exhibit Nos. 9E, 9F).

Mr. Sauceda-Contreras and Ms. Mendoza had lived together in Long Beach until nine months earlier, according to Ms. Mendoza's sister, Maria Rodriguez. (1 RT 188-189, 192.) While Ms. Mendoza was staying with Ms. Rodriguez, Mr. Sauceda-Contreras had come to the apartment, the two had argued, and Mr. Sauceda-Contreras had told Ms. Mendoza he did not want her there and would beat her up if she did not go with him. (1 RT 191-194.) For the first time at trial, Ms. Rodriguez related another incident in March 2006, when Mr. Sauceda-Contreras told Ms. Rodriguez he would not leave Ms. Mendoza alone and would rather see her dead than lose her. (1 RT 195.) Ms. Rodriguez claimed she told the police in March 2007 about the second incident, but police must not have recorded her remark.[5] (1 RT 197-198.)

[5]The prosecutor conceded in argument the interview transcript did not reflect the second purported threat. (3 RT 514.)

Mr. Sauceda-Contreras's Interrogation

Anaheim Police Department detectives Robert Blazek and Spanish-speaking officer Lisa Julissa Trapp interrogated Mr. Sauceda-Contreras for the greater part of the afternoon of his arrest. (2 RT 414-415, 416-420, 421-424, 437-438.) About two-thirds of the interrogation was played for the jury. (2 RT 426, 429; People's Exhibit Nos. 60A [tape], 59A [transcript of 60A], 60B [tape], 59A [transcript of 60B].)

Mr. Sauceda-Contreras worked two jobs. (3 CT 609-613, 616.) He had lived in Long Beach for four years with Ms. Mendoza, his former girlfriend, a methamphetamine addict, but Mr. Sauceda-Contreras did not use drugs or alcohol. (3 CT 619, 631, 640, 656-658, 777.) When Ms. Mendoza found him again about five or six months ago, she visited two or three times a month and wanted to live with him because he had a house and money. (3 CT 621, 645-646.)

She had shown up on January 9, around 8:00 a.m. (3 CT 618, 623, 644, 650.) They had argued that afternoon, when he told her he loved her, but did not want anything to do with her because she was not going to change and wanted her to leave; at one point, she scratched him but calmed down. (3 CT 622-624, 675.) No one else in the house knew she was there; he told her to be quiet, afraid the others would hear. (3 CT 652-654, 676-680.)

When asked about the argument overheard by neighbors, Mr. Sauceda-Contreras said it was not a big argument. (3 CT 758-759.) He and Ms. Mendoza fought, and she yelled and yelled; he told her to shut up and said he was not going to give her money. (3 CT 763-764.) In Mr. Sauceda-Contreras's opinion, the argument was small compared to past ones. (3 CT 768-770.) One moment Ms. Mendoza could be calm and the next destroy everything; she would get mad over anything. (3 CT 680-681, 712.) He knew how she got; the entire block could hear her, and it was better for him to be quiet. (3 CT 681, 713, 761-762.) Mr. Sauceda-Contreras had not pushed or hit her during the argument. (3 CT 765-767.) Ms. Mendoza had gone out a door to the street for a while in the afternoon. (3 CT 739-748, 4 CT 878-879.)

They went to a video store, rented a movie, and ate and spent the night together. (3 CT 624, 651.) She had stolen from him before, so he hid his wallet. (3 CT 629, 714.) She was really nervous like she needed drugs. (3 CT 624.) When Ms. Mendoza saw an iPod Mr. Sauceda-Contreras had bought, she demanded money, telling him he earned good money at two jobs and bought himself expensive things, but never did anything for her. (3 CT 674, 711-712, 718.) She wanted money to buy drugs; she scratched and hit him. (3 CT 623, 716, 719-727.) However, he did not hit her that night or the next day, nor did he choke her. (3 CT 716, 733-734, 800.)

She did not use drugs that night, but wanted money, and he told her to sleep, to eat, to rest; she got angry but fell asleep. (3 CT 655-656, 675.) They had sex during the night. (4 CT 907, 927.) When they woke up that morning, she was still nervous; everything bothered her. (3 CT 625, 660, 662.) At one point, she slept again; they heard everyone else leave. (3 CT 660, 692, 697.) Ms. Mendoza was sitting on the floor by the bed watching television, naked and staring at Mr. Sauceda-Contreras lying on the bed. (3 CT 689, 692, 4 CT 832, 848, 853-854, 859-861.) She said she had thought about what she was going to do. (3 CT 625.)

Mr. Sauceda-Contreras said he was not going to give her anything because she would use it for drugs. (3 CT 626.) She said she had lost everything -- her children, her mother, him; no one loved her any more, and she did not even love herself. (3 CT 626, 689-690.) She did not want to be on the street, with one man after another, earning just enough money for the day. (3 CT 627.) She asked him to get a bike and some things for each of her children and tell them that she loved them. (3 CT 635.) She wanted him to promise to burn her and keep the ashes with him when she died; he told her she was crazy. (3 CT 627-628, 663, 693, 4 CT 847.)

Mr. Sauceda-Contreras had told her earlier they needed to do laundry, so he got the laundry ready. (3 CT 661, 664, 687-688, 4 CT 828-830, 833, 840, 852.) Ms. Mendoza left the room; he thought she had gone to take a shower. (3 CT 629, 664, 694, 4 CT 841, 856, 863-864.) Mr.

Sauceda-Contreras folded blankets, cleaned up a little, put away plates from their evening snacks, and picked up trash. (3 CT 628-629, 4 CT 834, 838, 841, 847, 865, 868.)

When he did not see her, he got scared, looked for her, saw the bathroom door was open, and found her in the tub, not breathing. (3 CT 629-630, 665, 667, 4 CT 842.) He had seen on television how "they put air in the mouth," but did not know how to do it. (3 CT 667-668.) She had no heart beat and was very still, but not stiff, with white bubbles coming out of her mouth. (3 CT 684, 735, 787, 802, 807-808.) Angry, he thought how many years he had spent on her and then she died. (3 CT 700.) He yelled and tried to wake her, but realized she was really dead, so he took her out of the tub. (3 CT 702, 787.) She was really cold; he hit her, but she did not get up or do anything. (3 CT 668.)

He did not know how she did it as there was no medicine in that bathroom and no other drugs in the house. (3 CT 683, 738.) There was a shower hose near the faucet, but it was thin and not strong enough for her to choke herself. (4 CT 874.) He had not done anything to her. (3 CT 775.)

He did not know how much time passed from the last time he saw her until he found her in the tub. (3 CT 668, 695.) He had been gathering clothes and stripping the bed. (3 CT 669.) When pressed the time, he estimated an hour and a half, but did not really know because everything happened so fast. (3 CT 670-671, 695.) When asked why he did not look

for her sooner if she stole, he said she had disappeared before without him knowing, only to return in days. (3 CT 780-782.) The detective contended the tasks only took 20 minutes and she could not have gotten that cold in 20 minutes; Mr. Sauceda-Contreras said he did not know how much time passed, but she was cold. (4 CT 868-872.)

He had thought about calling the police, but could only remember what she had told him. (3 CT 630, 671, 702-703, 788.) He also believed police would put him in jail anyway, because she was dead in his house and police would think he did it. (3 CT 790, 799, 823.) He did not think police would believe that she just died like that, just as they did not believe him now. (3 CT 791.) Police had not believed him before, when Ms. Mendoza had called them "a thousand" times, saying he was going to hit her. (3 RT 793-794.)

Mr. Sauceda-Contreras admitted burning the body, doing it because he had promised her. (3 CT 634, 703-704, 736, 4 CT 823.) He did not know that funeral homes would burn the body and give one the ashes. (3 CT 798-799.) When he saw her on fire, he tried to take her out with the gloves, but the fire was too big and the gas can caught fire. (3 CT 706-707, 756-757, 4 CT 824-825.) He lied to the firemen. (3 CT 709.)

After several hours, Mr. Sauceda-Contreras still denied culpability for Ms. Mendoza's death, but told detectives more details of their conversation and gave a different version of how he had found her. (4 CT

887 et seq.) Ms. Mendoza said she wanted to change, quit drugs, get back with him, and get her children back. (4 CT 884.) He told her she would never change. (4 CT 929.) He needed to go to work, but was afraid to leave her for fear she would steal something. (4 CT 928-929.) He told her mean things -- he had seen her coming out of hotel rooms with men, she was trash causing everyone problems, she had ruined his life and his family's, he had lost everything because of her, and he was scared of other women who might be like her. (4 CT 884-886, 896-898.) He told her to leave and never come back; she said to hit her, but not tell her such things. (4 CT 886, 896.) He loved her and wanted to stop her crying, but pride stopped him. (4 CT 885, 909.) She said that he did not love her any more, but he said he just did not want anything to do with her. (4 CT 908.) As she had in the past, she threatened him -- if they did not get back together, she was going to make him and his "fucken [sic] family" lose their house and get him and his family, who were here without papers, sent back to Mexico. (4 CT 912-913, 924.) He was not angry, just hurt and tired; she had ruined his life before and would have done it again. (4 CT 917-919, 924-925.) However, he was mad when she said she was selling herself on the street and being hit by her clients, while he was living in a house and everything was fine. (4 CT 941.)

Ms. Mendoza went to the bathroom and cried, which she had done before to manipulate him, like the time she had cried until he broke down

and gave her money, whereupon she called him a "fucking stupid Mexican" and left with another man. (4 CT 887, 920-922.)

A lot of time went by, and, when he could not hear water, or anything, he knocked and heard choking. (4 CT 893, 933.) He put shorts on, went outside, and knocked on the window. (4 CT 934, 964-965.) It got quiet, and he used a key to push open the door; there would be marks on the door from the key. (4 CT 893-895, 977-979.)

Ms. Mendoza had killed herself. (4 CT 887.) He found her in the tub with his nine-year-old belt around her neck, wrapped around or connected to the faucet. (4 CT 891, 901, 947-954.) There were marks on her neck. (4 CT 948.) His belt had been taken from his pants in the bedroom; he did not choke her with it. (4 CT 900, 903, 906, 975.) She had threatened suicide before, saying she was going to throw herself in front of a car or train or something. (4 CT 981.) Mr. Sauceda-Contreras thought about calling Ms. Mendoza's mother, but was worried about telling her because of her medical problems. (4 CT 936-937, 970.)

DEFENSE EVIDENCE

The defense rested without presenting evidence. (2 RT 441.)

The defense theory of the case was that there was no proof as to how Ms. Mendoza died (3 RT 567-568), that her death could have been suicide or accident (3 RT 552, 556, 568), that she had a fatal amount of methamphetamine in her body (3 RT 536), that much of the prosecutor's

case, such as the belt, its indentation, and strangulation was speculation, not evidence (3 RT 540, 545, 546, 569), and that the prosecutor had failed to prove Mr. Sauceda-Contreras had committed an act causing death (3 RT 532, 538, 551).

ARGUMENTS

I.

THE COURT OF APPEAL CORRECTLY FOUND THAT POLICE IGNORED MR. SAUCEDA-CONTRERAS'S UNEQUIVOCAL INVOCATION OF HIS RIGHTS TO COUNSEL AND TO SILENCE, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS UNDER *MIRANDA*.

A. Introduction.

The Court of Appeal properly reversed Mr. Sauceda-Contreras's conviction when it found Mr. Sauceda-Contreras's statements to police had been erroneously admitted over his objection at trial, because he had invoked his Fifth Amendment rights to counsel and to silence under *Miranda*. (U.S. Const., 5th, 14th Amends.; *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] ("*Miranda*"); Cal. Const., art. I, § 24.) The Court of Appeal was right. Police never asked for or obtained an express waiver of Mr. Sauceda-Contreras's *Miranda* rights. There was no valid implied waiver. Mr. Sauceda-Contreras clearly and unequivocally invoked his rights to counsel and to silence, but police did not scrupulously honor his invocation by ceasing interrogation. There was no ambiguity in what he said calling for clarification. This Court should affirm the decision.

B. Proceedings Below.

Two detectives, Robert Blazek and Spanish-speaking Julissa Trapp, interrogated Mr. Sauceda-Contreras. (Court's Exhibit Nos. 1C, 1B.) The

trial court reviewed the DVD of the interrogation and translated transcripts, one provided by the prosecution (Court's Exhibit No. 1B) and one by the defense (Court's Exhibit No. 1C). (1 RT 67.) Court's Exhibit Nos. 1B and 1C are attachments to this brief under rule 8.204(d), California Rules of Court. The trial court noted the highlighting and handwriting on Court's Exhibit No. 1C was done by the court. (1 RT 72.) The trial court indicated there were some minor variations between the two, but, as to the *Miranda* issue, "both translation transcriptions pretty much matched up." (1 RT 72.) The version below is from Court's Exhibit No. 1B, but the translation of Mr. Sauceda-Contreras's invocation and Trapp's response is provided from both exhibits, as indicated.

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

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

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

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

[Blazek] We have to advise you of some rights.

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

[Blazek]: Okay?

[Sauceda-Contreras]: Okay.

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

[Sauceda-Contreras]: A huh, yes.

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

[Sauceda-Contreras]: Yes.

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

[Sauceda-Contreras]: Yes I understand.

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

[Sauceda-Contreras]: Yes I understand.

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

[Sauceda-Contreras]: If you can bring me a lawyer, that way I I [sic] with who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me. *(Court's Exhibit No. 1B.)*

If you can bring me a lawyer, I, I, that way I know with who, it's that this way I can tell you everything that I know and everything that I need to tell you. And have someone to represent me. Please. *(Court's Exhibit No. 1C.)*

[Trapp]: Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak with him right now without a lawyer present? *(Court's Exhibit No. 1B.)*

[Trapp]: O.K. maybe you did not understand your rights correctly. What the detective wants to know now is if you are willing to speak with him now without an attorney present? *(Court's Exhibit No. 1C.)*

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

[Trapp]: The decision is yours.

[Sauceda-Contreras]: Yes.

[Trapp]: It's fine?

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

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

[Sauceda-Contreras]: Yes.

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

(Court's Exhibit Nos. 1B, 1C, 2 CT 573-576.)

Defense counsel moved to exclude Mr. Sauceda-Contreras's statements to police pursuant to *Miranda*, arguing that Mr. Sauceda-Contreras had invoked his rights to an attorney and silence when, immediately after police informed him of his right to remain silent and his right to have a lawyer present during interrogation and asked him if he wanted to talk, he said "If you can bring me a lawyer . . . I can tell you

everything that I know and everything that I need to tell you. And have someone to represent me. Please." (1 RT 67-72.)

At the motion hearing, although the prosecution had the burden of proof to show a knowing, intelligent, and voluntary waiver (*Miranda*, *supra*, 384 U.S. at p. 475), it elected not to present any live testimony. (1 RT 68.) The prosecutor contended that Mr. Sauceda-Contreras made a knowing and voluntary waiver, and the officer "did a good job to figure out what the defendant wanted to do." (1 RT 69.) Defense counsel countered Mr. Sauceda-Contreras had invoked his right to counsel, making it clear he wanted a lawyer before he would talk to police, after which the police should have ceased questioning him, but instead sought to overcome his request for a lawyer by asking him further questions. (1 RT 69-70.) Mr. Sauceda-Contreras's invocation was not vague or ambiguous, defense counsel maintained, as shown by the specificity of his request for a "lawyer" and his desire for "someone to represent [him]" before he spoke with the detective. The clarity of his request was shown by the detective's subsequent question, which did not clarify Mr. Sauceda-Contreras's rights or his invocation, but instead challenged his request for a lawyer and his request not to answer questions without a lawyer's presence. (1 RT 70-71.)

The trial court denied the motion to exclude Mr. Sauceda-Contreras's statements, finding that the interrogator's questions were "clarifying questions," that the interrogator had told him the choice was his,

and that he had answered "yes" when asked if he wanted to speak with the detective now, and that Mr. Sauceda-Contreras was appropriately given his *Miranda* rights and knowingly and intelligently waived them. (1 RT 72; 2 CT 422.)

The prosecution played the interrogation recording for the jury during its case-in-chief. (1 CT 435-436; People's Exhibit Nos. 60A [DVD of first interrogation], 59A/3 CT 607-816 [transcript of first interview], 60B [DVD of second interrogation], 59B/4 CT 818-985.) The content of the interrogation is set forth in the Statement of Facts, *ante*, "Mr. Sauceda-Contreras's Interrogation" at pages 14 to 20 and not reiterated here.

C. Standard Of Review.

The prosecution bears the "heavy burden" of demonstrating a suspect's waiver of rights has been given knowingly, intelligently, and voluntarily (*Miranda*, *supra*, 384 U.S. at p. 475; *Moran v. Burbine* (1986) 475 U.S. 412, 421 [106 S.Ct. 1135, 89 L.Ed.2d 410] ("*Moran*"); *Tague v. Louisiana* (1980) 444 U.S. 469, 470 [100 S.Ct. 652, 62 L.Ed.2d 622]) by a preponderance of the evidence (*Colorado v. Connelly* (1986) 479 U.S. 157, 168 [107 S.Ct. 515, 93 L.Ed.2d 473]).

This Court accepts the trial court's resolution of disputed facts and inferences and its evaluations of credibility, where supported by substantial evidence, and independently determines from those undisputed facts whether the interrogators illegally obtained the challenged statements.

(*People v. Bacon* (2010) 50 Cal.4th 1082, 1105.) Here, the prosecution chose not to call either of the interrogating detectives or other witnesses, so there was no resolution of disputed facts or credibility. Therefore, this Court engages in "de novo review of the legal question of whether the statement at issue was ambiguous or equivocal." (*Ibid.*)

Contrary to respondent's contention *Miranda* is merely a "prophylactic" remedy (RBOM 22), *Miranda* is in fact a *constitutional* rule. (*Dickerson v. United States* (2000) 530 U.S. 428, 444 [120 S.Ct. 2326, 147 L.Ed.2d 405]; see also *Missouri v. Seibert* (2004) 542 U.S. 600, 609 [124 S.Ct. 2601, 159 L.Ed.2d 643 [accord]). As with other fundamental rights, any doubts about invocation must be broadly construed and resolved in favor of invocation. (*Michigan v. Jackson* (1986) 475 U.S. 625, 633 [106 S.Ct. 1404, 89 L.Ed.2d 631], overruled on other grounds in *Montejo v. Louisiana* (2009) 556 U.S. 778 [129 S.Ct. 2079, 173 L.Ed.2d 955].)

D. Mr. Sauceda-Contreras Unequivocally Invoked His Right To Counsel And His Right To Cut Off Questioning, But Police Failed to Scrupulously Honor Those Requests. Further, Police Did Not Obtain An Express Waiver And There Was No Implied Waiver On These Facts.

1. Introduction.

First, prior to custodial interrogation, police must warn an individual that he has a right to remain silent, that any statement he makes may be used in evidence against him, and that he has a right to the presence of an attorney, before and during interrogation. (*Miranda*, *supra*, 384 U.S. at pp.

478-479.) Here, police gave barely adequate warnings, with no attempt to ensure Mr. Sauceda-Contreras understood those warnings other than the repeated query, "Do you understand?" (Court's Exhibit No. 1B, 1C.)

Second, if the individual indicates in any manner he wishes to consult with an attorney before speaking, all police-initiated interrogation must cease unless and until the suspect has consulted with an attorney. (*Miranda*, *supra*, 384 U.S. at p. 474.) Here, Mr. Sauceda-Contreras invoked his rights to an attorney and to silence, but the interrogators did not cease questioning. Police are permitted to seek clarification when an invocation is ambiguous, i.e., expressing both a desire for counsel and a desire to continue the interview without counsel. (*Davis*, *supra*, 512 U.S. at p. 459.) Here, however, no clarification was permissible because Mr. Sauceda-Contreras's invocation was strong, immediate, and direct; there was no ambiguity in his request.

An individual may waive these rights, provided the waiver is made voluntarily, knowingly, and intelligently. The waiver may be express or, under certain limited circumstances, implied. (*North Carolina v. Butler* (1979) 441 U.S. 369, 375-376 [99 S.Ct. 1755, 60 L.Ed.2d 286] ("*Butler*").) Here, there was neither an express or valid implied waiver.

"Invocation and waiver are entirely distinct inquires, and the two must not be blurred by merging them together." (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [105 S.Ct. 490, 83 L.Ed.2d 488] ("*Smith v. Illinois*").)

Respondent discusses invocation, waiver, and post-waiver invocation as if they were one. (RBOM 23-25.) This approach obscures the real issue, which turns on Mr. Sauceda-Contreras's *immediate* invocation upon being advised of his rights under *Miranda*. This brief will examine invocation and waiver separately.

2. Mr. Sauceda-Contreras unequivocally invoked his right to counsel and his right to cut off questioning, but police failed to scrupulously honor his request.

The basic tenet of Fifth Amendment jurisprudence is that, when law enforcement officials seek to question a suspect about a crime, they must cease interrogation if the individual indicates, in any manner and at any time prior to or during questioning, that he wishes to remain silent or that he wants an attorney. (*Miranda*, *supra*, 384 U.S. at p. 474.) If the individual has invoked his right to counsel, the police must cease interrogation until he is accorded an opportunity to confer with an attorney or have the attorney present during questioning. (*Ibid.*) When police continue interrogation without an attorney, the government bears the heavy burden of demonstrating the defendant waived his privilege against self-incrimination and his right to counsel. (*Ibid.*)

Any statement the police elicit after an individual has shown he intends to exercise his Fifth Amendment privilege is presumed to be the product of compulsion, subtle or otherwise, because, without the right to cut off questioning, in-custody interrogation overcomes free choice in

producing a statement. (*Miranda*, *supra*, 384 U.S. at p. 473; see also *Arizona v. Roberson* (1988) 486 U.S. 675, 680 [108 S.Ct. 2093, 100 L.Ed.2d 704] [accord]; *Edwards v. Arizona* (1981) 451 U.S. 477, 481-482 [101 S.Ct. 1880, 68 L.Ed.2d 378].) Likewise, any assertion of the right to counsel bars interrogation until counsel is present. (*Michigan v. Harvey* (1990) 494 U.S. 344, 350 [110 S.Ct. 1176, 108 L.Ed.2d 293]; *Edwards*, *supra*, 451 U.S. at pp. 484-485.) When, as here, a defendant seeks to suppress statements because the police improperly ignored his request for counsel, there are two questions -- whether the accused actually invoked his right to counsel and, if so, whether police scrupulously honored his request. (*Smith v. Illinois*, *supra*, 469 U.S. at p. 95.)

Whether a suspect has invoked his right to counsel is an objective inquiry. (*Davis*, *supra*, 512 U.S. at p. 459.) After advising Mr. Sauceda-Contreras of his rights, Trapp said, "Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?", and Mr. Sauceda-Contreras responded, "If you can bring me a lawyer . . . I can tell you everything that I know and everything that I need to tell you. And have someone to represent me. Please." (Court's Exhibit No. 1C, 1 B.) Respondent contends that Trapp did "[n]ot understand[] what defendant meant by that response." (RBOM 19.) The issue is not what *Trapp* understood, but what "a reasonable officer in light of the circumstances would have understood." (*Davis*, *supra*, 512 U.S. at p. 459;

People v. Gonzalez (2005) 34 Cal.4th 1111, 1124.) The words are to be understood as ordinary people would understand them. (*Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [107 S.Ct. 828, 93 L.Ed.2d 920].)

Here, the Court of Appeal found "a reasonable police officer should have known [Mr.] Sauceda-Contreras was invoking his right to the advice of counsel" and ended the custodial interrogation. (Typed opn., p. 16.) Mr. Sauceda-Contreras asserted his privilege clearly and explicitly, telling Trapp, "If you can bring me a lawyer . . . I can tell you everything that I know and everything that I need to tell you. And have someone to represent me. Please." (Court's Exhibit Nos. 1C, 1B.) Mr. Sauceda-Contreras's response was an unambiguous invocation of his right to the *immediate* presence of an attorney (*People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1126). He distinctly told Trapp he wanted an attorney present in order to talk to the detective. He asserted his right to cut off questioning until he had lawyerly assistance. He did not wish to deal with police questioning without "someone to represent [him]." Any subsequent police-initiated questioning was barred until counsel was in fact present.

The interrogators need not cease questioning where the reference to an attorney is ambiguous or equivocal, i.e.,, where a reasonable officer in light of the circumstances would have understood that the individual only "might" be invoking the right to counsel. (*Davis*, *supra*, 512 U.S. at p. 459; *People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1124.) "Ambiguous" means

"[a]dmitting more than one interpretation or explanation; having a double meaning or reference." (1 The New Shorter Oxford English Dict. (1993) p. 64, col. 1.) An ambiguous request for counsel expresses both a desire for counsel and a desire to continue the interrogation without counsel. (See, e.g., *People v. Scaffidi* (1992) 11 Cal.App.4th 145, 153; see, e.g., *State v. Blackburn* (So. Dak. 2009) 766 N.W.2d 177, 181)

No particular word-formula is required to invoke a privilege. (*People v. Williams* (2010) 49 Cal.4th 405, 427 ("*Williams*"); *People v. Randall* (1970) 1 Cal.3d 948, 956.) "While police often carry printed cards to ensure precise Miranda warnings, the public is not required to carry similar cards so they can give similarly precise responses." (*In re H.V.* (Tex. 2008) 252 S.W.3d 319, 326.) There is no "talismanic phrase" to invoke *Miranda* rights, such as "I invoke my right to silence under the Fifth Amendment." (*Arnold v. Runnels* (9th Cir. 2005) 421 F.3d 859, 866.) A suspect is not required "to speak with the discrimination of an Oxford don." (*Davis*, *supra*, 512 U.S. at p. 476 (conc. opn. of Souter, J.).) However, the suspect must make some statement "that can reasonably be construed to be an expression of a desire for the assistance of an attorney *in dealing with custodial interrogation by the police*." (*McNeil v. Wisconsin* (1991) 501 U.S. 171, 176 [111 S.Ct. 2204, 115 L.Ed.2d 158], emphasis original.)

Respondent contends Mr. Sauceda-Contreras did not make a "clear and unambiguous invocation of his right to have an attorney present during

the police interview" (RBOM 25) and characterizes his straightforward response to Trapp's question as "confusing" (RBOM 26). Although the prosecution had the burden below, it elected not to call Trapp or other witnesses, so there is no evidence Trapp viewed the question as confusing.

Respondent, adhering to the dissent in the appellate court, speculates Mr. Sauceda-Contreras was actually asking a *question* about whether police could bring him an attorney, a question which implied the further question whether they could bring him an attorney "right now," since that was when the detective wanted to talk to him. (RBOM 27, citing typed opn., pp. 1-2 (dis. opn. of Aronson, J.).) This interpretation ignores the rule that words are to be understood in their plain meaning (*Connecticut v. Barrett, supra,* 479 U.S. at p. 529). This construction is also convoluted, reading into the invocation words and meanings which are not present. Mr. Sauceda-Contreras did not ask a question. He used a declarative sentence to make an affirmative statement. Mr. Sauceda-Contreras's use of "[p]lease" at the end of his invocation further shows it was not a question, but a politely phrased request.

Respondent also posits Mr. Sauceda-Contreras was under the impression he *needed* to have an attorney present in order to talk to police. (RBOM 27.) The prosecutor did not proffer this implausible interpretation. The trial court did not adopt it. Respondent did not suggest it in the appellate briefing. Respondent first broached it in respondent's Petition for

Rehearing, apparently uncomfortable with the dissent's strained construction of the invocation as a question and wanted to offer an interpretation that made "sense of all the words he used in the sentence." (Pet. Rehearing, p. 2; RBOM 28.) Further, respondent suggests this interpretation is plausible because Mr. Sauceda-Contreras spoke "only Spanish" (Pet. Rehearing, p. 2) and "broken English" (RBOM 27), but he and Trapp spoke in Spanish. However, his affirmative request is not a question in Spanish any more than it is in English. Respondent also justifies the interpretation based on Mr. Sauceda-Contreras's limited education (RBOM 27), which is certainly relevant to waiver, but does not substantiate any belief by Mr. Sauceda-Contreras that he could not talk to detectives without an attorney. Therefore, this Court need not consider this 11th-hour purported ambiguity now.

Respondent maintains the word "if" made the request conditional and therefore ambiguous. (RBOM 30.) While conditional requests may be ambiguous (*People v. Martinez* (2010) 47 Cal.4th 911, 952; *People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1126), Mr. Sauceda-Contreras's request to have a lawyer was not conditional or contingent. In *People v. Martinez, supra,* 47 Cal.4th 911, the request for a lawyer was contingent on taking a polygraph test (*id.* at p. 952) and, in *People v. Gonzalez, supra*, 34 Cal.4th 1111, the request was contingent on the defendant's being charged with an offense (*id.* at p. 1126). Here, Mr. Sauceda-Contreras did not make his

request for a lawyer subject to any event or condition. The only conditionality here was that he would not speak with the detective unless and until he had an attorney, as the interrogator had just advised him was his right.

Respondent agrees the context of the invocation is important in determining whether an invocation is ambiguous and permits further questioning for clarification. (RBOM 25, citing *Williams, supra,* 49 Cal.4th at p. 429.) Indeed, the timing, content, and context of a reference to counsel helps determine whether there was an unambiguous assertion of the right. (See, e.g., *State v. Bowlin* (2010) 43 Kan.App.2d 671, 684.) As the Court of Appeal explained, Trapp advised Mr. Sauceda-Contreras of his right to have a lawyer present *before and during* interrogation, and he said he understood; Trapp advised him an attorney would be appointed if he could not afford one, and he said he understood. (Typed opn. p. 17.) Trapp then asked, "Having in mind these rights that I just read, the detective would like to know if he can speak to you right now?" (Typed opn., p. 17.) Mr. Sauceda-Contreras answered "If you can bring me a lawyer, . . . that way I can tell you everything that I need to tell you and have someone to represent me." (Typed opn., p. 18.) As the Court of Appeal aptly summarized, "[a]fter being advised it was his right to have a lawyer present during the interrogation [Mr.] Sauceda-Contreras essentially responded -- bring me a lawyer and I will talk." (Typed opn., p. 18.) Mr. Sauceda-

Contreras replied directly, immediately and responsively to Trapp's question, on the heels of her explanation of his right to an attorney. His response to Trapp's asking whether he wanted to talk to the detective was to ask for the lawyer she had just told him he could have. The timing, context, and content of his response show he made a straightforward invocation of his rights.

As the Court of Appeal noted in its opinion, the facts here are identical to those in *Smith v. Illinois*, *supra*, 469 U.S. 91. (Typed opn., pp. 16-17.) Although the Court of Appeal relied heavily on *Smith v. Illinois*, respondent has ignored *Smith v. Illinois* in this court, just as it did below. (Typed opn., p. 17.) There, after police informed the suspect of his rights to remain silent and have a lawyer present during questioning, they asked "Do you understand that?" The suspect told the officers, "Uh, yeah, I'd like to do that." (469 U.S. at pp. 92-93.) Instead of stopping, officers continued to read the *Miranda* warnings, informing the suspect that if he could not afford a lawyer, one would be appointed for him, and the defendant then agreed to talk to police. (*Ibid.*) The subsequent statements were inadmissible because, as the Supreme Court explained, when a suspect unambiguously asserts his right to counsel, even if the officer has not finished reading the *Miranda* warnings, all questioning must cease. (*Id.* at p. 98.) "Where nothing about the request for counsel or the circumstances leading up to the request [for counsel] would render it

ambiguous, all questioning must cease." (*Ibid.*) Here, as in *Smith v. Illinois*, there was no need to clarify what Mr. Sauceda-Contreras wanted, because what he wanted was manifest: a lawyer, someone to represent him, during questioning. There was no need for Trapp to try to determine what Mr. Sauceda-Contreras really wanted to do; he had just told her what he wanted to do. As in *Smith v. Illinois*, the detective was not permitted to continue and rephrase the question slightly in order to obtain a more favorable answer, but was required to cease questioning.

Respondent relies almost entirely on *Williams*, *supra*, 49 Cal.4th 405. However, as the Court of Appeal found, this Court's decision in *Williams* is inapposite for a number of reasons. (Typed opn., p. 20.) In *Williams*, police advised defendant of his *Miranda* rights, asked if he understood them, and defendant answered affirmatively. Police then told defendant about his right to silence and explicitly asked if he waived the right, to which he answered affirmatively. Police told him about his right to speak to an attorney and have one present during questioning, explicitly asked if he waived the right, and defendant asked, "You talking about now?" The officer, asked "Do you want an attorney here while you talk to us?" and defendant answered "Yes," but, when asked if he was sure and when a second officer commented that he did not want to talk to them, the defendant said, "Yeah, I'll talk to you right now" and agreed to do so without an attorney. (49 Cal.4th at p. 426.) One officer testified that

defendant appeared confused concerning the availability of counsel and that the officer was attempting to resolve the confusion. (*Id.* at p. 423.) The Court reasoned that, when asked if he would relinquish his right to an attorney, defendant responded with a question concerning timing. (*Id.* at p. 429.) Based on his intent to answer questions, shown by his waiver of the right to silence, the confusion testified to by the officer, and the question about availability of an attorney, this Court found his response ambiguous, as a reasonable officer would be unsure if he intended to invoke his right to counsel. (*Ibid.*) As the Court of Appeal found, *Williams* is not controlling because Mr. Sauceda-Contreras never waived his to silence, Trapp asked but a single compound question, and Mr. Sauceda-Contreras responded not with a question but with an affirmative, declarative statement. (Typed opn., p. 20.) Trapp did not interpret the response as a question, as she did not explain whether a lawyer could be brought. Instead, having failed to initially secure a waiver, she simply asked the question again, more forcefully, "by suggesting [Mr.] Sauceda-Contreras did not understand the rights he had just demonstrated he understood." (Typed opn., p. 21.) The Court of Appeal found *all* questioning (not merely "badgering") must cease after an invocation. (Typed opn., p. 21.) Indeed, the police need not badger because Miranda is designed to "dispel whatever coercion is inherent in the interrogation process." (*Davis*, *supra*, 512 U.S. at p. 460.)

Respondent claims clarification was necessary based on Mr. Sauceda-Contreras's *postrequest* responses to Trapp. (RBOM 19, 26-27.) So does the dissent in the Court of Appeal, which relied upon Trapp's slight modification of her question, adding whether Mr. Sauceda-Contreras was willing to speak to police "right now without a lawyer present." (Typed opn., pp. 1-2 (dis. opn.).) However, "postrequest responses to further interrogation may not be used to cast retrospective doubt on the clarity of the initial request itself." (*Smith v. Illinois*, *supra*, 469 U.S. at p. 100.) The interrogator cannot proceed "on his own terms and as if the defendant had requested nothing, in the hope that the defendant might be induced to saying something casting retrospective doubt on the clarity of his initial statement." (*Id.* at p. 99.) Mr. Sauceda-Contreras's initial invocation was clear, and respondent cannot rely upon postrequest responses to make his invocation look unclear.

Rather than scrupulously honoring his right to cut off questioning, Trapp continued to question Mr. Sauceda-Contreras, telling him "O.K. maybe you did not understand your rights correctly." (Court's Exhibit Nos. 1C, 1B.) Mr. Sauceda-Contreras had fully understood his right to have an attorney present, as he had just demonstrated by asking for the presence of one. However, Trapp explicitly questioned the accuracy of his understanding of his rights and implicitly challenged the correctness of his exercise of those rights. Had Trapp actually believed he did not understand

his rights, she would have explained those rights to him again, rather than telling him he did not understand and then asking him the same question slightly rephrased. This was not clarification, but gamesmanship. Trapp clarified nothing except her desire to have Mr. Sauceda-Contreras continue the interrogation. After her correction and re-questioning of him, Mr. Sauceda-Contreras would have been under the impression that, because his initial understanding of the right to an attorney and his exercise of that right had been questioned by authorities as incorrect, he must have wrongly understood and exercised his rights.

One purpose of the *Miranda-Edwards* guarantee is to protect "the suspect's desire to deal with the police only through counsel." (*People v. Gonzalez*, *supra*, 34 Cal.4th at p. 1123.) Thus, although Mr. Sauceda-Contreras had communicated his "desire for the assistance of an attorney in dealing with custodial interrogation by the police" (*McNeil v. Wisconsin*, supra, 501 U.S. at p. 176), Trapp challenged his decision by telling him he did not correctly comprehended his rights, which was also a way of telling him he had not correctly exercised his rights.

There is no ambiguity here based on uncertainty, no prefacing of his request with "I think," "maybe," "perhaps," or "I reckon." (*Davis*, *supra*, 512 U.S. at p. 462 ["maybe I should talk to a lawyer" ambiguous]; *People v. Stitely* (2005) 35 Cal.4th 514, 533 ["I think it's about time for me to stop talking" ambiguous].) There is no ambiguity here based on confusion, such

as asking for advice. (*People v. Roquemore* (2005) 131 Cal.App.4th 11, 23 ["Can I call a lawyer or my mom to talk to you?" ambiguous].) There is no ambiguity here based on expressing frustration. (*People v. Stitely, supra,* 35 Cal.4th at p. 535 ["I think it's about time for me to stop talking" ambiguous].) There is no ambiguity here based on indecisiveness. (*People v. Scaffidi* (1992) 11 Cal.App.4th 145, 155 ["There wouldn't be (an attorney) running around here now, would there . . . I just don't know what to do" ambiguous in context of previous assertion he wanted to confess].)

Here, the police failed to cut off questioning. The Supreme Court created a bright-line rule that "*all* questions must cease" immediately after an accused asserts his rights under *Miranda*. (*Smith v. Illinois, supra,* 469 U.S. at p. 98 [105 S.Ct. 490, 83 L.Ed.2d 488], emphasis original; *Fare v. Michael C.* (1979) 442 U.S. 709, 719 [99 S.Ct. 2560, 61 L.Ed.2d 197] [describing rule as "rigid"].) The interrogators are not allowed to ask further questions until the accused has an attorney present, once the accused has asked for counsel. Interrogators are not permitted to ask just a few more questions or test a defendant's invocation; all questioning must come to an end at once. The critical safeguard of *Miranda* is that interrogation immediately conclude upon invocation. (*Michigan v. Mosley* (1975) 423 U.S. 96, 103 [96 S.Ct. 321, 46 L.Ed.2d 313].) The admissibility of statements taken after invocation depends on whether the "right to cut off questioning" has been "scrupulously honored." (*Id.* at p. 104.) Here, Mr.

Sauceda-Contreras invoked his right to counsel, and his right to silence in the absence of counsel, but interrogators did not end questioning.

The requirement that the police cease interrogation without an attorney's presence following a suspect's invocation of the right to counsel, is premised on the belief that more questioning at that point is coercive, even if the questioning is about the suspect's *Miranda* rights. The requirement that questioning cease prevents "police from badgering a defendant into waiving his previously asserted *Miranda* rights." (*Michigan v. Harvey*, *supra*, 494 U.S. 344, 350; see also *People v. Crittenden* (1994) 9 Cal.4th 83, 128.) Such coercion need not amount to harassing the defendant; *Miranda* acknowledges the possibility of "subtle" coercion. (384 U.S. at pp. 473-474.) When the initial response is an invocation, any change of mind results in a valid waiver only if officers have not improperly cajoled the waiver. In *People v. Marshall* (1990) 50 Cal.3d 907, the suspect initially invoked the right to counsel but *immediately* changed his mind *without intervention by police.* (*Id.* at p. 925.) Thus, under those circumstances, it was acceptable under *Miranda* for officers to take a waiver and then to interrogate. (*Ibid.*) Here, the police persisted after Mr. Sauceda-Contreras had invoked his rights, and Mr. Sauceda-Contreras did not independently change his mind. Trapp did not honor Mr. Sauceda-Contreras's clear request, but prevailed upon him, telling him "Okay, perhaps you didn't understand your rights," i.e., his invocation of

his right meant he must not have understood his rights and implying that, otherwise he would, of course, have agreed to talk to police without an attorney. This was cajolery and overreaching. Mr. Sauceda-Contreras did not change his mind of his own accord; rather any change of mind was the result of the unwarranted police perseverance and refusal to honor his invocation. Trapp improperly persisted, and Mr. Sauceda-Contreras's subsequent accession to her repeated requests was not knowing, intelligent, and voluntary.

3. Mr. Sauceda-Contreras did not expressly waive any of his *Miranda* rights.

Here, respondent misleadingly claims that the interrogator asked for an express waiver of his rights when it says "[w]hen defendant was asked if he was willing to give up those rights and talk to the detective . . . ." (RBOM 19.) Police never explicitly asked Mr. Sauceda-Contreras whether he was waiving or willing to give up either his right to counsel or his right to silence or even whether he was willing to waive his "*Miranda* rights." Police never requested or obtained an express waiver before or after his invocation.

Respondent has not met its "heavy burden" of showing an express waiver, nor could respondent do so on these facts. Respondent appears to be relying upon an implied waiver by Mr. Sauceda-Contreras.

4. Mr. Sauceda-Contreras did not impliedly waive any of his *Miranda* rights.

Miranda required an express waiver of the rights to counsel and to silence. (384 U.S. at pp. 475-476.) Subsequent cases accepted an implied waiver of those rights, under certain limited circumstances. (*Butler*, *supra*, 441 U.S. at pp. 375-376; *People v. Whitson* (1998) 17 Cal.4th 229, 247-248.) There is a presumption the defendant did not waive his rights, but in some cases waiver can be "clearly inferred" from the defendant's actions and words, but the government must still prove the waiver was knowing, intelligent, and voluntary. (*Butler*, *supra*, 441 U.S. at p. 373.) Despite respondent's reliance on implied waiver, however, respondent does not discuss the concept nor meet its "heavy burden" of showing that there was a valid implied waiver.

The waiver must be both knowing and intelligent and voluntary, two distinct components. (*Moran*, *supra*, 475 U.S. at p. 421.) The issue of waiver is determined on "the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (*Butler*, *supra*, 441 U.S. at pp. 374-375.) Here, there was no valid implied waiver because the government cannot make an affirmative showing that Mr. Sauceda-Contreras's subsequent agreement to talk to detectives without an attorney present and his doing so constituted a knowing and intelligent and voluntary waiver under the circumstances.

Any implied waiver is not valid because respondent has not shown it was knowing and intelligent. As respondent concedes, Mr. Sauceda-Contreras had a limited education (RBOM 27), which would have limited his ability to understand his rights. Respondent also concedes he spoke "broken English" (RBOM 27) and, although the advisals were given in Spanish, his limited English ability meant his general knowledge of *Miranda* was more restricted than that of most Americans. There is no evidence that Mr. Sauceda-Contreras was a repeat offender or at all experienced with custodial interrogation and his constitutional rights. As a Mexican national, he would not have been familiar with the American legal system. His comprehension and ability to express himself were certainly limited at times, such as when he had no word for faucet or shower (4 CT 891 ["thing with the water"]) or mouth-to-mouth resuscitation (3 CT 667-668 ["how they put air in the mouth"]. Furthermore, his understanding would have been belied by Trapp's telling him his understanding and exercise were wrong.

Any implied waiver is not valid because respondent has not shown it was voluntary. As a threshold matter, when, as here, a suspect believes he is not capable of undergoing questioning without the guiding hand of counsel, there is a presumption any subsequent waiver is at the authorities' behest. (*Arizona v. Roberson* (1988) 486 U.S. 675, 681 [108 S.Ct. 2093, 100 L.Ed.2d 702].)

Respondent suggests that only coercion or deception renders a *Miranda* waiver involuntary. (RBOM 31.) Not so. Although Trapp did engage in deception, overreaching is another ground which renders a waiver involuntary. (*Colorado v. Connelly* (1986) 479 U.S. 157, 170 [107 S.Ct. 515, 93 L.Ed.2d 473] ["voluntariness of a waiver . . . has always depended on the absence of police overreaching"].) In fact, the core purpose of *Miranda* remains the prevention of government overreaching. (*United States v. Balsys* (1998) 524 U.S. 666, 691-692 [118 S.Ct. 2218, 141 L.Ed.2d 575].) "Overreaching" is "[t]he act or instance of taking unfair . . . advantage of another, esp. by fraudulent means." (Black's Law Dict. (9th ed. 2009) p. 1213, col. 2.) Here, there was deception and overreaching in obtaining any implied waiver. As set forth earlier, Trapp understood Mr. Sauceda-Contreras's request perfectly well, because otherwise her response would have been to say *she* did not understand what he was saying, rather than *he* did not understand *his rights correctly*. He had just demonstrated he fully understood his right to have an attorney present by asking for the presence of one. However, Trapp explicitly questioned that understanding and implicitly challenged the correctness of his exercise of those rights. Had Trapp actually believed he did not understand his rights, she would have explained those rights to him again, rather than telling him he did not understand and then asking him the same question slightly rephrased. She weakened his understanding of his rights and undermined his exercise of it.

Although he then acceded to her repeated request, that accession was far from voluntary. Essentially, he gave in to her insistence he did not understand and to her implication that the interrogators expected answers to their questions *now*, regardless of what she may have told him about any rights.

Further, Trapp was not a disinterested translator, but a police detective in her own right. She translated initially, but then gave the *Miranda* advisals and asked related questions on her own, not as Blazek's translator. (Court's Exhibit Nos. 1B, 1C.) The lack of neutrality weighs against voluntariness.

Moreover, because Mr. Sauceda-Contreras was a Mexican national, the detectives should have advised him of his right to speak with a Mexican consular representative before speaking to police. (Vienna Convention on Consular Relations, art. 36; Pen. Code, § 836c.) Although suppression is not a remedy for this violation (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331 [126 S.Ct. 2669, 165 L.Ed.2d 557]), such a claim can be raised as part of a broader challenge to the voluntariness of statements to police (*id.* at p. 350). By analogy, police failure to advise Mr. Sauceda-Contreras of his right to consult his consular representation, which is meant to ensure he is fully informed of his legal rights and legal options, tends to further show the waiver was not voluntary.

Respondent has not shown that any implied waiver was valid because it was both knowing and intelligent and voluntary.

E. Conclusion.

Respondent has not met its heavy burden to show an express waiver or a valid implied waiver. Respondent has also failed to show ambiguity in Mr. Sauceda-Contreras's invocation permitting clarification or that police scrupulously honored his invocation. This Court should affirm the decision.

II.

THE COURT OF APPEAL CORRECTLY FOUND ADMISSION OF THE STATEMENTS WAS NOT HARMLESS BEYOND A REASONABLE DOUBT.

Under *Chapman v. California* (1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] ("*Chapman*"), reversal is required unless the government can show that introduction of the erroneously admitted statements was harmless beyond a reasonable doubt. (*Id.* at p. 24; *People v. Sims* (1993) 5 Cal.4th 405, 447.) This Court does not determine whether a guilty verdict would have been rendered in a trial without the erroneously admitted statements, but "whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279 [113 S.Ct. 2078, 124 L.Ed.2d 182], emphasis original.)

The Court of Appeal was right when it found the government had not proven the error harmless beyond a reasonable doubt. The case was close. There was no evidence of a definitive cause or manner of death, and there were lethal doses of methamphetamine in Ms. Mendoza's body. The jurors were deeply troubled, as shown by deliberations almost twice as long as evidence presentation. The statements were indispensable to the prosecution's proof and argument. Respondent has failed to carry its

burden to show the error was harmless beyond a reasonable doubt, as it failed in the court below.[6]

There is no question the prosecution made Mr. Sauceda-Contreras's statements from the interrogation the centerpiece of its case against him. The prosecutor played the interrogation tapes before the jury for two hours, 35 minutes -- one-quarter of the total evidence presentation time. (2 CT 426-432, 433-436, 438-441.) The prosecutor presented other evidence to rebut the statements, such as the firefighters, several forensic technicians, the pathologist, and the interrogator. The prosecutor spent 40 percent of his closing argument referencing Mr. Sauceda-Contreras's statements, reviewing their details with the jury, and picking them apart. (3 RT 482, 485, 488, 493-514, 517-520, 523-529.) The prosecutor re-played nine different excerpts from the tapes during closing argument. (3 RT 488, 497, 499, 500.) There is no reason for this Court to treat this evidence as any less crucial than the prosecutor viewed it or as any less pivotal than the jury would have regarded it based on the prosecutor's reliance. (*People v. Valentine* (2001) 93 Cal.App.4th 1241, 1246.)

The prosecutor's recurring theme in this murder trial -- a case lacking a cause of death, manner of death and any direct physical evidence -- was consciousness of guilt, based on Mr. Sauceda-Contreras's false

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[6] The Court of Appeal noted "the Attorney General fails to respond to Sauceda-Contreras's contention he was prejudiced by admission of the interviews." (Typed opn., p. 22.)

statements and burning the body. (3 RT 500, 501, 502, 516, 517, 519, 528, 576, 582, 583, 586.) In addition to the statements, the prosecution presented as much evidence as possible to show that these statements were false and that Mr. Sauceda-Contreras was a liar. The prosecutor then argued that Mr. Sauceda-Contreras should be found guilty because his own statements established the manner and cause of death, i.e., his statement that he found Ms. Mendoza with his belt around her neck showed that he had strangled her with that belt. (3 RT 476, 521-522.) The prosecutor discounted the admittedly fatal levels of methamphetamine in Ms. Mendoza's body based on the statements, saying "We know it's not a drug overdose. We know it was not a drug overdose. We know that from the defendant's statement about what happened." (3 RT 585, 521, 523.) The prosecutor also argued that Mr. Sauceda-Contreras should be found guilty, because some statements were inconsistent with other statements (3 RT 495) or inconsistent with the other evidence (3 RT 505, 506, 507, 508). "Our case," the prosecutor argued, "is all the lies and the deceit and the attempts to destroy the evidence" (3 RT 584; see also 3 RT 482, 484, 487, 491, 492, 494-494, 495-496, 499-500 ["it's all, all a lie"], 501, 502, 505, 510, 525, 528, 576-577, 583, 586.)

Closing arguments are relevant to prejudice (*People v. Chavez* (2004) 118 Cal.App.4th 379, 388; *People v. Lee* (1987) 43 Cal.3d 666, 677), and, here, the prosecutor concentrated on the statements, used them to

fill crucial evidentiary gaps, and relied upon them to paint Mr. Sauceda-Contreras as deceitful and guilty of premeditated and deliberate murder.

An obvious indication of a close case is lengthy jury deliberations, as this Court stated in *People v. Cardenas* (1982) 31 Cal.3d 897, 904-907. (See also *People v. Cooper* (1991) 53 Cal.3d 771, 837; *Lawson v. Borg* (9th Cir. 1995) 60 F.3d 608, 612.) Where the length of jury deliberations exceeds the length of the evidentiary phase, it is a compelling indicator of prejudice. (*People v. Filson* (1994) 22 Cal.App.4th 1841, 1852, overruled on other grounds in *People v. Martinez* (1995) 11 Cal.4th 434, 452.) Here, the case was very close, as shown by the jury deliberations of 18 hours over five days on only one count with no enhancements, almost twice as long as the 10-hour presentation of evidence. (2 CT 426-432, 433-436, 438-441, 443-448, 513-514.)

Confessions are considered evidentiary bombshells. (*People v. Cahill* (1993) 5 Cal.4th 478, 497.) The statements here were not admissions of guilt, but rather recitals of facts that the prosecutor argued established guilt. Nonetheless, statements by a defendant, the person who sits before the jury every day as the focus of the trial and about whom the jury must make its grave decision, naturally have significant impact, especially when, as here, a defendant does not testify. Furthermore, just like a wrongly admitted confession, a wrongly admitted admission forces the defense "to devote valuable trial resources neutralizing the [admission]

or explaining it to the jury, resources that could otherwise be used to create a reasonable doubt as to some other aspect of the prosecution's case." (*Rice v. Wood* (9th Cir. 1996) 77 F.3d 1138, 1142.)

Murder requires, in addition to the death of a human being, an unlawful act that is the proximate cause of that death. (*People v. Schmies* (1996) 44 Cal.App.4th 38, 47-48.) Proof of criminal agency is indispensable. Here, the prosecutor presented no affirmative proof that death resulted from criminal agency. The government's own expert forensic pathologist testified at trial that he could not determine the cause of death and listed it as "undetermined." (2 RT 330-332.) The pathologist could not determine the manner of death, which, in his opinion, could have been accident, homicide, or suicide. (2 RT 333, 343-344.) The toxicology laboratory found a fatal level of methamphetamine in Ms. Mendoza's liver, and the pathologist testified he would have declared an overdose as the cause of death, were thermal injuries absent. (2 RT 364-365, 368.) Although he also opined that the concentration of methamphetamine *might* have been altered by heat, neither he nor the laboratory could say whether that had actually happened or, if so, to what extent. (2 RT 328-329, 376, 360, 366, 369-370, 373, 375.) Further, the liver cross section tested was taken from deep within the liver and showed no significant thermal changes. (2 RT 358-359.) If the prosecutor did not have the statements of Mr. Sauceda-Contreras to spin into a speculative cause and manner of death

-- homicidal ligature strangulation -- any inference of criminal agency would have been absent.

Respondent argues any error in admitting Mr. Sauceda-Contreras's statement to police was harmless beyond a reasonable doubt because the remaining evidence showed (1) a violent domestic relationship, (2) a struggle inside the house, (3) Ms. Mendoza's blood on the floor of the bathroom, (4) scratches on Mr. Sauceda-Contreras, (5) Ms. Mendoza's DNA on Mr. Sauceda-Contreras's belt, and (6) the risky and incriminating manner in which Mr. Sauceda-Contreras attempted to destroy the body. Respondent's contentions can be disposed of speedily.

First, respondent points to evidence it characterizes as "consistent with a violent domestic relationship." (RBOM 35.) This evidence was Ms. Mendoza's sister testifying Mr. Sauceda-Contreras had threatened to beat Ms. Mendoza on one occasion, yet had not touched her and, on another occasion, he had told the sister he would rather see Ms. Mendoza dead than lose her, but again had not touched her. However, as the Court of Appeal recognized, the sister "was not the most credible witness as she did not report the [second] threat[] to law enforcement officers when they interviewed her" (typed opn., p. 22), and the prosecutor downplayed her testimony about the second episode as well. (3 RT 514.) The third occasion was the neighbors' overhearing what sounded like Ms. Mendoza being shoved into a wall, after apparently pressuring Mr. Sauceda-

Contreras to give her money and then goading him to hit her the day before. (1 RT 122-125.) This evidence alone would not have supported guilt, but the prosecutor wove this weak and somewhat equivocal domestic violence evidence with Mr. Sauceda-Contreras's own statements to convey "a long history of violence between them" (3 RT 510-511) portraying Mr. Sauceda-Contreras as an "abusive, controlling individual" (3 RT 511).

Second, respondent relies upon "indications of a struggle inside the house, with the bedroom in disarray and the mattress slightly off the box spring." (RBOM 35, citing 1 RT 249.) The mattress is perhaps one to four inches off the box spring (People's Exhibit Nos. 35, 36, 37), as happens when one strips a bed. The mattress is stripped, with sheets, blankets, and other clothes piled on a chair, as if it is laundry day. (People's Exhibits No. 36, 37.) The entertainment unit, with its television, DVD's, and knickknacks, is undisturbed. (People's Exhibit Nos. 38, 39.) The photographs show the appearance of the bedroom does not amount to slight untidiness, let alone show signs of a struggle.

Third, respondent notes that Ms. Mendoza's blood was found on the bathroom floor. (RBOM 35, citing 1 RT 255-256, 2 RT 387-389; see People's Exhibit Nos. 48, 49 [evidence marker B].) The evidence does not show Ms. Mendoza's blood elsewhere in the house. The photographs show the blood is a very small smudge, which could have occurred naturally or happened during the fight the neighbors overheard. (1 RT 122-125.) Other

unknown individuals' DNA was present in the blood. (1 RT 255, 259, 270, 2 RT 386-389.) The pathologist ruled out trauma as a cause of death (2 RT 323-324), and the prosecution relied upon a bloodless ligature strangulation as the cause of death. The prosecutor never explained what fatal injury (or even domestic violence injury) could have left so little blood.

Fourth, respondent points to evidence that there were scratches on Mr. Sauceda-Contreras.[7] (RBOM 35-36.) The photographs speak for themselves -- the small abrasion on his head is almost undetectable (People's Exhibit No. 9D), the facial injuries are nearly indiscernible (People's Exhibit Nos. B, C), and the small cuts on both hands are not fresh and are consistent with being a restaurant worker (People's Exhibit Nos. 9E, 9F). The only fresh, significant mark is a scratch on his upper chest (People's Exhibit Nos. 9B, 9C). However, that scratch alone is insufficient to show guilt and could have been caused by the wood or box springs of the mattress placed next to the trash can (1 RT 159, 234-2235) or by one of the many metal objects he used while burning her body (1 RT 232-233, 236,

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[7]Respondent inadvertently cites as evidence at trial the preliminary hearing testimony. (RBOM 36, citing 1 CT 289.) The cited testimony was not before this jury and certainly cannot be relied upon by this Court in evaluating harmless error. Similarly, respondent cites the description of some photographs as recorded by the clerk on the "Exhibit List." (RBOM 36, citing 2 CT 513.) The Exhibit List and its descriptions of exhibits are also not part of the evidence before the jury and cannot be relied upon by this Court for prejudice analysis.

244); it could also have occurred during the fight overheard by the neighbors the day before (1 RT 122-125).

Fifth, respondent admits the pathologist could not determine if Ms. Mendoza had been strangled, but nonetheless points to two facts supporting that conjecture, that Ms. Mendoza was a major contributor to DNA found on the inside third of Mr. Sauceda-Contreras's belt, near the buckle (RBOM 35, citing 2 RT 394) and that there was a "noticeable indentation" 11 inches from the buckle (RBOM 25, citing 1 RT 214). The prosecutor speculated in closing argument that 11 inches was the approximate circumference of a skinny person's neck (2 RT 522-523), but there was no testimony establishing that nor any evidence that Ms. Mendoza was skinny or had a particularly skinny neck. More importantly, the measuring tape laid sloppily next to the belt extends beyond the buckle; a more accurate estimate to the "indentation" would be nine to ten inches, far too small for even a very skinny neck. (See People's Exhibit Nos. 62, 63) Further, the belt, when viewed, was extremely worn, with breakage, curling, and warping from wear. (1 RT 224-225; People's Exhibit Nos. 62, 63.) Characterizing what appears to be mere warping as an "indentation," and conjecturing that the "indentation" was caused by a few minutes of pressure, yet visible a year later, is not credible proof. An old, well-used belt could have warping or "indentation" for many reasons. The prosecutor's speculation that the force used was so "tremendous" (3 RT

523) that it permanently distorted the belt is contradicted by evidence that, if strangulation had occurred, so little force was used that there was no hemorrhaging in the deeper muscles of the neck (2 RT 350-351, 357) and no fractured hyoid bone or thyroid cartilage (2 RT 354), as shown by the pathologist's evidence.

As to DNA, the expert testified DNA can be transferred to an item, like the belt, by touch or transfer. (2 RT 379-381, 398-399.) Ms. Mendoza's DNA could have been on the belt because she or her belongings had contact with it or Mr. Sauceda-Contreras had touched her and then it. Significantly, the DNA analyst performed no frequency estimate as to Ms. Mendoza's DNA (2 RT 388), so it is unclear how often a match to her DNA might be expected to occur in the general population.

Sixth, echoing the prosecutor's argument below (3 RT 505, 510, 526), respondent relies upon the burning of the body to show that "defendant was willing to destroy evidence and lie to government officials to protect himself," that, had she died from an accidental drug overdose, he would have no motive to burn her body in such a "risky and incriminating manner," and that he could only have done so to eliminate evidence he had murdered her. (RBOM 34, 36.) The prosecutor also argued that "[h]e doesn't act like one would expect an innocent person to act" and burning a body showed consciousness of guilt. (3 RT 516.)

When a prosecutor depends upon destruction of evidence as consciousness of guilt, the question becomes -- guilt of what? This Court has recognized that consciousness of guilt evidence is not a permissible inference for legal guilt of the crime charged (i.e., the ultimate determination of the truth or falsity of the criminal charges), but is instead a permissible inference for non-legal, moral, or psychological guilt of some wrongdoing. (*People v. Crandell* (1988) 46 Cal.3d 833, 871; *People v. Arias* (1996) 13 Cal.4th 92, 142.) Mr. Sauceda-Contreras possessed a plethora of moral and psychological guilt -- he had tried to end a long-term, deeply troubled relationship with a methamphetamine addict; he had failed to save Ms. Mendoza or her children from her drug addiction and prostitution. As an illegal immigrant (4 RT 924), with two brothers who also may have been here illegally as well, he would naturally be worried that a dead body in his house, even one he did not kill, would have led to their deportation. He could easily and simply have panicked.

Most importantly, even if one could infer legal guilt of homicide from destruction of the body, consciousness of guilt would not have answered the question of the degree of homicide. As this Court has explained, although consciousness-of-guilt evidence in a murder case may bear on a "defendant's state of mind *after* the killing, it is irrelevant to ascertaining defendant's state of mind immediately prior to, or during, the killing." (*People v. Anderson* (1968) 70 Cal.2d 15, 32, emphasis original.)

"Evasive conduct shows fear: it cannot support the double inference that defendant planned to hide his crime at the time he committed it and that therefore defendant committed the crime with premeditation and deliberation." (*Ibid.*) Fear may have motivated Mr. Sauceda-Contreras to burn Ms. Mendoza's body, but it could not establish his state of mind for purposes of commission of a homicide, much less commission of deliberate and premeditated first degree murder.

Lastly, respondent mentions that, during the interrogation, Mr. Sauceda-Contreras "never wavered from his position that he had nothing to do with [Ms.] Mendoza's death." (RBOM 37.) While this Court has found prejudice arguments questionable where the defendant's statements bolstered an exculpatory claim (*People v. Bacon* (2010) 50 Cal.4th 1082, 1108), that is not the situation here. In *People v. Bacon*, the defendant had admitted consensual sex with the murder victim during the legal part of his interrogation and made a second admission during the subsequent challenged interrogation. (*Ibid.*) Not only did the jury have the unchallenged admission of consensual sex, but also the second admission added details that bolstered the admissions. (*Ibid.*) Here, while Mr. Sauceda-Contreras made exculpatory statements, they were contradictory or false, and the prosecution relied upon this series of negatives to create its positive proof.

Respondent has not shown that the admission of the statements was harmless beyond a reasonable doubt. The prosecution relied heavily on the statements in evidence and in argument. The remaining evidence against Mr. Sauceda-Contreras was flimsy, particularly as to criminal agency and premeditation and deliberation. The theme that Mr. Sauceda-Contreras was guilty because he lied to police was critical to the prosecution's case, precisely because the remaining evidence of guilt was so equivocal as to homicide and so completely lacking as to the degree of homicide. The evidence highlighted by respondent in its brief is minimally probative, equally consistent with absolute innocence, or incapable of establishing the degree of homicide. The jury was deeply troubled by the case and took a very long time to deliberate. There is substantial scope for doubt and misgivings. Reversal is mandated.

III.

IN THE ALTERNATIVE, THIS COURT SHOULD REMAND THE CASE TO THE COURT OF APPEAL FOR CONSIDERATION OF THE UNDECIDED ISSUES ON APPEAL.

On appeal, Mr. Sauceda-Contreras raised six other issues, including erroneous denial of his suppression motion (Appellant's Opening Brief (AOB) 44-55), constitutionally insufficient evidence of commission of an act causing death (AOB 56-65), constitutionally insufficient evidence of premeditated and deliberate murder (AOB 66-80), constitutionally impermissible inference of guilt created by CALCRIM No. 362 (AOB 81-96), cumulative error (AOB 97-99), and independent review of subpoenaed documents not released to the defense (AOB 100-102). Because the Court of Appeal reversed the judgment, it did not address these claims. (Typed opn., p. 2.)

Were this Court to reverse the judgment of Court of Appeal, this Court should remand the case to the Court of Appeal for determination of these issues.

CONCLUSION

This Court should affirm the decision of the Court of Appeal that Mr. Sauceda-Contreras's statements were admitted in violation of his constitutional rights under *Miranda* and that the government failed to show their admission harmless beyond a reasonable doubt.

In the alternative, this Court should remand the case to the Court of Appeal for determination of the undecided issues.

Dated: November 10, 2011 Respectfully submitted,

/s/

Diane Nichols
Attorney for Jose Sauceda-Contreras

CERTIFICATION OF WORD COUNT

I hereby certify the number of words in Appellant's Answer Brief on the Merits is 13,995, based on the calculation of the computer program used to prepare this brief.

Dated: November 10, 2011 /s/

Diane Nichols

APPENDIX "A"

Court's Exhibit No. 1C
Copy of Defense Counsel's Tape Transcription
Dated 1/10/2007

EXHIBIT NO. 1C

Case No. 07NF0170

X ID only (Date) NOV - 6 2008

___ IN EVIDENCE (Date) _____

___ PEOPLE ___ DEFENDANT ___ JOINT
___ Petitioner ___ Respondent X COURT

___ Other _____

PEOPLE OF THE STATE OF CALIFORNIA
VS.
JOSE SAUCEDA-CONTRERAS

_____
SIGNATURE Atty/Party Introducing Sensitive Exhibit

ALAN CARLSON, Executive Officer and Clerk

By GRACE CABUNOC, Deputy Clerk

NOTE: THIS ITEM IS A PERMANENT COURT RECORD, DO NOT REMOVE FROM THE COURTROOM.

PUBLIC DEFENDER
ORANGE COUNTY
TAPE TRANSCRIPTION

DEFENDANT: JOSE SAUCEDA-CONTRERAS

PD TAPE NO.: ~~07NS0170~~ DVD 5 **CASE NO.:** 07NF0170 ~~06NF0425~~

CHARGE: 187

INVESTIGATOR:

ATTORNEY(S): WAITE

TRIAL DATE: NOT YET SET **INTERVIEW DATE:** 01/10/07 - 1:20pm.

LEGEND:

Q: **DETECTIVE**

A: **JOSE SAUCEDA-CONTRERAS**

MV: **UNIDENTIFIED MALE VOICE**

FV: **UNIDENTIFIED FEMALE VOICE** = Det. Julissa Trapp

Note: (..?) = Non-intelligible or non-distinguishable words or passages
[ ] = Transcriber's comment(s).
Uh huh = Affirmative response.
Huh uh = Negative response.

BEGIN TAPE:

English:		Spanish:	
MV:	Are you right handed or left?	MV:	Eres de mano derecha o izqierda?
FV:	Which hand do you use to Write?	FV:	Con Que escribes?
A:	Right hand.	A:	Con la Derecha.
MV:	Put your left hand.	MV:	Pon la mano izquierda
MV:	Is this O.K?	MV:	Esta bien?
A:	Ah huh	A:	ah huh
MV:	Is it tight?	MV:	Esta apachurrando?
A:	No.	A:	No.
MV:	O.K.	MV:	O.K.
FV:	We will be with you shortly, O.K.	FV:	Horita vamos contigo en un momento, O.K?
MV:	Jose?		
A:	Ah huh	A:	Ah huh
MV:	I am detective (...?).	I:	Hola buenas tardes. Este es el detective Chuck.
I:	Hello, good afternoon. This is detective Chuck		
I:	I will be translating for you. O.K.	I:	Yo voy a introducir por usted, O.K.
A:	O.K. fine.	A:	O.K. está bien.
Q:	We'd like to talk to you.		

I:	The detective would like to talk to you.	I:	El detective quiere hablar con usted.
Q:	But, because you've been hand cuffed and transported in a police car. 1:28:34		
I:	But, because you're hand cuffed and brought here in a police car.	I:	Pero porque usted esta esposado y lo trajeron aquí en un carro de policía.
Q:	We have to advise you of some rights.		
I:	We would like to inform you of your rights.	I:	Le quiero avisar a usted de unos derechos de que tiene usted.
A:	O.K	A:	O.K.
I:	You have the right to remain silence. Do you understand?	I:	Usted tiene el derecho de permanecer callado. Entiende usted?
A:	Ah huh	A:	Ah huh
I:	Yes.	I:	Si.
A:	Yes.	A:	Si.
I:	Anything you say can be used against you in a court. Do you understand?	I:	Cualquier cosa que usted diga se puede usar contra usted en una corte. Entiende usted?

A:	Yes.	A:	Si.
I:	You have the right to have an attorney present before and during the interrogation. Do you Understand?	I:	Usted tiene derecho a tener presente un abogado antes y durante su enterratorio. Entiende usted?
A:	Yes, I understand.	A:	Si, entiendo.
I:	If you would like an attorney and cannot afford one. One can appointed to you with no charge before the interrogation if you wish. Do you understand?	I:	Si usted quiere un abogado y no puede pagarlo se le puede nombrar uno gratis antes del enterratorio si usted lo desea. Entiende usted?
A:	Yes, I understand.	A:	Si, entiendo.
I:	Having these rights that I have just read you. The detective would like to know if he can talk to you now?	I:	Teniendo estos derechos en mente que le acabo de leer. El detective quiere saber si él puede hablar con usted horita?
A:	If you can bring me a lawyer, I, I, that way I know with who, it's that this way I can tell you everything that I know and everything that I need to tell you. And have someone to represent me. ~~At least.~~ Please	A:	Si me puede traer un abogado, yo, yo, así ya se dé con quien, es que, ya así le puedo decir todo lo que yo se y todo lo que necesito decirle y alguien que me represente. Por lo menos

1:29:39

I:	O.K. maybe you did not understand your rights correctly. What the detective wants to know now is if you are willing to speak with him now without an attorney present?	I:	O.K. a lo mejor no entendió bien sus derechos. Lo que el detective quiere saber orito es que si usted está dispuesto a hablar con el horita, sin un abogado presente?
A:	Oh, oh, o.k. That's fine.	A:	Oh, oh, o.k está bien.
I:	The choice is yours.	I:	es, es la decisión es de usted.
A:	Yes.	A:	Si.
I:	Is this O.K.	I:	Esta bien?
A:	Ah huh. It's fine.	A:	Ah huh, está bien.
I:	Do you want to speak with him now?	I:	Quiere hablar con el horita?
A:	Yes.	A:	Si.
I:	I did explain his, well about the attorney, I will explain everything. I wanted to make sure he didn't understand me correctly. The detective wants to know if you want to talk to him right now. Without an attorney present and he said yes.		

APPENDIX "B"

Court's Exhibit No. 1B
Copy of Prosecution's Tape Transcription
Dated 1/10/2007

EXHIBIT NO. 1B

Case No. 07NF0170

X ID only (Date) NOV 0 6 2008

__ IN EVIDENCE (Date) _____

__ PEOPLE __ DEFENDANT __ JOINT

__ Petitioner __ Respondent X COURT

__ Other _____

PEOPLE OF THE STATE OF CALIFORNIA

vs.

JOSE SAUCEDA-CONTRERAS

SIGNATURE--Atty/Party Introducing Sensitive Exhibit

ALAN CARLSON, Executive Officer and Clerk

By GRACE CABUNOC Deputy Clerk

NOTE: THIS ITEM IS A PERMANENT COURT RECORD, DO NOT REMOVE FROM THE COURTROOM.

Anaheim Police Department

Date: Time: DR: # 07-5034

Location:

Persons present in the interview are:

Detective:	Robert Blazek	(RB)
	Julissa Trapp	(JT)
	Elizabeth Faria	(EF)
	Unidentified Male 1	(UM1)
Suspect:	Jose Sauceda	(JS)

Transcribed by Linda Lock, P/T Word Processing Operator, Auto Theft/Warrant Detail.

All Spanish will be placed in () & bold.

[Start of Tape 1- Side A]

(UM1) **(Es de mano derecha o izquierda.)**

Are you right handed or left handed?

(EF) **(Con que escribes?)**

Which do you write with?

(JS) **(Con la derecha.)**

With the right.

(UM1) **(Okay dame la otra. Esta bien? No te esta apachurrando?)**

Okay give me the other one. Is it all right? It's not squeezing you?

(JS) No

(EF) **(Horrita hablamos con tigo en un momento, okay.)**

We'll speak with you in just a moment, okay.

[Detectives leave the room]
[Detectives enter the room]

(RB) Jose?

(JS) A huh

(RB) Hi, I'm Detective Blazek, Detective Trapp.

(JT) **(Hola, buenas tardes yo soy la Detective Trapp.)**
Hello, good afternoon I am Detective Trapp.

(JS) **(Buenas tardes como esta?)**
Good afternoon how are you?

(JT) **(Yo voy a traducir para usted okay?)**
I'm going to translate for you okay?

(JS) **(Okay esta bien.)**
Okay that's fine.

(RB) We'd like to talk to you.

(JT) **(El Detective quiere hablar con usted.)**
The detective would like to speak with you.

(RB) But because you've been handcuffed and transported in a police car…

(JT) **(Pero porque esta esposado y lo trajeron aquí en un carro de policía)**
But because you're handcuffed and they brought you in the police car

(RB) we have to advise you of some rights.

(JT) **(Le quiero avisar usted de unos derechos que tiene usted.)**

I want to advise you of some of the rights you have.

(RB) Okay?

(JS) Okay.

(JT) **(Usted tiene el derecho de permanecer callado. Entiende usted?)**
You have the right to remain silent. Do you understand?

(JS) **(A huh, si.)**
A huh, yes.

(JT) **(Cual quier cosa que usted diga se puede usar en contra usted en una corte. Entiende usted?)**
Whatever you say can be used against you in a court of law. Do you understand?

(JS) **(Si.)**
Yes.

(JT) **(Usted tiene el derecho de tener presente un abogado antes y durante su entrega torio. Entiende usted?)**
You have the right to have a lawyer present before and during this interrogation. Do you understand?

(JS) **(Si entiendo)**
Yes I understand.

(JT) **(Si usted quiere un abogado pero no puede pagarlo se le puede nombrar uno gratis antes de el integratorio si usted lo desea. Entiende usted?)**
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?

(JS) **(Si entiendo)**
Yes I understand.

(JT) **(Teniendo estos derechos en mente que le acabo le leer, el detective quiere saber si puede el hablar con usted horrita)**
Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?

(JS) **(Si me puedes traer un abogado, yo yo así ya se de con quien este...ya si le puede decir todo lo que yo se y todo lo que necesito decirle y alguien que me represente.)**
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.

(JT) **(Okay, ala mejor no entiendo bien sus derechos. Um...lo que el detective quiere saber horrita es que usted esta dispuesto a hablar con el horita sin un abogado presente?)**
Okay, perhaps you didn't understand your rights. Um...what the detective wants to know right now is if you're willing to speak with him right now without a lawyer present?

(JS) **(O, okay esta bien.)**
Oh, okay that's fine.

(JT) **(La decisión es de usted.)**
The decisión is yours.

(JS) **(Si.)**
Yes.

(JT) **(Esta bien?)**
It's fine?

(JS) **(A huh, esta bien)**
A huh, it's fine.

(JT) **(Quiere hablar con el horrita)**
Do you want to speak with him right now?

(JS) **(Si.)**
Yes.

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

(RB) Okay. What's your name?

(JS) Jose Sauceda.

(RB) And your birthdate?

(JT) **(Su fecha de nacimiento?)**
Your birthdate?

(JS) **(Ah, 17 de Febrero...)**
Ah, February 17...

(JT) February 16

(JS) 87

(JT) **(Diez y seis o Diez y siete?)**
Sixteen or seventeen?

(JS) **(Dies y siete)**
Seventeen.

DECLARATION OF SERVICE

PEOPLE OF
THE STATE OF CALIFORNIA
v. **JOSE SAUCEDA-CONTRERAS**

SUPREME COURT NO. **S191747**
COURT OF APPEAL NO. **G041831**

The undersigned declares: I am an attorney duly licensed to practice in the State of California and am not a party to the subject cause. My business address is P.O. Box 2194, Grass Valley, California 95945-2194. I served the attached **APPELLANT'S ANSWER BRIEF ON THE MERITS** by placing a true and correct copy thereof in a separate envelope for each addressee named hereafter, addressed as follows:

Supreme Court of California
Clerk's Office, First Floor
350 McAllister Street
San Francisco CA 94102

Court of Appeal
Fourth Appellate District,
Division Three
P.O. Box 22055
Santa Ana CA 92702

Office of the Attorney General
110 West "A" Street, Ste. 1100
P.O. Box 85266
San Diego CA 92186-5266

Appellate Defenders, Inc.
555 West Beech Street, Ste. 300
San Diego CA 92101

Orange County Superior Court
For delivery to:
Honorable Richard F. Toohey
700 Civic Center Drive West, Room K100
Santa Ana CA 92702

Jose Sauceda-Contreras
G55875
P.O. Box 5006
Calipatria CA 92233

Each envelope was then sealed and with the postage thereon fully prepaid deposited in the United States mail by me at Nevada City, California on November 10, 2011.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date: November 10, 2011 /s/

Diane Nichols