SUPREME COURT, STATE OF COLORADO 101 West Colfax Avenue, Suite 800 Denver, Colorado 80202	FILED IN THE SUPREME COURT FEB 25 2013 OF THE STATE OF COLORADO Christopher T. Ryan, Clerk
Certiorari to the Colorado Court of Appeals Case No. 08CA630	
RICARDO JAIME SANCHEZ Petitioner v. THE PEOPLE OF THE STATE OF COLORADO Respondent	σ COURT USE ONLY σ
Douglas K. Wilson, Colorado State Public Defender JOSEPH P. HOUGH, #34384 1290 Broadway, Suite 900 Denver, CO 80203 Appellate.pubdef@coloradodefenders.us (303) 764-1400 (Telephone)	Case Number: 11SC215

REPLY BRIEF

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CERTIFICATE OF COMPLIANCE	

I hereby certify that this reply brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The reply brief complies with C.A.R. 28(g).

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☑ It contains 1,700 words.

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Signature of attorney or party

ARGUMENT

In its Answer Brief, the State relies primarily on four of this Court's previous decisions: *People v. Aguilar-Ramos*, 86 P.3d 397 (Colo. 2004); *People v. Redgebol*, 184 P.3d 86 (Colo. 2008); *Mejia-Mendoza*, 965 P.2d 777 (Colo. 1998); and *People v. Al-Yousif*, 49 P.3d 1165 (Colo. 2002).(AB,p21-32) However, none of those cases support the State's argument that Sanchez was "adequately informed that an attorney would be provided free of charge if he could not afford one."(AB,p32) In fact, when taken as a whole, the cases soundly support Sanchez's contention that due to Sergeant Mendez's failure to accurately communicate that the defendant was entitled to a free attorney, his statements should have been suppressed.

For instance, in *Aguilar-Ramos*, this Court specifically states, "officers must inform a suspect that he has the right to remain silent, that if he waives his right to that silence anything he say may be used against him, that he has the right to an attorney present, and *that any attorney will be appointed free of charge if the suspect cannot afford an attorney*." *Id.* at 400 (emphasis added). Furthermore, where "the police *fail to accurately communicate* to the defendant his basic rights under *Miranda*, and the defendant is therefore unable to understand those rights,

any resulting waiver must be deemed constitutionally insufficient." *Id.* at 403 (emphasis added).

Quite clearly, Sergeant Mendez failed to "accurately communicate" to Sanchez that an attorney "se le assignara" ("will be assigned") meant one "appointed free of charge" before the defendant spoke to the officer. To the contrary, when Sanchez expressed substantial concern about this point ("[T]he lawyer is going to want money, true? Decide a lawyer, because the lawyer is going to want money, true?"), Mendez said nothing to clarify or "accurately communicate" to the defendant that an attorney would cost the defendant nothing and in fact, added to Sanchez's misunderstanding by confirming that an attorney would require payment ("Well the thing is yes, yes [lawyers] are [going to want money]…") before brushing aside the issue by immediately stating thereafter, "but the things, were we are, we are going to talk soon."

Indeed, at the suppression hearing below, Mendez readily conceded that at no point before, during or after the interrogation, was Sanchez advised, by Mendez or anyone else for that matter, that he would not have to pay for an attorney's services and one would be appointed free of charge if the defendant desired counsel or other legal services.(4/16/07,p147-49) Thus, if anything, *Aguilar-Ramos* most certainly supports defendant's argument that Mendez's failure to

"accurately communicate" that Sanchez would be appointed an attorney "free of charge" if he could not afford but desired one, resulted in a constitutionally insufficient *Miranda* advisement and waiver. *Id.* at 400-03.

In *People v. Redgebol*, *supra*, this Court indicates that the "totality of the circumstances surrounding the interrogation" (including "any language or comprehension barriers encountered by the defendant during the advisement and interrogation") must be considered to "ensure that the accused evinced the requisite level of comprehension" concerning the rights he is being asked to waive. *Id.* at 93 (internal citations and quotations omitted). Here, however, as Judge Fox notes in dissent, Mendez "obtained no assurance that Sanchez understood either the word 'assigned' or the American concept of court-appointed counsel. The concept of court-appointed counsel is a foreign notion to a non-English-speaking, unsophisticated person."(Slip,Op.,p25)

Again, Mendez said nothing to "ensure that [Sanchez] evinced the requisite level of comprehension" concerning free appointed counsel. Instead, as previously noted, not only did Mendez fail to clarify Sanchez's repeatedly voiced concern about a lawyer "going to want money" but confirmed defendant's misapprehension ("Well the thing is yes, yes [lawyers] are [going to want money]...") before quickly dismissing the issue and coaxing the defendant into speaking with him--"but the

things, were we are, we are going to talk soon." Thus, as with *Aguilar-Ramos*, *Redgebol* actually supports defendant's argument that all things considered, including "language [and] comprehension barriers," Sanchez could not "knowingly and intelligently" waive a "right he did not understand"—as Judge Fox puts it.(Slip,Op.,p23)

Similarly, in *Mejia-Mendoza* this Court emphasizes the importance of avoiding "inaccurate word choices" and "misleading statements" when interrogating an unsophisticated non-English speaking suspect. *Id.* at 782. Clearly here, not only did Mendez fail to accurately explain that by "will be assigned" he meant "free" but also misled the defendant into thinking that any attorney would necessarily require payment for his or her services, "Well the thing is yes, yes [lawyers] are [going to want money]...". Indeed, as Judge Fox notes in dissent, "[Mendez] could have easily cured the deficiency by simply asking Sanchez whether he understood what 'se le assignara' (which the officer used for 'will be assigned') meant, and explaining as necessary, right after he said those words and before he proceeded to interrogate Sanchez."(Slip,Op.,p25)

Finally, the State contends that the facts and circumstances here most closely resemble those in *Al-Yousif* and accordingly, this Court should find that Sanchez "did not act confused based on this advisement" and therefore, his motion to

suppress was rightly denied.(AB,p32) However, *Al-Yousif* primarily concerned the defendant's and officer's general language skills and comprehension, but that is not the issue here.

No one contends that Sanchez or Mendez were so deficient in the Spanish language that the defendant was incapable of understanding the "three precepts" of a general *Miranda* advisement. Rather, Sanchez argues that on the particular aspect of the advisement, concerning the appointment of an attorney, Mendez not only failed to clarify and dispel defendant's belief that a lawyer was "going to want money" but further confirmed defendant's misunderstanding ("Well the thing is yes, yes [lawyers] are [going to want money]...") before erroneously instructing Sanchez that he must then speak with Mendez--"but the things, were we are, we are going to talk soon."

In sum, none of the cases relied upon by the State support its argument or the court of appeals' conclusion that defendant "knowingly and intelligently" waived his *Miranda* rights in this case. To the contrary, the cases serve only to emphasize an officer's duty to: (1) "accurately communicate" to a suspect that "any attorney will be appointed free of charge if the suspect cannot afford an attorney" (*Aguilar-Ramos, supra* at 400-03); (2) "ensure that the accused evinced the requisite level of comprehension" as to his rights (*Redgebol*, *supra* at 93); and

(3) refrain from using "inaccurate word choices" and "misleading statements" (*Mejia-Mendoza*, *supra* at 782) as Mendez did here.

Simply put, when a criminal suspect expresses significant concern or confusion over a particular portion of his *Miranda* rights (such as the appointment of a *free* attorney if one is desired), it is imperative that the interrogating officer clarify such a misunderstanding in order for a subsequent waiver to be "knowing and intelligent." Because Mendez not only failed to clarify Sanchez's misunderstanding but compounded it, the State cannot show that defendant's subsequent waiver was both "knowing and intelligent," and therefore, his incriminating statements should have been suppressed.

Turning now to the consequent harm engendered by the erroneous admission of defendant's statements at trial, in its Answer Brief the State contends there was "ample evidence of deliberation without the defendant's confession" and as such, "any error in the trial court's admission of the defendant's interview was harmless beyond a reasonable doubt."(AB,p36-37)

Sanchez readily concedes that even in the absence of his confession, there was indeed sufficient *circumstantial* evidence of the defendant's intent and deliberation as: (1) Sanchez gave his wife a large amount of money and wished her, his children and his brother goodbye, prior to the shooting; (2) was overheard

arguing with the victim; (3) and fired on the victim numerous times. However, sufficient or even purportedly "ample" evidence of guilt, beyond a confession, is simply not the applicable standard. Rather, this Court must be "confident beyond a reasonable doubt that the error did not *contribute* to the verdict." *People v. Grace*, 55 P.3d 165, 169 (Colo. App. 2001) (emphasis added).

As discussed in the Opening Brief, the defendant contended, at trial, that he shot and killed the victim only after being threatened first—not only previously, by the victim's threats against Sanchez and his family, but also because *immediately before* the shooting, the victim took two steps towards the defendant and yelled, "Fuck your mother."(2/7/08,p287) The prosecution below put on no evidence to the contrary and no one disputed Sanchez's version of events in this respect.

Again, while a reasonable jury could infer intent and deliberation based upon the circumstantial evidence presented, no evidence demonstrated Sanchez's intent and deliberation more clearly than his confession where, among other incriminating statements, he admitted purchasing a gun and bullets just prior to the shooting and for the sole purpose of shooting and killing the victim. Indeed, it is difficult to imagine stronger, more *direct* evidence than an uncoerced confession to what amounts to all the essential elements of a crime.

Not only did the prosecution below fight hard against the suppression of Sanchez's confession (after an extensive and lengthy motions hearing, where the prosecution called an out-of-state witness to testify—indicating the importance of the statements to the case), but the vast majority of the prosecution's lengthy opening statement and closing argument consisted of quoting Sanchez's own words spoken during his confession.(2/5/08,p191-96;2/8/08,p91-120,134-50) According to the prosecution, Sanchez's statements, more than any other piece of evidence, demonstrated the defendant's "exercise of reflection and judgment concerning" the shooting and critically undermined his self-defense claim or any chance of him being convicted of a lesser offense.

Thus, while the State is correct that there was circumstantial evidence of Sanchez's intent and deliberation, in the absence of the confession, the State simply cannot prove, beyond a reasonable doubt, that defendant's admission to buying a gun and bullets in order to shoot and kill the victim the following day, "did not contribute to the verdict" of first degree murder. *Grace*, *supra* at 169. Accordingly, Sanchez's conviction should be reversed and his case remanded for a new trial.

CONCLUSION

For the reasons and authorities discussed here and in the Opening Brief, the defendant respectfully requests this Court overrule the court of appeals' opinion, reverse his conviction and remand his case for a new trial.

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CERTIFICATE OF SERVICE

I certify that, on February 25, 2013, a copy of this Request for Extension of Time was hand-delivered to the Colorado Court of Appeals for deposit in the Attorney General's mailbox to the attention of:

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