In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

JOSE SAUCEDA-CONTRERAS,

Defendant and Appellant.

Case No. S191747

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

REPLY BRIEF

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General
MARILYN L. GEORGE
Deputy Attorney General
State Bar No. 119232
110 West A Street, Suite 1100
San Diego, CA 92101
P.O. Box 85266
San Diego, CA 92186-5266
Telephone: (619) 645-3038
Fax: (619) 645-2191
Email: Marilyn.George@doj.ca.gov
Attorneys for Plaintiff and Respondent

TABLE OF CONTENTS

Page

Introduction 1

I. Officer Trapp did not violate the mandates of *Miranda* when she asked defendant more questions after his initial response because no reasonable officer in the same situation would have understood the response to be an unambiguous request for the assistance of counsel 2

A. No objectively reasonable officer would have understood defendant's initial response to be an unambiguous request for counsel 2

B. Defendant expressly agreed to talk to the detective without an attorney 13

C. Defendant's police interview was voluntary 15

II. Assuming defendant's interview was improperly admitted into evidence at trial, the error was harmless in light of the totality of the evidence introduced 21

Conclusion 25

TABLE OF AUTHORITIES

Page

CASES

Berghuis v. Thompkins
[2010] 560 U.S., 130 S.Ct. 9, 10

Chapman v. California
(1967) 386 U.S. 18 [87 S.Ct. 824, 17 L.Ed.2d 705] 21, 25

Edwards v. Arizona
(1981) 451 U.S. 477 [101 S.Ct. 1880, 68 L.Ed.2d 378 6

Fare v. Michael C.
(1979) 442 U.S. 707 [99 S.Ct. 2560, 61 L.Ed.2d 197] 19, 20, 22

Hoechst Celanese Corp. v. Franchise Tax Bd.
(2001) 25 Cal.4th 508 3

In re Michael C.
(1978) 21 Cal.3d 471 19

Murphy v. Netherland
(4th Cir.1997) 116 F.3d 97 18

North Carolina v. Butler
(1979) 441 U.S. 369 [99 S.Ct. 1755, 1758-1759, fn. 6, 60 L.Ed.2d 286] .. 14

People v. Boyer
(1989) 48 Cal.3d 247 5

People v. Cruz
[2009] 44 Cal.4th 11, 12, 13

People v. Davis
(1981) 29 Cal.3d 814 14

People v. Davis
(2009) 46 Cal.4th 539 ..... 5, 15

People v. DeVaughn
(1977) 18 Cal.3d 889 14

People v. Dykes
(2009) 46 Cal.4th 731 5

People v. Johnson
(1969) 70 Cal.2d 541 14

People v. Lessie
(2010) 47 Cal.4th 1152 ..... 19, 20, 21

People v. Maury
(2003) 30 Cal.4th 342 16

People v. Roberts
(2010) 184 Cal.App.4th 1149 18

People v. Smith
(2007) 40 Cal.4th 483 18

People v. Sully
(1991) 53 Cal.3d 1195 14

People v. Whitson
(1998) 17 Cal.4th 229 5

People v. Williams
(2010) 49 Cal.4th 405 ..... passim

Sanchez-Llamas v. Oregon
(2006) 548 U.S. 331, [343-344] [126 S. Ct. 2669, 165 L.Ed.2d 557] .....
..... 18, 19

Smith v. Illinois (1984) 469 U.S. 91[105 S.Ct. 490, 83 L.Ed.2d 488] 6, 7

Yates v. Evatt
(1991) 500 U.S. 391 [111 S.Ct. 1884, 114 L.Ed.2d 432] 22

STATUTES

Penal Code
§ 834c 18
§ 834c, subd. (a) (1) 18

Welfare and Institutions Code
§ 627 20
§ 627, subd. (b) 19

CONSTITUTIONAL PROVISIONS

United States Consitution - Fifth Amendment 19, 20

COURT RULES

California Rules of Court, rule 8.224.....6

OTHER AUTHORITIES

Vienna Convention on Consular Relations, Article 36.....18, 19, 21

INTRODUCTION

Defendant was arrested after he was caught burning the body of Martha Mendoza in a metal trash can in his Anaheim back yard. He was taken to an interview room at the Anaheim Police Department and advised of his rights pursuant to *Miranda*. After each right was read to him in Spanish by Officer Julissa Trapp, he was asked if he understood the right and defendant responded in the affirmative. Officer Trapp asked: "Having in mind these rights that I just read, the detective would like to know if he can speak with you right now?" Defendant's initial response was: "If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." Officer Trapp said: "Okay, perhaps you didn't understand your rights. Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?" Defendant responded: "Oh, okay, that's fine." Officer Trapp followed that up by telling defendant, "The decision is yours," and asking him, "It's fine?" and "Do you want to speak to him right now?" Defendant answered the questions in the affirmative and never expressed a desire to remain silent. During the interview, defendant denied killing Mendoza, but was caught in several lies, repeatedly changed his story about the events of that day, and disclosed a possible motive for her murder.

In the Answer Brief on the Merits, defendant contends Officer Trapp understood defendant's response was an unambiguous request for counsel and claims she deliberately ignored his request in order to coerce or trick him into agreeing to talk to the detective. Defendant also maintains he was never asked if he was willing to waive his *Miranda* rights, and did not expressly waive them. Finally, defendant asserts he never impliedly waived his *Miranda* rights so his interview was not voluntary. All of defendant's contentions fail as any reasonable officer in Officer Trapp's

position would not have understood defendant's disjointed and a paradoxical response to be an unambiguous request for counsel. Defendant expressly waived his rights when he agreed to speak to the detective "right now" without an attorney present, and said "Yes," when he was directly asked, "Do you want to speak to him right now?" Additionally, defendant's interview was voluntary and uncoerced.

I. OFFICER TRAPP DID NOT VIOLATE THE MANDATES OF *MIRANDA* WHEN SHE ASKED DEFENDANT MORE QUESTIONS AFTER HIS INITIAL RESPONSE BECAUSE NO REASONABLE OFFICER IN THE SAME SITUATION WOULD HAVE UNDERSTOOD THE RESPONSE TO BE AN UNAMBIGUOUS REQUEST FOR THE ASSISTANCE OF COUNSEL

Defendant contends his police interview should have been suppressed because he requested the assistance of an attorney after he was advised of his *Miranda* rights, but his request was ignored. He maintains all questioning should have immediately stopped and the officer's followup questions caused him to be subjected to an involuntary interview. (Answer Brief at 27-43.) This claim fails because any reasonable officer in Officer Trapp's position would not have immediately understood his initial response as being an unambiguous request for the assistance of counsel.

A. No Objectively Reasonable Officer Would Have Understood Defendant's Initial Response to be an Unambiguous Request for Counsel

As noted in the Opening Brief on the Merits at pages 27-28, the record on appeal contains three possible meanings for defendant's initial response upon being asked if the detective could speak to him "right now:"

> 1.) The majority of the appellate panel found defendant's response, standing alone, was an unambiguous and unequivocal invocation of his right to counsel. (Slip. Opn. at p. 16.)
>
> 2.) Justice Aronson, in his dissenting opinion, found defendant's response was actually a question asking whether they could bring him an attorney, which impliedly asked if they

> could bring him an attorney "right now," since that was when the detective wanted to speak to him. Justice Aronson found that by asking, "what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present," Officer Trapp effectively told defendant they could not provide him with an attorney "right now." (Dis. at pp. 1-2.) Thus, defendant's response was not an exercise "of his right to cut off questioning," but was instead a question inviting a response. (Dis. at p. 5.)
>
> 3.) Defendant may have been under the impression he needed to have an attorney present in order to be able to talk to the detective. This interpretation makes sense of all of the words he used in the sentence, "If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." It is also consistent with his affirmative response when Officer Trap asked him if he was willing to talk to the detective "right now without a lawyer present."

While defendant's initial response included, "[i]f you can bring me an attorney . . . and "someone to represent me," his response also expressed his desire to tell the detective, "everything that [he knew] and everything that [he needed] to tell" him. Defendant never said anything about wanting to remain silent. Therefore, any objective listener in Officer Trapp's position would have found defendant's initial response, in context, unclear and ambiguous. A statement or writing is ambiguous if it is "susceptible to more than one reasonable interpretation." (*Hoechst Celanese Corp. v. Franchise Tax Bd.* (2001) 25 Cal.4th 508, 519.) As set forth above, there are at least three different ways to understand defendant's initial response.

Additionally, and possibly more importantly, the words defendant spoke in Spanish may have been even more confusing to Officer Trapp than their English translation suggests. In translating the response into English, the meaning of defendant's words may have been unintentionally altered or distorted in an attempt to make sense of the response. Attached to the Answer Brief on the Merits as Appendix "A" is an English translation of

the *Miranda* admonition and defendant's responses prepared by the Orange County Public Defender. It was marked as Court's Exhibit No. 1-C[1] and was utilized by the trial court when the *Miranda* issue was addressed (1 RT 67), but was not admitted into evidence or made part of the record on appeal. According to the Public Defender's translation, appellant's initial response was actually the following:

> 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.[2]

(Defendant's Appendix "A" at p. 3.)

The significance of this slightly different, but more disjointed response is not what defendant meant, but how the response was understood, or not understood, at that moment by Officer Trapp as a reasonable officer. The extra words in the translation provided by the Public Defender's Office make defendant's initial response even more confusing than the words the parties have relied upon in Court's Exhibit No. 1-B. (2 CT 522, 571-576.)

In any event, in his Answer Brief on the Merits, defendant refuses to consider the possibility that Officer Trapp did not understand what he meant when he said: "If you can bring me a lawyer, that way I I [*sic*] with

---

[1] Defendant's counsel has advised respondent that the copy of Court's Exhibit No. 1-C was obtained from the Orange County Superior Court.

[2] The transcript prepared by the Public Defender's Office bears hand written notations by the trial court. (1 RT 72.) In one of the notations, the words *at least* were crossed out and the word *please* was inserted. Respondent is using the words *at least* because they are an accurate translation of the words *por lo menos*, which appear in Spanish in the transcript. The trial court apparently made the change based upon what it heard and saw on the DVD. (Defendant's Appendix "A" at p. 3.)

who . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me." (2 CT 575, ellipses in the original.) Instead, defendant insists his response was an unambiguous request for counsel and that Officer Trapp understood he was invoking his right to counsel, but intentionally chose to ignore the invocation.

"The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence." (*People v. Dykes* (2009) 46 Cal.4th 731, 751.) A valid *Miranda* waiver may be express or implied. (*People v. Whitson* (1998) 17 Cal.4th 229, 248.) "On review of a trial court's decision on a *Miranda* issue, [a reviewing court] accept[s] the trial court's determination of disputed facts if supported by substantial evidence, but . . . independently decide[s] whether the challenged statements were obtained in violation of *Miranda*." (*People v. Davis* (2009) 46 Cal.4th 539, 586; *People v. Boyer* (1989) 48 Cal.3d 247, 263.) In the instant matter, the trial court watched the pertinent portion of the DVD of defendant's interview (Court's Exhib. No. 1-A), and utilized two transcripts of the DVD in Spanish and English, one prepared by the People (Court's Exhib. No. 1-B), and one prepared by the Public Defender's Office (Court's Exhib. No. 1-C). (1 RT 67.) The trial court denied the motion to exclude the interview from evidence after it found defendant had been appropriately advised of his rights pursuant to *Miranda* and had knowingly and intelligently waived those rights. (1 RT 72; 2 CT 422.) Thus, in addition to the transcripts of what was said, the trial court had the advantage of being able to see defendant's demeanor and body language. There was apparently nothing in defendant's behavior that suggested his will was being overborne by Officer Trapp's questions.[3]

---

[3] For this Court's consideration in addressing the *Miranda* issue, as well as in evaluating the photographs and physical evidence discussed in

(continued...)

Defendant never expressed any hesitation or unwillingness to talk to Detective Blazek. On the contrary, defendant's words suggest he wanted to talk to the detective so he could explain that by burning her body, he was only trying to fulfill Mendoza's wish that he cremate her body after she died and keep her ashes with him. (3 CT 627.) There was nothing coercive about defendant's interview and he never expressed a desire to stop the interview.

Defendant contends the facts in the instant matter "are identical to those in *Smith v. Illinois*" (1984) 469 U.S. 91[105 S.Ct. 490, 83 L.Ed.2d 488]. (Answer Brief at p. 36.) Respondent disagrees. In that matter, after being advised of his rights to remain silent, to consult an attorney, and have an attorney present during questioning, the arrestee responded, "Uh, yeah. I'd like to do that." The officer did not stop the interview and finished reading the balance of the *Miranda* admonition. Then the officer asked if he was willing to talk without an attorney present. The arrestee said, "Yeah and no, uh, I don't know what's what, really." After the officer said if he agreed to talk, he could stop the interview at any time, the arrestee said, "All right. I'll talk to you then," and eventually confessed to robbery. (*Smith v. Illinois, supra*, 469 U.S. at p. 93.) The United States Supreme Court found that when the unambiguous response of, "Uh, yeah. I'd like to do that," was made, the interview should have stopped (citing *Edwards v. Arizona* (1981) 451 U.S. 477, 484 [101 S.Ct. 1880, 68 L.Ed.2d 378], and went on to explain that responses to further questioning "may not be used to cast retrospective doubt on the clarity of the initial request itself. Such

---

(...continued)
the harmless error issue (*post*), respondent will submit a request to the Orange County Superior Court to transmit pertinent exhibits in this matter to this Court pursuant to rule 8.224 of the California Rules of Court.

subsequent statements are relevant only to the distinct question of waiver." (*Smith v. Illinois, supra*, 469 U.S. at pp. 99-100.)

However, instead of being "identical," the situation in *Smith v. Illinois* is inapposite because after the arrestee was advised of his right to have an attorney present during questioning, and he responded, "Uh, yeah. I'd like to do that," there was never a question about the officer's understanding of what had been said. The officer clearly understood the arrestee was asking for a lawyer to be present during questioning. They were both speaking in English and the officer's comprehension of the response was evidenced by his statement that *if* the arrestee agreed to talk, he could stop the interview at any time. (*Smith v. Illinois, supra*, 469 U.S. at p. 93.) In the instant matter, in context, defendant's response was objectively ambiguous.

The pertinent facts in the instant matter are instead more similar to the situation in *People v. Williams* (2010) 49 Cal.4th 405. In that matter, as the murder suspect was being advised of his rights under *Miranda*, he indicated he was willing to waive his right to remain silent, but requested an attorney.

> [Detective] Knebel then explained: "OK, let's be real clear. If you ... if you want an attorney here while we're talking to you we'll wait till Monday and they'll send a public defender over, unless you can afford a private attorney, so he can act as your ... your attorney." Defendant responded: "No I don't want to wait till Monday." Knebel repeated: "You don't want to wait till Monday." Defendant replied: "No." Knebel clarified: "You want to talk now." Defendant replied: "Yes." Knebel inquired: "OK, do you want to talk now because you're free to give up your right to have an attorney here now?" Defendant responded: "Yes, yes, yes."

(*People v. Williams, supra,* 49 Cal.4th at p. 426.)

This Court found that after it was made clear that there would be a two day delay, the suspect's "final and impatient 'yes, yes, yes' confirms our conclusion that, once the question whether counsel could be provided immediately had been resolved, [he] had not the slightest doubt that he

wished to waive his right to counsel and commence the interrogation." (*People v. Williams, supra*, 49 Cal.4th at p. 427.) This same was true in the instant matter. Defendant began his initial response by saying, "If you can bring me a lawyer," then talked about telling them "everything that I know and everything that I need to tell you and someone to represent me." After defendant understood Officer Trapp was asking him if the detective could talk to him "right now without a lawyer present," he immediately agreed. (2 CT 575.) When Officer Trapp directly asked defendant: "Do you want to speak to him right now?" Defendant responded: "Yes." (2 CT 576.) As Justice Aronson explained in his dissent, by strictly relying upon the sequential order of the questions and responses, "the majority's analysis in our case would have compelled in *Williams* the suppression of the defendant's subsequent statement because Officer Kneble continued to ask questions, including the entreaty, 'Are you sure?'" (Dissent at 3.)

In *Williams*, this Court explained:

> The question whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, subsequent to a valid waiver, he or she effectively has invoked the right to counsel. [Citations.] It is settled that in the latter circumstance, after a knowing and voluntary waiver, interrogation may proceed "until and unless the suspect *clearly* requests an attorney." [Citation, italics added.] Indeed, officers may, but are not required to, seek clarification of ambiguous responses before continuing substantive interrogation. [Citation.]
>
> With respect to an initial waiver, however, "[a] valid waiver need not be of predetermined *form*, but instead must reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision." (*People v. Cruz* [2009] 44 Cal.4th [636], 667, 80 Cal.Rptr.3d 126, 187 P.3d 970, italics added; see *Berghuis v. Thompkins* [2010] 560 U.S. at p. __, 130 S.Ct. at p. 2261.) [*Miranda* "does not impose a

formalistic waiver procedure that a suspect must follow to relinquish these rights"].

(*People v. Williams, supra*, 49 Cal.4th at pp. 427-428.)

This Court explained that while,

> the question whether a waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind, the question of ambiguity in an asserted invocation must include a consideration of the communicative aspect of the invocation - what would a listener understand to be the defendant's meaning. The high court has explained - in the context of a postwaiver invocation - that this is an objective inquiry, identifying as ambiguous or equivocal those responses that "a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect might be invoking the right to counsel."

(*People v. Williams, supra,* 49 Cal.4th at p. 428, quoting *Davis v. United States* (1994) 512 U.S. 452, 459 [114 C.St. 2150, 129 L.Ed.2d 362], relying upon *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [107 S.Ct. 828, 93 L.Ed.2d 920] (a case concerning a response to an initial admonition).)

This Court determined, "[t]his objective inquiry is consistent with our prior decisions rendered in the context of analyzing whether an assertion of rights at the initial admonition stage was ambiguous." (*People v. Williams, supra,* 49 Cal.4th at p. 428.)

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

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

In *Berghuis v. Thompkins, supra,* 560 U.S.___ [130 S.Ct. 2250, 176 L.Ed.2d 1098], the United States Supreme Court addressed how law

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

Writing for the Court, Justice Kennedy explained,

> There is good reason to require an accused who wants to invoke his or her right to remain silent to do so unambiguously. A requirement of an unambiguous invocation of *Miranda* rights results in an objective inquiry that "avoid[s] difficulties of proof and ... provide[s] guidance to officers" on how to proceed in the face of ambiguity. *Davis*, 512 U.S., at 458-459, 114 S.Ct. 2350. If an ambiguous act, omission, or statement could require police to end the interrogation, police would be required to make difficult decisions about an accused's unclear intent and face the consequence of suppression "if they guess wrong." *Id.*, at 461, 114 S.Ct. 2350. Suppression of a voluntary confession in these circumstances would place a significant burden on society's interest in prosecuting criminal activity. See *id.*, at 459-461, 114 S.Ct. 2350; *Moran v. Burbine*, 475 U.S. 412, 427, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986). Treating an ambiguous or equivocal act, omission, or statement as an invocation of *Miranda* rights "might add marginally to *Miranda's* goal of dispelling the compulsion inherent in custodial interrogation." *Burbine*, 475 U.S., at 425, 106 S.Ct. 1135. But "as *Miranda* holds, full comprehension of the rights to remain silent and request an attorney are sufficient to dispel whatever coercion is inherent in the interrogation process." *Id.*, at 427, 106 S.Ct. 1135; see *Davis, supra,* at 460, 114 S.Ct. 2350.

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

In *People v. Cruz, supra*, 44 Cal.4th 636, the murder suspect, like defendant, was a Mexican national who spoke Spanish and at least some English. (*Id.*, at p. 645, 653.) After his arrest for the murder of a sheriff's deputy, the suspect was advised of his *Miranda* rights with the assistance of a Spanish language interpreter. After he was advised of his right to talk to an attorney and to have the attorney present while he was being questioned, he was asked if he understood that right. The suspect responded, "'mas o menos,' which means 'more or less.'" In response, the detective read the *Miranda* rights to the suspect a second time. This time, the suspect stated he understood after each right was read to him and said he wanted to talk to the detective. The ensuing interview lasted about two hours and the suspect confessed to killing the deputy. On appeal, the suspect claimed his statements and confession should not have been introduced at trial because his waiver of his constitutional "rights was not voluntary, knowing and intelligent." (*People v. Cruz, supra*, 44 Cal.4th at pp. 666-667.)

This Court again acknowledged that a waiver of *Miranda* rights and consent to be interviewed does not require "any particular words or phrases." A valid waiver must only "reflect that the suspect in fact knowingly and voluntarily waived the rights delineated in the *Miranda* decision." After a suspect has acknowledged that he or she understands their *Miranda* rights, the suspect's "expressed willingness to answer questions" is "sufficient to constitute an implied waiver of such rights." (*People v. Cruz, supra*, 44 Cal.4th at p. 667.)

> Although there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver was *knowing and intelligent under the totality of the circumstances surrounding the interrogation*. [Citations.]

(*People v. Cruz, supra*, 44 Cal.4th at p. 668, emphasis added.)

This Court rejected the argument that by saying "more or less" when he was asked if he understood his right to counsel, the suspect was expressing his confusion. The detective had read the *Miranda* rights to the suspect a second time and, after hearing each right, he stated he understood each right and agreed to be interviewed.

> In consideration of the totality of circumstances surrounding the interrogation, we find that [the suspect's] responses to [the detective's] inquiries reciting his *Miranda* rights reflect a knowing and intelligent understanding of those rights, and that [the suspect's] willingness to answer questions after expressly affirming on the record his understanding of each of those rights constituted a valid implied waiver of them.

(*People v. Cruz, supra*, 44 Cal.4th at pp. 668-669.)

In the instant matter, defendant's initial response was similar to the suspect in *Cruz* saying "more or less." In both situations, whatever defendant and the suspect in *Cruz* meant was not clear. In *Cruz*, the detective apparently understood the response meant the suspect *somewhat* understood his rights, so the detective went through the rights again, more thoroughly. (*People v. Cruz, supra*, 44 Cal.4th at p. 668.) Here, Officer Trapp rephrased her question and explained, "what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?" Defendant responded, "Oh, okay, that's fine." (2 CT 575.) Defendant subsequently responded, "Yes," when Officer Trapp asked, "Do you want to speak to him right now." (2 CT 576.) Thus, in this matter just as in *Cruz*, after an initial ambiguity was cleared up, there was a knowing and intelligent waiver of *Miranda* rights under the totality of the circumstances surrounding the interview. This Court did not,

> find that single response, in isolation, controlling on the question whether [the suspect] made a knowing and voluntary waiver of his *Miranda* rights under the totality of the circumstances surrounding his interrogation.

(*People v. Cruz, supra*, 44 Cal.4th at p. 668.)

Here, no reasonable officer would have immediately understood defendant to be clearly and unambiguously requesting an attorney upon hearing the following response:

> If you can bring me a lawyer . . . that way I can tell you everything that I know and everything that I need to tell you and someone to represent me.

(2 CT 575.)

A similar conclusion holds true for the more literal translation:

> 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 [*or* please].

(Defendant's Appendix "A" at p. 3.)

The record affirmatively reflects Officer Trapp was trying to make sense of what defendant said and understand what he wanted to do. The totality of her questions on this point show she was not trying to coerce him into an interview. The "protective purpose of the *Miranda* rule" was not impaired by Officer Trapp's "limited number of followup questions to render more apparent the true intent of the defendant." (*People v. Williams, supra*, 49 Cal.4th at p. 429.)

B. Defendant Expressly Agreed to Talk to the Detective Without an Attorney

Defendant asserts Officer Trapp never asked him if he was willing to waive his *Miranda* rights, and contends he never expressly or impliedly waived his rights. (Answer Brief at 43-48.) Nothing in *Miranda* required Officer Trapp to ask defendant if he was willing to waive his rights.

Nevertheless, Officer Trapp asked defendant if he was willing to talk to the detective "right now without a lawyer present." This constituted an explicit request for a waiver. Defendant's response of, "Oh, okay, that's fine" (2 CT 575), was an express waiver of his *Miranda* rights and an agreement to proceed with the interview. Defendant affirmed his express waiver of his rights when he said "Yes," after he was asked, "what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present?" (2 CT 576.)

The *Miranda* rights were carefully read to defendant and he stated he understood each of those rights. If defendant wanted to have an attorney with him while he was being questioned by the police, he could and should have said so when Officer Trapp clarified for him that the detective wanted to know if he could talk to him "right now without a lawyer present." Instead, defendant said, "Oh, okay, that's fine." (2 CT 574-575.) Defendant "was informed of his *Miranda* rights, expressly affirmed his understanding of those rights, and then proceeded to answer questions and to make statements." (*People v. Sully* (1991) 53 Cal.3d 1195, 1233, citing *North Carolina v. Butler* (1979) 441 U.S. 369, 375-376, fn. 6 [99 S.Ct. 1755, 1758-1759, fn. 6, 60 L.Ed.2d 286], and *People v. Davis* (1981) 29 Cal.3d 814, 824-825.) As this Court has long held, if a suspect has been informed of his *Miranda* rights and indicates that he understands those rights, his decision to speak is sufficient evidence that he knows his rights and chooses not to exercise them. (*People v. Johnson* (1969) 70 Cal.2d 541, 556, (disapproved on another point in *People v. DeVaughn* (1977) 18 Cal.3d 889, 899, fn. 8).)

> No particular manner or form of *Miranda* waiver is required, and a waiver may be implied from a defendant's words and actions. [Citations.] In determining the validity of a *Miranda* waiver, courts look to whether it was free from coercion or deception, and whether it was "'made with a full

awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.'" [Citations.] Both aspects are tested against the totality of circumstances in each case, keeping in mind the particular background, experience and conduct of the accused. [Citations.]

(*People v. Davis* (2009) 46 Cal.4th 539, 585-586.)

C. Defendant's Police Interview Was Voluntary

As discussed above, defendant assigns to Officer Trapp the sinister motive of purposely undermining his request for counsel by "telling him his understanding and exercise were wrong." (Answer Brief at 45.) However, this interpretation is belied by the totality of the circumstances. Nothing Officer Trapp said was threatening or coercive, and she did not make any direct or implied promises.

This Court has articulated the relevant inquiry as follows:

> A statement is involuntary if it is not the product of "'a rational intellect and free will.'" (*Mincey v. Arizona* (1978) 437 U.S. 385, 398 [98 S.Ct. 2408, 2416, 57 L.Ed.2d 290].) The test for determining whether a confession is voluntary is whether the defendant's "will was overborne at the time he confessed." (*Lynumn v. Illinois* (1963) 372 U.S. 528, 534 [83 S.Ct. 917, 920, 9 L.Ed.2d 922].) "'The question posed by the due process clause in cases of claimed psychological coercion is whether the influences brought to bear upon the accused were" such as to overbear petitioner's will to resist and bring about confessions not freely self-determined. "'In determining whether or not an accused's will was overborne, 'an examination must be made of' all the surrounding circumstances-both the characteristics of the accused and the details of the interrogation.'" (*People v. Thompson* [1990] 50 Cal.3d [134,] 166 [internal citations omitted].)
>
> A finding of coercive police activity is a prerequisite to a finding that a confession was involuntary under the federal and state Constitutions. (*People v. Benson* (1990) 52 Cal.3d 754, 778 [parallel citations].) A confession may be found involuntary if extracted by threats or violence, obtained by direct or implied promises, or secured by the exertion of improper influence.

> (*Benson, supra*, at p. 778.) Although coercive police activity is a necessary predicate to establish an involuntary confession, it "does not itself compel a finding that a resulting confession is involuntary." (*People v. Bradford* (1997) 14 Cal.4th 1005, 1041 [parallel citations].) The statement and the inducement must be causally linked. (*Benson, supra*, at pp. 778-779.)

(*People v. Maury* (2003) 30 Cal.4th 342, 404-405.)

In the instant matter, after defendant's initial response, the following exchange occurred:

> [Officer Trapp]: Okay, perhaps you didn't understand your rights [well].[4] Um . . . what the detective wants to know right now is if you're willing to speak to him right now without a lawyer present.
>
> [Defendant]: Oh, okay, that's fine.
>
> [Officer Trapp]: The decision is yours.
>
> [Defendant]: Yes.
>
> [Officer Trapp]: It's fine?
>
> [Defendant]: A huh, it's fine.
>
> [Officer Trapp]: Do you want to speak to him right now?
>
> [Defendant]: Yes.

(2 CT 575-576.)

These follow up questions are not the kind of questions that would be asked if the objective was to trick or coerce defendant into waiving his *Miranda* rights. They are instead the kind of questions that would be asked to make sure defendant was willing to talk to the detective "right now without a lawyer present." (2 CT 574.) In an attempt to minimize

---

[4] The word *well* is not included in the English translation of this sentence. In the Spanish version, Officer Trapp said: "Okay, ala mejor no entiendo *bien* sus derechos." (2 CT 575, emphasis added.) The Public Defender's translation of that sentence is: "Okay, maybe you did not understand your rights *correctly*." (Defendant's Appendix "A" at p. 4, emphasis added.)

defendant's "comprehension and ability to express himself," counsel on appeal asserts defendant did not know the words for faucet or shower in his interview. (Answer Brief at 45, citing 4 CT 891 [defendant called it the "thing with the water"].) However, in his very next sentence, defendant referred to the bathtub spout as "el tubo," which is Spanish for "the tube" or "the pipe." (4 CT 891.) Counsel also claims defendant did not know the term for "mouth to mouth resuscitation." (Answer Brief at 45, citing 3 CT 667-668 ["how they put air in the mouth"].) In this instance, defendant was demonstrating how he claimed he had tried to blow air into Mendoza's mouth after he found she was not breathing, as he had "seen it on television." (3 CT 667-668.)

Two isolated instances of possibly not knowing the name or words for something during the lengthy interview hardly establishes that defendant had an inability to comprehend. To the contrary, throughout his interview, defendant expressed himself clearly and used words that demonstrated his comprehension of complex concepts or ideas. (See, e.g., Mendoza killed herself because he "scorned her real badly" (4 CT 882); he "humiliated her" by saying he had seen "her selling herself on the streets of Long Beach" (4 CT 883); and he was "ashamed that [he] could love someone like that" (4 CT 912).) During the interview, defendant also had the presence of mind to offer to help the police "bring in someone that's big" who had sold drugs to Mendoza. (3 CT 672-673.)

During the interview, defendant answered questions easily and volunteered disparaging information about Mendoza. (e.g., 3 CT 619-621 [left her five children with him while she went off with other men and used drugs]; 3 CT 665 [had stolen expensive things from him in the past]; 3 CT 717-718 [demanded money from defendant]; and 4 CT 928-929 [could not be trusted].) The fact that defendant's interview was incriminating because of his lies, changing stories, and the disclosure of a possible motive for her

murder (i.e., Mendoza threatened to have him and his relatives deported if he did not give her money or let her live with him (4 CT 912-913)), did not change a voluntary interview into a coercive interview.

Defendant also asserts the police failed to advise him of his right to speak to a representative of the Mexican Consulate in violation of Article 36 of the Vienna Convention on Consular Relations and Penal Code section 834c. (Answer Brief at 47.) Penal Code section 834c, subdivision (a) (1), requires an arresting officer to advise a foreign national of the right to contact his or her country's consulate. While defendant correctly concedes suppression of his interview is not an available remedy for such an omission (Answer Brief at 47, citing *Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, [343-344] [126 S. Ct. 2669, 165 L.Ed.2d 557]), he offers it as further proof that his agreement to talk to the detective was not voluntary.

Because this claim is being raised for the first time before this Court, it has been forfeited. "A party may not assert theories on appeal which were not raised in the trial court." (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1193.) Moreover, there is no evidence in the record on appeal that the arresting officer failed to comply with this requirement. The record only reflects that Officer Trapp, who was not the arresting officer, did not advise defendant that he had the right to contact the Mexican Consulate when she advised him of his far greater rights under *Miranda*. Arguments relying on matters outside the record may not be considered on appeal. (*People v. Smith* (2007) 40 Cal.4th 483, 507.)

In any event, the Vienna Convention does not create a personal right of constitutional dimension. (*Murphy v. Netherland* (4th Cir.1997) 116 F.3d 97, 99-100.) Suppression of illegally obtained evidence is an "entirely American legal creation" and was not included or contemplated as a remedy for a violation of Article 36 of the Vienna Convention. (*Sanchez-Llamas v. Oregon, supra,* 548 U.S. at pp. 342-344.) A foreign national

detained on suspicion of a crime enjoys the protections of the Due Process clause and is protected against compelled self-incrimination. (*Id.*, at p. 350.)

While recognizing that a violation of the Vienna Convention could not result in the suppression of an involuntary interview, defendant nevertheless attempts to bootstrap *Miranda's* remedy of exclusion by presenting this claim in conjunction with his claim that his interview was not voluntary. However, defendant fails to explain how the alleged omission of being advised that he had the right to contact someone at the Mexican Consulate rendered his agreement to talk to the detective involuntary.

This Court rejected a similar claim of involuntariness in a situation where a juvenile, gang-related murder suspect was advised of his rights under *Miranda*, but was not advised of his right under Welfare and Institutions Code section 627, subdivision (b), to make a telephone call to a designated adult. (*People v. Lessie* (2010) 47 Cal.4th 1152, 1161, 1166.) This Court relied upon the High Court's reasoning in *Fare v. Michael C.* (1979) 442 U.S. 707 [99 S.Ct. 2560, 61 L.Ed.2d 197], which requires courts to determine whether a suspect has waived his or her Fifth Amendment privilege against self incrimination by inquiring into the totality of the circumstances surrounding the interrogation. (*Id.*, pp. 724-725.)

In a previous decision, this Court had reversed a minor's murder conviction when it "held 'that the minor's request for his probation officer - essentially a "call for help"- indicated that the minor intended to assert his Fifth Amendment privilege.'" (*People v. Lessie, supra*, 47 Cal.4th at p. 1164, quoting *In re Michael C.* (1978) 21 Cal.3d 471, 476.) After a grant of certiorari, the United States Supreme Court found that "by treating a suspect's request to speak with someone other than an attorney as an invocation of the Fifth Amendment privilege," this Court had "unjustifiably

extended *Miranda*." (*People v. Lessie, supra*, 47 Cal.4th at p. 1165, quoting *Fare v. Michael C., supra,* 442 U.S. at pp. 722-723.)

This Court explained,

> the high court in *Fare* painstakingly reiterated the rule that only a request for an attorney constitutes a per se invocation of a suspect's Fifth Amendment privilege. When no such request is made, the court held, "the determination whether statements obtained during custodial interrogation are admissible against the accused is to be made upon an inquiry into the totality of the circumstances surrounding the interrogation, to ascertain whether the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and to have the assistance of counsel."

(*People v. Lessie, supra*, 47 Cal.4th at pp. 1165-1166, quoting *Fare v. Michael C., supra,* 442 U.S. at pp. 724-725.)

Applying these principles to the case before it, this Court concluded that the "bare violation" of Welfare and Institutions Code section 627 by failing to advise the minor of his right to call his parents had "very limited relevance in the present context." (*People v. Lessie, supra*, 47 Cal.4th at p. 1170.) As this Court noted, the Legislature had not authorized exclusion as a remedy for such violations, and courts are barred from creating such a remedy under the state Constitution. (*Ibid.*) Under the totality of the circumstances, nothing suggested that the minor intended to invoke his Fifth Amendment privilege when he asked to speak with his father. (*Ibid.*)

In similar fashion, defendant's attempt to use his Vienna Convention claim to bolster his claim of involuntariness is unavailing. The totality of the circumstances in the instant matter establishes defendant was advised of his rights under *Miranda*, indicated he understood those rights, was asked if he was willing to speak to the detective "right now without a lawyer present," and he responded, "Oh, okay, that's fine." (2 CT 575.) Officer Trapp told him the decision was up to him and asked, "It's fine?" and "Do you want to speak to him right now?" Defendant answered both of those

questions by saying, "Yes." (2 CT 575-576.) Nothing in the totality of the circumstances revealed that waiver was not knowingly and intelligently made, and any failure to advise him of his rights under the Vienna Convention has "very limited relevance" in determining his waiver of his rights under *Miranda*. (*People v. Lessie, supra*, 47 Cal.4th at p. 1170.)

Officer Trapp's follow up questions were clearly asked to ensure that he was willing to proceed with the interview. There was no coercion or deception on Officer Trapp's behalf. As this Court noted in *Williams*, "under the circumstances, it does not appear that the officers were "badgering" defendant into waiving his rights; his response reasonably warranted clarification." (*People v. Williams, supra*, 49 Cal.4th at 429, citations omitted.) Accordingly, under the totality of the circumstances, defendant's waiver of his rights to counsel and to remain silent was knowing and voluntarily.

Respondent submits this Court should reverse the Court of Appeal's holding and rule that after the trial court determined defendant had been advised of his rights pursuant to *Miranda*, and after defendant knowingly and voluntarily agreed to talk to the detective without the presence of an attorney, the DVD of the interview was properly admitted into evidence at trial.

II. ASSUMING DEFENDANT'S INTERVIEW WAS IMPROPERLY ADMITTED INTO EVIDENCE AT TRIAL, THE ERROR WAS HARMLESS IN LIGHT OF THE TOTALITY OF THE EVIDENCE INTRODUCED

Assuming defendant's interview should have been excluded from evidence due to a *Miranda* violation, the error is subject to the "harmless beyond a reasonable doubt" standard advanced in *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705]. (*Arizona v. Fulminante* (1991) 499 U.S. 279, 307–312 [111 S.Ct. 1246, 113 L.Ed.2d 302]; *People v. Johnson* (1993) 6 Cal.4th 1, 32.) "The *Chapman* test is

whether it appears 'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" (*Yates v. Evatt* (1991) 500 U.S. 391, 402-403 [111 S.Ct. 1884, 114 L.Ed.2d 432], quoting *Chapman v. California, supra*, 386 U.S. at p. 24.) In light of the totality of the evidence introduced at trial, especially the incriminating manner in which defendant was attempting to destroy Mendoza's body, and her DNA on the inside of the belt he was wearing, defendant would have been convicted of first degree murder in the absence of the DVD of his police interview.

Defendant places great importance on the prosecutor's reliance on his lies and inconsistencies in the interview, and how the prosecutor used some of defendant's statements to bolster the physical evidence and his closing argument. (Answer Brief at 49-52.) Since the DVD of his interview was admitted into evidence, it was proper, and even expected, for the prosecutor to rely upon it. Defendant asserts this was a close case because there was no known cause of death and the jury deliberated for a long time. (Answer Brief at 52-53.) However, defendant assumes the jurors were struggling between guilty and not guilty. Defendant does not consider that the jurors were taking their time to fully consider whether he was guilty of first degree murder, second degree murder, or manslaughter, which, in addition to not guilty, were available options. (2 CT 491-495.)

On pages 33 through 36 of the Opening Brief on the Merits, respondent noted all of the other evidence against defendant. This included defendant's efforts to completely destroy Mendoza's body by placing it in a metal can on his cement patio (1 RT 139), propping the body away from the side of the can with a brick so it would thoroughly burn (1 RT 240-241), and using gasoline to ignite and sustain the fire. (1 RT 140, 241.) That day, defendant demonstrated his willingness to lie to protect himself. First he told firefighters there was no fire, before saying he was cooking a pig he bought in Indio for a big party he was planning. (1 RT 157, 160-

162.) Defendant argues his behavior could be explained by the fact that he and his brothers were in the country illegally and he panicked at the thought that they could all be deported if a dead body was found inside the house. (Answer Brief at 59.) This argument lacks logic. By setting fire to the body and continuing to add gasoline to the fire, defendant only drew attention to himself. If he wanted to get Mendoza's body out of the house, he could have used his brother's car, to which he had the keys and was parked in the driveway. (4 CT 879-880.) The only realistic explanation for burning Mendoza's body was to destroy all evidence of her murder.

Respondent also noted the history and evidence of domestic violence which included the verbal and physical fight the neighbors overheard one day earlier (Merits Brief at 34-35, citing 1 RT 122-124), and the testimony of Mendoza's sister about defendant's abusive and controlling behavior towards Mendoza, as well as his statement that he would rather see Mendoza dead than lose her. (Merits Brief at 34, citing 1 RT 191-195.) Defendant counters by quoting the comment in the Court of Appeal's opinion that Mendoza's sister "was not the most credible witness" because she had not reported defendant's threat when she was interviewed by police. (Answer Brief at 54, quoting Slip. Opin. at 22.) The sister's credibility was for the jurors to evaluate. There was nothing in the record about the circumstances of the sister's police interview or her emotional state at the time. During her testimony, Mendoza's sister insisted she had told the police about defendant's threat and said she had called Detective Blazek "numerous times." (1 RT 196-199.) No evidence was introduced to the contrary.

As for the physical evidence, which included photographs of scratches on defendant's face, neck, chest, and hands (1 RT 220-221), Mendoza's DNA on the inside of the belt he was wearing when he was arrested (2 RT 394), a small amount of Mendoza's blood on the floor in the bathroom (2

RT 387-388), and his bedroom in disarray (1 RT 249), defendant offers a variety of possible innocent explanations. (Answer Brief at 55-57.) This Court may make its own determination of the strength and significance of this evidence after the transmittal of the photographs and other pertinent exhibits. (See fn. 5, *ante*.)

Perhaps the most damaging physical evidence against defendant was the belt he was wearing when he was arrested. Mendoza was the major contributor (defendant was the minor contributor) of the DNA on the inside third of the belt next to the buckle, and there was a marked impression across the leather, 11 inches from the edge of the buckle. (1 RT 214; 2 RT 394-395.) Defendant attempts to discount the prosecutor's argument about the distortion on the belt 11 inches from the edge of the buckle being consistent with the circumference of a skinny person's neck, and claims there is nothing in the record to substantiate the prosecutor's description of Mendoza as skinny. (Answer Brief at 57.) The jurors saw photographs of Mendoza's body (2 CT 520-521 [People's Exhib. Nos. 57 & 64]), so they could have taken her size into consideration when considering the prosecutor's argument. Defendant himself, who according to his probation report was 5'4" and weighed 100 pounds, (2 CT 525), said he used to call the methamphetamine using Mendoza "Flaca," which was Spanish slang for a skinny girl. (3 CT 624, 657-659.)

Due to the thermal injuries to Mendoza's body caused by the fire, the pathologist could not determine her cause of death (2 RT 323-327), and the methamphetamine levels in the body were elevated by the desiccation of the body's tissue. (2 RT 370.) If the jury accepted the prosecutor's argument that the physical evidence on the belt proved defendant had used it to strangle Mendoza, in conjunction with his pattern of violence towards her, and the incriminating way he was attempting to dispose of her body, it would have found defendant guilty of murder in the absence of the

evidence of his police interview. Accordingly, even assuming the trial court erred by admitting the DVD of the interview into evidence, it is "beyond a reasonable doubt that the error complained of did not contribute to the verdict." (*Chapman v. California, supra*, 386 U.S. at 24.)

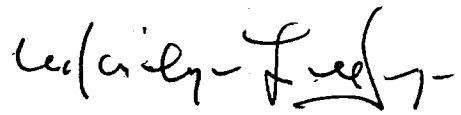
CONCLUSION

Based upon the foregoing, respondent respectfully submits this Court should find the trial court properly admitted the DVD of defendant's police interview into evidence. In the event this Court finds a *Miranda* violation occurred in this matter, respondent respectfully submits the error was harmless beyond a reasonable doubt. Under either scenario, defendant's first degree murder conviction should be reinstated.

Dated: December 19, 2011

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
DANE R. GILLETTE
Chief Assistant Attorney General
JULIE L. GARLAND
Senior Assistant Attorney General
STEVE OETTING
Supervising Deputy Attorney General



MARILYN L. GEORGE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

SD2011701412
80584190.doc

CERTIFICATE OF COMPLIANCE

I certify that the attached **REPLY BRIEF** uses a 13 point Times New Roman font and contains 7,808 words.

Dated: December 19, 2011

KAMALA D. HARRIS
Attorney General of California

MARILYN L. GEORGE
Deputy Attorney General
Attorneys for Plaintiff and Respondent

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

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

I declare:

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

On December 19, 2011, I served the attached **REPLY BRIEF** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

Diane Nichols
Attorney at Law
P.O. Box 2194
Grass Valley, CA 95945-2194

The Honorable Tony J. Rackauckas
District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

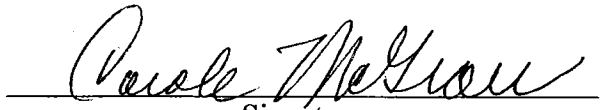
The Honorable Richard Toohey
Judge
Orange County Superior Court
Central Justice Center
700 Civic Center Drive West
Santa Ana, CA 92701

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

and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on December 19, 2011, to Appellate Defenders, Inc.'s electronic notification address eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on December 21, 2011, at San Diego, California.

Carole McGraw
Declarant


Signature

«Matter Matter ID»
80585168.doc