S181611

In the Supreme Court of the State of California

THE PEOPLE OF THE STATE OF CALIFORNIA, **Plaintiff and Respondent,** **v.** **SAMUEL MOSES NELSON,** **Defendant and Appellant.**	S_____

Fourth Appellate District, Division Three, Case No. G040151
Orange County Superior Court, Case No. 04ZF0072
The Honorable Frank F. Fasel, Judge

APR 7 - 2010

PETITION FOR REVIEW

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TO THE HONORABLE RONALD M. GEORGE, CHIEF JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT

Respondent, the People of the State of California, respectfully petitions this Court to grant review in the above-entitled case, pursuant to rule 8.500 of the California Rules of Court. Respondent has attached a copy of the unpublished Court of Appeal opinion (Exhibit A).

ISSUES PRESENTED

When a juvenile defendant asks to speak to a parent, after a knowing and voluntary waiver of his Fifth Amendment rights, and interrogation continues until there is a confession, should a trial court apply the United States Supreme Court's objective, reasonable officer test (*Davis v. United States* (1994) 512 U.S. 452 [114 S.Ct. 2350, 129 L.Ed.2d 362]) to determine if the juvenile has invoked his Fifth Amendment rights which means interrogation must cease?

REASONS FOR REVIEW

Review is necessary in this case to clarify a unsettled area of law involving which United States Supreme Court test to apply to determine whether a juvenile, who has waived his rights under *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] (*Miranda*), thereafter invokes his *Miranda* rights by asking to speak to a parent.

In *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [99 S.Ct. 2560, 61 L.Ed.2d 197] (*Fare*), the United States Supreme Court held that whether an adult or juvenile suspect has waived his Fifth Amendment rights is

determined by application of a totality of circumstances test. (*Fare, supra,* 442 U.S. at p. 725.)

In *People v. Lessie* (2010) 47 Cal.4th 1152, this Court applied *Fare's* totality of circumstances test to a minor, to determine if a request to speak to a parent precluded a waiver of the right against self-incrimination during police interrogation. *Lessie* disapproved the special rule in *People v. Burton* (1971) 6 Cal.3d 375, that a minor's request to speak to a parent is a per se invocation of *Miranda* rights.

The Court of Appeal in appellant's case ruled that although the minor initially knowingly and voluntarily waived his *Miranda* rights, his request thereafter to speak to his mother was tantamount to a request for an attorney which should have ended the interrogation. The appellate court thus effectively resurrected the special rule in *Burton* which this Court had just disapproved in *Lessie*. Moreover, the appellate court expressly rejected the application of *Davis v. United States* (1994) 512 U.S. 452 [114 S.Ct. 2350; 129 L.Ed.2d 362] to a minor.

Davis held that after a valid *Miranda* waiver, "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Id.* at p. 459, emphasis in original.) This Court applied *Davis* to adults in *People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125, noting, "*Davis* now provides the standard by which we assess whether a defendant's reference to counsel constituted an unambiguous and unequivocal invocation of the right to counsel." (Citations omitted.) *Fare* found no reason not to apply the totality of circumstances rule to all defendants, whether adults or minors. Similarly, *Davis* should apply to juveniles as well as adults.

A grant of review by this Court is necessary to establish for lower courts whether the objective, reasonable officer test (*Davis*) applies to juveniles, as it does to adults, who have waived their *Miranda* rights and thereafter ask to speak to a parent, but not to speak to an attorney.

Respondent respectfully asks this Court to reverse the Court of Appeal's decision and to affirm appellant's murder burglary and murder convictions.

CASE HISTORY AND FACTS

In April 2004, appellant burglarized Katherine Parks' home in Laguna Niguel and took two purses. In May 2004, appellant burglarized Sheryl Adler's home in Laguna Niguel and took two wallets and a checkbook. On June 18, 2004, appellant burglarized Jane Thompson's home in Laguna Niguel and took her purse, credit cards and a checkbook. (1 CT 11-13, 20-23, 34.)

On June 20, 2004, Thompson's neighbor, 15 year old Samuel Nelson, used Thompson's stolen Visa card to purchase $245 worth of lobster and steak at one restaurant and $600 worth of food at another. His third attempt to use Thompson's checks to buy $35 worth of sandwiches was a failure. (1 CT 41-43, 63-74.)

On June 26, 2004, deputies found 72-year-old Thompson beaten to death in her home. She died of massive blunt force head trauma, with multiple skull fractures and brain hemorrhaging. (1 CT 25, 30; 2 RT 345, 349-350.)

On June 28, 2004, deputies spoke with appellant who admitted going into Thompson's house, but claimed he entered at her request. (1 CT 29-30.) Appellant said he would take a polygraph exam. (3 CT 525.) The next day, deputies approached appellant and asked him to come to the station for further discussion. He agreed, and they drove him to the station

where, as the Court of Appeal found, he knowingly and voluntarily waived his *Miranda* rights and later confessed. (1 CT 35-41, 50-51, 59-60; 2 RT 350-354.)

Long after his *Miranda* waiver and before his confession, appellant asked to speak to his mother. (1 RT 224.) He answered more questions, and asked several more times to speak with his mother, then answered more questions. He never asked to speak to an attorney. (1 RT 214; 3 CT 635-641, 647, 657-667, 687-696, 699-701.)

Appellant admitted burglarizing the Parks, Adler and Thompson residences, admitted using Thompson's stolen Visa card, and described in detail how he killed Thompson by hitting her on the head with a hammer, initially because she stirred in her sleep, and then because some of her blood got in his mouth as a result of the first blow to her head. (1 CT 35-41.)

After a court trial, appellant was found guilty of one count of murder and five counts of burglary, in large part based on his confession and on evidence that was discovered as a result of it. He was sentenced to an indeterminate term of twenty-five-years-to-life for the murder, and concurrent terms for the burglaries.

On February 25, 2010, the Court of Appeal reversed the murder conviction and two burglary counts. (Slip opn. at p. 32.) It held that, although appellant voluntarily and knowingly waived his *Miranda* rights initially, the officers should have known that during interrogation, the first time he asked to speak to his mother – two hours into the interrogation -- he was actually asking to speak to an attorney, and questioning should have terminated immediately. The court applied the totality of circumstances test in *Fare, supra,* 442 U.S. at p. 725, and *Lessie, supra,* 47 Cal.4th at p. 1168. The Court of Appeal expressly declined to apply *Davis v. United States* to appellant, stating that neither *Fare* nor *Lessie* suggested "that the

totality-of-circumstances test must be abandoned when evaluating whether a postwaiver request to speak to a parent constitutes an invocation of a minor's *Miranda* rights." (Slip opn. at p. 31.)

A strong dissent argued the objective, reasonable officer test in *Davis* was the proper test under the federal Constitution to determine if a suspect, adult or juvenile, has unambiguously invoked his Fifth Amendments rights, after an initially valid *Miranda* waiver. (Dis. opn. at pp. 1-5, 7-9. 12-14.) Respondent's petition for rehearing was denied on March 23, 2010, by the Court of Appeal.

ARGUMENT

A. Review is Necessary to Establish That Once a Minor Has Waived His *Miranda* Rights, Any Subsequent Invocation of a Right to Counsel Must be Judged Under the Reasonable Officer Test.

The Court of Appeal, while applying the *Fare* totality of the circumstances test, has added a gloss that appears to treat juveniles specially by construing a request to speak to a parent as a request to speak to an attorney, and in so doing has revived the *Burton* test. This Court should take the opportunity to establish that, as under federal law, only a request for an attorney is a request for an attorney, and that an interrogating officer need not try to fathom what the adolescent means when he asks to speak to a parent, but instead may rely on the bright line test established by the United States Supreme Court in *Davis, supra,* 512 U.S. 460.

B. Background and the Demise of the Special Rule for Juveniles in *People v. Burton*

In *People v. Burton,* this Court held that when a minor is taken into custody and is subjected to interrogation without the presence of an attorney, "his request to see one of his parents, made at any time prior to or

during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege." (*Burton, supra,* 6 Cal.3d at pp. 383-384.)

In 1978, the California Supreme Court extended the *Burton* rule to a minor's request to see his probation officer, equating it with the request for an attorney. (*In re Michael C.* (1978) 21 Cal.3d 471, 722-723.)

However, in *Fare v. Michael C., supra,* 442 U.S. 707, the United States Supreme Court reversed this Court, and established that there is in fact no separate test for minors, and that what courts are supposed to do in analyzing *Miranda* waiver situations, for adults or minors, is to look at the totality of the circumstances. (*Fare, supra,* at pp. 724-725, italics added.) In *Fare,* while the minor was advised of his *Miranda* rights and being informed he had the right to have an attorney present during interrogation, he asked if he could speak with his probation officer. The police said no. He then expressly agreed to talk without an attorney being present and thereafter made incriminating statements which were admitted at trial. *Fare* stated:

> This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits--indeed, it mandates--inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]

(*Fare, supra,* 442 U.S. at p. 725.)

In *Fare, supra,* 442 U.S. 407, the United States Supreme Court reasoned that only the request for a lawyer could automatically trigger

constitutional protections as "the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. [¶] The *per se* aspect of *Miranda* was thus based on the unique role the lawyer plays in the adversary system of criminal justice in this country. Whether it is a minor or an adult who stands accused, the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of that person in his dealings with the police and the courts." (*Ahmed A. v. Superior Court* (1989) 215 Cal.App.3d 528, 537, quoting *Fare v. Michael C., supra,* 442 U.S. at p. 719.)

However, *Fare* did not expressly overrule *Burton*. That task fell to this Court, which did so in *Lessie*. This court ruled,

> . . . [T]he special rule for minors announced in *Burton, supra,* 6 Cal.3d 375, cannot fairly be rationalized, or correctly perpetuated, as nothing more than a restatement of the federal totality-of-the-circumstances test. By its own terms, *Burton* requires courts to give at least presumptive weight to a minor's request to see a parent in determining whether the minor has invoked the Fifth Amendment privilege. This is more than federal law compels. As the court in *Fare, supra,* 442 U.S. 707, 725, explained, "[w]here the age and experience of a juvenile indicate that his request for his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination." That *Burton* goes beyond the unadorned totality-of-the-circumstances test in attributing weight to a minor's request for a parent is clear; precisely how much farther it goes is not. But however far beyond that test *Burton* does go, it goes too far. The Truth-in-Evidence provision (Cal. Const., art. I, § 28, subd. (f)(2)) permits the courts of this state to exclude a defendant's self-incriminatory statements only under the compulsion of federal law. (Citation.)

(*Lessie, supra,* 47 Cal.4th at p. 1168, footnote omitted.)

In *Lessie,* the 16 year old defendant asked to speak to his father while being transported to the police station and prior to waiving *Miranda* rights.

He repeated the request to speak to his father after confessing. The trial court denied the motion to exclude the original confession and a second confession made several months later at juvenile hall, despite a *Burton* argument. The trial court found as a factual matter that Lessie's purpose in asking to speak with his father had not been to assert his right to remain silent or to obtain the assistance of counsel. (*Lessie* at p. 1160.) Having rejected *Lessie's* argument that he had invoked his Fifth Amendment privilege, the court rejected the additional argument that the confession at juvenile hall violated *Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct. 1880, 68 L.Ed.2d 378]. (*Lessie, supra,* 47 Cal.4th at p. 1161.)

Lessie emphasized that the United States Supreme 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 there is no request for an attorney, 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." (*Fare,* 442 U.S. at pp. 724-725.) "This totality-of-the-circumstances approach," the court continued, "is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved." (*Id.*, at p. 725; *Lessie, supra,* 47 Cal.4th at pp. 1165-1166, emphasis added.)

This Court concluded in *Lessie* that, "the Truth-in-Evidence provision of the Constitution (Cal. Const., art. I, § 28, subd. (f)(2)) leaves us with no power to exclude a minor's self-incriminatory statements except as federal law requires, and federal law requires us to apply not the presumptive rule of *Burton, supra,* 6 Cal.3d 375, 383-384, but the totality-of-the-circumstances rule of *Fare, supra,* 442 U.S. 707, 724-726. (*Lessie, supra,*

47 Cal.4th at p. 1167.) The trial court rejected the argument that Lessie had invoked his Fifth Amendment rights by asking to speak to his father and admitted both confessions. Lessie involved the question of whether that juvenile knowingly and voluntarily initially waived his *Miranda* rights, not whether he desired to invoke those rights after a valid waiver.

C. The Objective Test in *Davis* Is Applicable after a Knowing and Voluntary Waiver of *Miranda* Rights

After a knowing and voluntary waiver of *Miranda* rights, law enforcement officers may continue questioning until and unless the suspect clearly and unambiguously requests an attorney. (*Davis, supra,* 512 U.S. at p. 461.) "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Id.* at p. 459, emphasis in original.)

As noted above, the United States Supreme Court has stated that only the request for a lawyer automatically triggers constitutional protections since "the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation. (*Fare v. Michael C., supra,* 442 U.S. at p. 719.)

In *Davis,* the adult defendant was advised of, and waived his *Miranda* rights, then, an hour and a half into the interview with Naval Investigative Service agents, said, "Maybe I should talk to a lawyer." (*Davis, supra,* 512 U.S. at p. 455.) The agents reminded Davis of his right to counsel and told him they would not interrogate him further until he clarified whether he was requesting counsel. He told them he did not want an attorney and, after again being reminded of his right to remain silent and to counsel, the interrogation proceeded until he said, "I think I want a lawyer before I say

anything else," and questioning ceased. (*Davis, supra, 512 U.S. at p. 455.*) *Davis* concluded that a reasonable officer would have understood only that "the suspect *might be invoking the right to counsel,*" which is insufficient to require cessation of questioning. (*Davis, supra,* 512 U.S. at p. 459, emphasis added.) The question is not what the defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood the defendant to be saying. (*Davis* at p. 460; *Gonzalez* at p. 1126.)

D. The Trial Court Properly Relied on *Davis v. United States*

Here, after testimony from appellant and others, briefing and oral argument, the trial court denied appellant's motion to suppress his confessions, finding that under *Davis v. United States, supra,* 512 U.S. 452, appellant's requests to speak with his mother long after he had validly waived his rights were not unambiguous requests to speak to an attorney, and the officers were not required to terminate questioning. (2 RT 314-315, 317.) Before trial, when the *Miranda* issue was renewed as a motion in limine, the court stood by its original findings and denied the motion again. (6 CT 1603; 2 RT 333-334.)

Applying the factors in *Fare's* totality of circumstances test, the trial court found appellant's statements were voluntary because he displayed a significant amount of sophistication; he was intelligent, articulate, had prior police contacts and prior *Miranda* advisements, and was not a "vulnerable waif" who was being steamrollered by the police. (2 RT 310-311.) The trial court expressly resolved the credibility issue against appellant, finding that "the young Mr. Nelson here has zero credibility with the court." (2 RT 295, 315-317.).

Notwithstanding this record, the appellate court declined to apply the objective test in *Davis* to appellant's claim that his request to speak to his

mother was the legal equivalent of a request to speak with an attorney. (Slip opn. at pp. 30-31)

However, as stated in the dissent, in this post-waiver context, it is *Davis* which sets out the applicable test rather than *Fare*. Thus, "*Davis* does not focus on divining the suspect's subjective intent -- which may have been confused or inchoate -- in uttering particular words, but rather on the officer's objectively reasonable observations as to whether the suspect is revoking the previous waiver of *Miranda's* Fifth Amendment guarantees. Therefore, "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (Dis. opn. at p. 2, citing, *Davis, supra,* 512 U.S. at pp. 461-462.) Here, the officers knew appellant had experience dealing with law enforcement and the juvenile justice system, had served a two-month juvenile commitment, and he displayed the physical and emotional characteristics of a hardened and streetwise young adult. When appellant explained he wanted "to let [his mother] know what is happening" and talk to her about whether to take the polygraph (maj. opn. ante, at p. 17), a reasonable officer could conclude Nelson's request to speak with his mother was not a request for an attorney. Because this statement and Nelson's other statements that followed were ambiguous, officers could proceed with the interview. (See *People v. Stitely* (2005) 35 Cal.4th 514, finding *Davis* applies not only to post-waiver invocations of the right to counsel but also to the right to silence; dis. opn. at p. 2.)

Although the People have the burden to prove a *Miranda* waiver is knowing and voluntary, once there is a valid waiver, as here, "if a suspect subsequently requests an attorney" questioning must cease, but this protection "must be affirmatively invoked by the suspect." (*Davis, supra,* 512 U.S., at p. 459; dis. slip opn. at p. 1.) The trial court found appellant's requests to speak with his mother were ambiguous and not clear

invocations of his right to stop answering questions or to speak with an attorney. There is substantial evidence in the record to support the trial court's findings. The reviewing court must "accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence." (*Gonzalez* at p. 1125; dis. opn. at p. 4.)

Here appellant asked repeatedly to speak with his mother, not with an attorney. He talked to his grandmother and he talked to his brother, both of whom told him to wait to talk to his mother or an attorney before taking a polygraph. He asked again to talk to his mother but not to an attorney. To find that the first time appellant asked to speak to his mother – two hours after waiving his *Miranda* rights – that he unambiguously and actually meant he wanted to speak to an attorney finds no support in the case law except in *Burton*, which is defunct. As explained in *Fare* and noted above, only the request for a lawyer automatically triggers constitutional protections as "the lawyer occupies a critical position in our legal system because of his unique ability to protect the Fifth Amendment rights of a client undergoing custodial interrogation." (*Fare, supra,* 442 U.S. at p. 719.)

There is no explanation in the appellate opinion why a juvenile's waiver of *Miranda* rights is subject to the same test as an adult's pursuant to the United States Supreme Court in *Fare, supra,* 442 U.S. at p. 725, but analyzed under a different standard than an adult when purportedly asserting those rights after a valid *Miranda* waiver. In short, in the circumstances of this case, the appellate court's refusal to apply *Davis* to a juvenile carves out the same kind of "special rule" for minors rejected by the California Supreme Court in *Lessie,* and the United States Supreme Court in *Fare.*

Respondent respectfully asks this Court grant review to determine the applicability of the United States Supreme Court's objective test in *Davis* to a juvenile defendant who has knowingly and voluntarily waived his *Miranda* rights, then asked to speak to a his mother but not an attorney, in light of the demise of *Burton* in *People v. Lessie,* and therefore reverse the Court of Appeal's conclusion that appellant's confessions should have been suppressed.

CONCLUSION

For the foregoing reasons, respondent respectfully requests that this Court grant review of the Court of Appeal's decision, which erroneously found appellant's confessions should have been suppressed, and affirm appellant's convictions for one count of murder and two counts of burglary.

Dated: April 05, 2010

Respectfully submitted,

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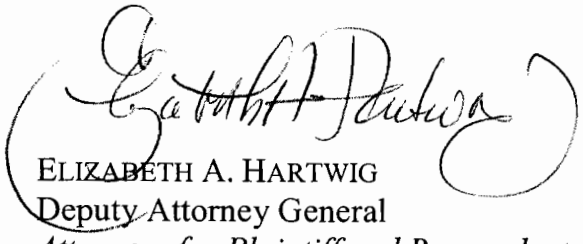

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CERTIFICATE OF COMPLIANCE

I certify that the attached PETITION FOR REVIEW uses a 13 point Times New Roman font and contains 4,109 words.

Dated: April 05, 2010

EDMUND G. BROWN JR.
Attorney General of California

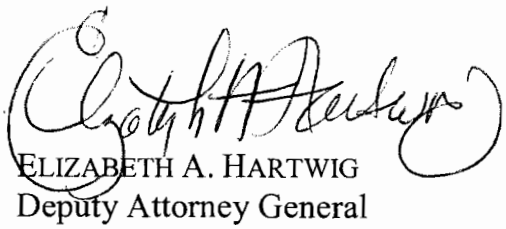

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EXHIBIT A

COPY

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,	
Plaintiff and Respondent,	G040151
v.	(Super. Ct. No. 04ZF0072)
SAMUEL MOSES NELSON,	O P I N I O N
Defendant and Appellant.	

Appeal from a judgment of the Superior Court of Orange County, Frank F. Fasel, Judge. Affirmed in part and reversed in part.

Mary Woodward Wells, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Barry Carlton and Elizabeth A. Hartwig, Deputy Attorneys General, for Plaintiff and Respondent.

Samuel Moses Nelson appeals from his murder and burglary convictions. He argues the incriminating oral and written statements he made during an interview regarding these crimes were obtained in violation of his Fifth Amendment rights as defined in *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*). He also requests this court review the proceedings relevant to his *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).) After reviewing the record, we find no abuse of discretion with respect to the *Pitchess* motion. However, we conclude Nelson's *Miranda* rights were violated when, after being accused of murder, Nelson requested to speak with his mother "to let her know what was happening" and he explained he wanted to "talk to her about it [and] see what [he] should do." The United States Supreme Court (*Fare v. Michael C.* (1979) 442 U.S. 707 (*Fare*)) and more recently the California Supreme Court (*People v. Lessie* (2010) 47 Cal.4th 1152 (*Lessie*)), have held a totality-of-the-circumstances test is to be applied in cases involving juveniles. Nelson's parental requests, when viewed in context, compel exclusion of his subsequent confession. Accordingly, the murder conviction and two burglary convictions must be reversed. However, we affirm the three burglary convictions relating to Jane Thompson because Nelson confessed to those crimes before he invoked his Fifth Amendment rights. In sum, the judgment is affirmed in part and reversed in part.

I

A. The Burglaries

In April 2004, Katherine Parks's home on Via Loma in Laguna Niguel was burglarized. Two purses were stolen. In May 2004, Sheryl Adler's home on Via Palma in Laguna Niguel was burglarized. Two wallets and a checkbook were stolen. In June 2004, Jane Thompson's home on Vista Way in Laguna Niguel was burglarized. Her purse, credit cards, and a checkbook were stolen.

On June 20, 2004, Nelson used Thompson's stolen Visa credit card to purchase $245 worth of lobster and steak at the Chart House and over $600 of food at the

Beach House Restaurant. A few days later (June 25), Nelson attempted to use Thompson's checks to buy $35 worth of sandwiches in Dana Point, but he was rebuffed.

B. The Murder

On June 25, 2004, deputies found 72-year-old Thompson beaten to death in her home. She died of massive blunt force head trauma, with multiple skull factures and brain hemorrhaging. Orange County Deputy Sheriffs Daniel Salcedo and Brian Sutton conducted a neighborhood canvas during their investigation of the murder. They contacted Nelson outside his house, and he agreed to be interviewed about the crime while sitting in Salcedo's vehicle. When asked if he had ever been inside Thompson's house, Nelson replied that a few weeks earlier he had been kicking his soccer ball outside and Thompson asked him to help her remove a dead mouse from her house. Nelson said he could not remember Thompson's name, but he pointed to her house that was approximately 45 to 60 feet from his own home. Nelson said he followed Thompson into her house and into the master bedroom to retrieve the dead mouse. He gave an accurate description of the floor plan, which was identical to his house.

Nelson stated he knew Thompson had been killed, and he was aware of the recent rash of burglaries in his neighborhood. He denied having anything to do with these crimes. Nelson admitted he occasionally liked to walk around his neighborhood late at night to smoke and check things out. He stated he was willing take a lie detector test.

Later that same day, Sutton and Salcedo investigated the charges on Thompson's credit cards, verified the charges were made, and obtained a description of the person who made the purchases. The next day, the manager of the Beach House Restaurant identified Nelson from a photo lineup as the person who had used Thompson's credit card to purchase $633.64 of food. He signed the transaction slip as Sam Adler.

Sutton and Salcedo returned to Nelson's home and asked if he would be willing to go to the Sheriff's Department to discuss the case. Salcedo told Nelson he did not have to go, and he was free to leave if he chose. Nelson agreed to accompany them, and he was driven to the Sheriff's Department in Santa Ana. In an audio/video recorded interview, Nelson was advised and waived his *Miranda* rights after some preliminary questions. Nelson restated he was in Thompson's home only to retrieve a dead mouse. When Salcedo questioned him about using Thompson's credit card, Nelson stated he found her purse with the credit cards on June 22 in the greenbelt area behind her house. Nelson admitted he used the credit cards at some local businesses, buying over $200 of food at the Chart House and over $500 of food at the Beach House restaurant. Nelson stated he signed the transaction slips as either Sam Thompson or Sam Adler. He stated these purchases were made on June 24. The restaurants' records showed the food was bought on June 20.

Salcedo continued to question Nelson about the credit card purchases, and Nelson eventually admitted he had entered Thompson's house late on June 18 when she was not home. Nelson explained he entered through an unlocked rear sliding glass door, went upstairs, and took a credit card from a desk drawer and some jewelry. Nelson said he returned to Thompson's house early in the morning (1:00 a.m.) on June 24 but discovered she was home. He returned several times that morning, watching and waiting for her to turn off the lights and go to bed. At approximately 2:30 a.m., Nelson saw Thompson had fallen asleep on the couch in front of the television. Nelson entered through the same unlocked sliding door, took her purse, and left. He explained he needed money for a trip to Colorado.

Nelson explained he returned to Thompson's house the next night because he needed more money for his Colorado trip. He entered Thompson's home and saw her asleep on the couch in front of the television. Thereafter, he exited and entered the house

a few times. After returning to the house a third time, and still finding Thompson asleep, Nelson returned to his home after deciding he needed to "formulate a better plan . . . ."

Despite his other admissions, during much of the interrogation Nelson denied responsibility for Thompson's murder. After several hours of interrogation Nelson ultimately revealed his involvement in the murder. The circumstances leading up to Nelson's confession will be discussed in greater detail anon.

Nelson confessed the murder occurred as follows: When at home Nelson changed into dark sweatpants and sweatshirt, diving gloves, and a beanie cap. He armed himself with a finishing hammer. He returned to Thompson's home and found she was still asleep. Nelson stood over her to see whether she was awake. When she stirred, he struck her one or two times on the side of the head with the hammer. Thompson rolled off the couch onto the floor. Nelson became enraged upon discovering some of her blood had gotten into his mouth. He did not like the taste and proceeded to angrily hit her with the hammer until he made a hole in her head.

Nelson described how he left the house, holding the hammer so it would not drip and leave a bloody trail. Later, he wrapped the hammer in one of the plastic bags available on his street for residents to use for dog droppings. He deposited the bag and his beanie cap in a trash can across the street. He then took off his clothes, wrapped them in a ball, and left them in the greenbelt behind Thompson's house.

During the interview, Nelson also admitted burglarizing the Parks's and Adler's residences. Later, Nelson told deputies they could find the ball of clothing not on the greenbelt but across the street. At other locations near Thompson's house, deputies located some of Thompson's credit cards and jewelry. The next day, Nelson wrote an apology letter to Thompson.

C. The Case

Nelson was charged with first degree burglary of Parks and Adler (counts 1 and 2), three counts of first degree burglary against Thompson (counts 3, 4, and 5), and

her murder during the felony (count 6). The indictment also alleged two enhancements: (1) Nelson personally used a deadly weapon pursuant to Penal Code section 12022, subdivision (b)(1), and (2), he committed the first degree burglaries against a person over the age of 65 pursuant to Penal Code section 667.9, subdivision (a).

Nelson filed a formal *Pitchess* motion for the discovery of three peace deputies' personnel records. The trial court denied the motion after conducting an in camera review of the requested records. Nelson's motion to suppress evidence of statements he made to his mother at the sheriff's headquarters interview room was granted. However, his motion to dismiss the indictment and his motion to transfer the case to juvenile court were both denied. Nelson filed an in limine motion to exclude his other incriminating statements to the police as involuntary and in violation of *Miranda, supra,* 384 U.S. 436. After the court denied this motion, Nelson waived his right to a jury and submitted to a court trial.

The court found Nelson guilty as charged and sentenced him to an indeterminate term of 25 years to life for the principal offense of murder, and concurrent upper six-year terms for four of the five burglary convictions. Sentence on the final burglary count was imposed and stayed. The terms for the special enhancements were stricken.

II

On appeal, Nelson argues his oral and written statements were erroneously admitted because the statements were obtained in violation of his Fifth Amendment rights as defined by *Miranda, supra,* 384 U.S. 436. He maintains a juvenile's request to speak to a parent is a *per se* invocation of his or her Fifth Amendment rights. (*People v. Burton* (1971) 6 Cal.3d 375 (*Burton*).) Alternatively, Nelson argues even under the federal totality-of-the-circumstances test (*Fare, supra,* 442 U.S. 707), his first parental request during the custodial interrogation was an invocation of his *Miranda* rights. As we will explain, only the latter argument has merit.

A. Standard of Review

"In considering a claim that a statement or confession is inadmissible because it was obtained in violation of a defendant's rights under *Miranda* . . . the scope of our review is well established. '"We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if they are substantially supported. [Citations.] However, we must independently determine from the undisputed facts, and those properly found by the trial court, whether the challenged statement was illegally obtained."' [Citation.] 'We apply federal standards in reviewing defendant's claim that the challenged statements were elicited from him in violation of *Miranda*.' [Citation.]" (*People v. Box* (2000) 23 Cal.4th 1153, 1194; see also *Lessie, supra,* 47 Cal.4th at p. __.)

In this case the facts relating to Nelson's interrogation are undisputed. It was videotaped and the audio tape was transcribed. We accept those facts, and the trial court was not required to make any additional factual findings. What is disputed in this case is the legal import of those facts. The legal question we must decide is whether after validly waiving his *Miranda* rights, Nelson's subsequent statements were legally sufficient to constitute an invocation of *Miranda* rights and required cessation of the interrogation. "'[W]e independently decide whether the challenged statements were obtained in violation of *Miranda* [*supra,* 384 U.S. 436].' (*People v. Davis* (2009) 46 Cal.4th 539, 586).)" (*Lessie, supra,* 47 Cal.4th at p. __.)

B. The Legal Test To Be Applied

In *Lessie,* our Supreme Court recently acknowledged and addressed head on "a long-standing, unresolved conflict between binding precedents" regarding the standard that should be applied for juveniles invoking their Fifth Amendment rights during a custodial interrogation. (*Lessie, supra,* 47 Cal.4th at p. __.) In short, the court decided a totality-of-the-circumstances test, as articulated by the United States Supreme Court opinion of *Fare, supra,* 442 U.S. at page 725 controls.

"This totality-of-the-circumstances approach is adequate to determine whether there has been a waiver even where interrogation of juveniles is involved. We discern no persuasive reasons why any other approach is required where the question is whether a juvenile has waived his rights, as opposed to whether an adult has done so. The totality approach permits—indeed, it mandates—inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]" (*Fare, supra,* 442 U.S. at p. 725.)

In so ruling, our Supreme Court in *Lessie* overruled its previous decision in *Burton, supra,* 6 Cal.3d 375 [holding juvenile's parental request, made during custodial interrogation, constituted a *per se* invocation of Fifth Amendment rights]. In *Lessie* the court reasoned *Burton*'s special rule for juveniles was inconsistent with the high court's subsequent decision in *Fare* that required courts to determine whether a defendant—minor or adult—waived his or her Fifth Amendment privilege by inquiring into the totality of the circumstances surrounding the interrogation. (*Fare, supra,* 442 U.S. at pp. 724-725.)

Accordingly, the legal test to be applied, in light of the totality of the circumstances, is whether the suspect validly invoked his *Miranda* rights. "'"[U]nder the familiar requirements of *Miranda*, . . . a suspect may not be subjected to custodial interrogation unless he or she knowingly and intelligently has waived the right to remain silent, to the presence of an attorney, and to appointed counsel in the event the suspect is indigent."' [Citations.] [The Supreme Court] has observed 'that no particular form of words or conduct is necessary on the part of a suspect in order to invoke his or her right to remain silent' [citation], and the suspect may invoke this right by any words or conduct reasonably inconsistent with a present willingness to discuss the case freely and completely. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 829 (*Samayoa*).)

C. Evolution of the Totality of the Circumstances Test

Although the *per se* test established in *Burton* has now been overruled in *Lessie*, it is nevertheless important to mention the *Burton* decision as it is the starting point for any discussion of totality-of-the-circumstances test's development. In *Burton*, a 16-year-old defendant spoke to deputies after having been advised of his *Miranda* rights. (*Burton, supra,* 6 Cal.3d at p. 379.) Prior to the statements, his father had arrived at the police station and asked to see him and was refused. Defendant had also asked to see his parents before questioning commenced. The Supreme Court held, "[W]hen, as in the instant case, a minor is taken into custody and is subjected to interrogation, without the presence of an attorney, his request to see one of his parents, made at any time prior to or during questioning, must, in the absence of evidence demanding a contrary conclusion, be construed to indicate that the minor suspect desires to invoke his Fifth Amendment privilege. [Citations.]" (*Id.* at pp. 383-384.)

In the *Burton* case our Supreme Court reasoned, "It appears to us most likely and most normal that a minor who wants help on how to conduct himself with the police and wishes to indicate that he does not want to proceed without such help would express such desire by requesting to see his parents. For adults, removed from the protective ambit of parental guidance, the desire for help naturally manifests in a request for an attorney. For minors, it would seem that the desire for help naturally manifests in a request for parents. It would certainly severely restrict the 'protective devices' required by *Miranda* in cases where the suspects are minors if the only call for help which is to be deemed an invocation of the privilege is the call for an attorney. It is fatuous to assume that a minor in custody will be in a position to call an attorney for assistance and it is unrealistic to attribute no significance to his call for help from the only person to whom he normally looks—a parent or guardian. It is common knowledge that this is the normal reaction of a youthful suspect who finds himself in trouble with the law." (*Burton, supra,* 6 Cal.3d at p. 382.) Prior to the United States Supreme Court ruling in *Fare,* California

courts followed *Burton* and viewed any request by a minor to speak with a parent to be *per se* invocation of the juvenile's Fifth Amendment rights.

In *Fare*, a 16-year-old murder suspect, with a lengthy juvenile record, responded to a *Miranda* advisement by asking if his probation officer could be present. (*Fare, supra,* 442 U.S. at p. 710.) When the juvenile was told that was not possible, he waived his rights and made admissions. (*Ibid.*) Prior to trial, the juvenile sought unsuccessfully to exclude his admissions relying on the *Burton* case. The California appellate court affirmed the lower court's ruling. (*Fare, supra,* 442 U.S. at p. 713, fn. 2.) Our California Supreme Court granted review, and by a divided vote, reversed the ruling, held, "[the] 'request to see his probation officer at the commencement of interrogation negated any possible willingness on his part to discuss his case with the police [and] thereby invoked his Fifth Amendment privilege.'" (*Id.* at p. 713.) The court based this conclusion on its view that, because of the juvenile court system's emphasis on the relationship between a probation officer and the probationer, the officer was "'a trusted guardian figure who exercises the authority of the state as *parens patriae* and whose duty it is to implement the protective and rehabilitative powers of the juvenile court.'" (*Id.* at pp. 713-714.) It concluded the juvenile's request for his probation officer was the same as a request to see his parents, and thus under *Burton's per se* rule it constituted an invocation of the juvenile's Fifth Amendment rights. (*Id.* at p. 714.) In making this ruling, the court also expressly rejected the totality-of-the-circumstances test, noting, "'[O]ur question turns not on whether the [juvenile] had the ability, capacity or willingness to give a knowledgeable waiver, and hence whether he acted voluntarily, but whether, when he called for his probation officer, he exercised his Fifth Amendment privilege.'" (*Id.* at p. 715.)

The United State Supreme Court granted review and reversed. (*Fare, supra,* 442 U.S. at p. 724.) It concluded the California Supreme Court erred in finding a juvenile's request for his probation officer was a *per se* invocation of his Fifth

Amendment rights under *Miranda*. (*Fare, supra,* 442 U.S. at p. 724.) It upheld the waiver as valid, holding that only a specific request for an attorney is a *per se* invocation of the right to counsel. Other requests (for parents, trusted adults, or probation officers) are to be considered as part of applying the normal totality-of-the-circumstances test. (*Id.* at pp. 724-725.) The court concluded, "There is no reason to assume that such courts—especially juvenile courts, with their special expertise in this area—will be unable to apply the totality-of-the-circumstances analysis so as to take into account those special concerns that are present when young persons, often with limited experience and education and with immature judgment, are involved. Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination. At the same time, that approach refrains from imposing rigid restraints on police and courts in dealing with an experienced older juvenile with an extensive prior record who knowingly and intelligently waives his Fifth Amendment rights and voluntarily consents to interrogation." (*Fare, supra,* 442 U.S. at pp. 725-726.)

In the 30 years following the *Fare* decision, California appellate courts have struggled with the question of whether the *Burton* test was still good law and can be reconciled with *Fare*. Recently our Supreme Court ended the debate and in the *Lessie* case declared the *Fare* totality-of-the-circumstances test must apply. "The decisions of [the Supreme Court] are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 (*Auto Equity Sales*).)

C. The Totality-of-The-Circumstances Test As Applied

We find instructive to review the totality-of-the-circumstances analysis as applied in the *Fare* and *Lessie* cases. In the *Fare* case, the juvenile suspect who was on probation asked at the outset to see his probation officer. When the police denied this

request, the juvenile without any further hesitation stated he would talk without consulting an attorney, and made various incriminating statements. (*Fare, supra,* 442 U.S. at pp. 710-712.) In considering the totality of the circumstances, the Supreme Court observed, "[N]o special factors indicate that [the juvenile] was unable to understand the nature of his actions. He was a 16 1/2-year-old juvenile with considerable experience with the police. He had a record of several arrests. He had served time in a youth camp, and he had been on probation for several years. He was under the full-time supervision of probation authorities. There is no indication that he was of insufficient intelligence to understand the rights he was waiving, or what the consequences of that waiver would be. He was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." (*Id.* at pp. 726-727.)

In addition the Supreme Court in *Fare* determined, "The transcript of the interrogation reveals that the police officers conducting the interrogation took care to ensure that [the juvenile] understood his rights. They fully explained to [the juvenile] that he was being questioned in connection with a murder. They then informed him of all the rights delineated in *Miranda*, and ascertained that [he] understood those rights. There is no indication in the record that [the juvenile] failed to understand what the officers told him. Moreover, after his request to see his probation officer had been denied, and after the police officer once more had explained his rights to him, respondent clearly expressed his willingness to waive his rights and continue the interrogation." (*Fare, supra,* 442 U.S. at p. 726.) In light of all the foregoing circumstances, the court concluded Fare's statements were voluntary and admissible.

In the *Lessie* case a 16-year-old murder suspect confessed to the crime during a custodial investigation. (*Lessie, supra,* 47 Cal.4th at p. __.) After being advised he was under arrest, police officers told Lessie he could make whatever phone calls he wanted to make. He requested to call his father, but he did not have the phone number. When the police obtained the number they asked Lessie if he wanted to call his father or

did he want them to make the call. Lessie indicated he would like to call his father. Before giving Lessie a telephone, the police officers asked a series of booking questions and advised him of his *Miranda* rights, which he waived. The officers then proceeded with more booking questions and asked Lessie about his prior commitments to juvenile hall. Thereafter, Lessie made numerous incriminating statements and again asked if he could make a phone call to his father. Lessie was advised he would be given a cellular telephone so he could speak with his father privately. Before the phone was provided, Lessie made additional incriminating statements. When he eventually was given the telephone to call his father, Lessie was unable to reach him and left a message stating he was in jail and requesting his father to call him back. (*Lessie, supra,* 47 Cal.4th at p. __.)

In reviewing the totality of the circumstances, the Supreme Court concluded, "Nothing in the record suggests defendant was unable to understand, or did not understand, the meaning of the rights to remain silent and to have the assistance of counsel, and the consequences of waiving those rights. [Lessie] was, at the time of his interrogation, 16 years old and, while no longer in school, had completed the 10th grade and held jobs in retail stores. While no evidence was offered that [Lessie] had, or had not, previously been advised of his rights under *Miranda, supra*, 384 U.S. 436 . . . he was no stranger to the justice system. [He] had been arrested twice before, once for burglary and making criminal threats, and once for fleeing police after a traffic stop and possessing marijuana. Both sets of charges led to proceedings in juvenile court, and the second resulted in a commitment to juvenile hall. Nothing in this background, or in the transcript of [Lessie's] interrogation, suggests his decision to waive his *Miranda* rights was other than knowing and voluntary. Asked by detectives to confirm that he understood each right as read to him, he answered affirmatively four times. While defendant did not expressly waive his *Miranda* rights, he did so implicitly by willingly answering questions after acknowledging that he understood those rights. [Citation.]" (*Lessie, supra,* 47 Cal.4th at p. __.)

The court in *Lessie,* determined, "The only apparent reason to question the validity of [Lessie's] waiver is his claim that, by asking to speak with his father, he intended to exercise his Fifth Amendment rights and that the police induced him to waive his rights by withholding a telephone until after he had confessed. To be sure, the police chose to continue questioning defendant rather than allowing him to use the telephone. The trial court noted this with evident frustration in concluding the police had committed 'at least a technical violation' of Welfare and Institutions Code section 627, subdivision (b), by not advising [Lessie] that he had the right to make telephone calls within an hour after being taken into custody. The bare violation of section 627, however, has very limited relevance in the present context." (*Lessie, supra,* 47 Cal.4th at p. __, fn. omitted.) The court concluded that based on the entire record, there was no basis for construing Lessie's request to speak with his father was an invocation of his Fifth Amendment rights.

D. Circumstances Surrounding Nelson's Statements[1]

Salcedo and Sutton first interviewed Nelson in a car in front of his house. Nelson denied any criminal involvement, and Nelson stated he was willing to take a polygraph test. The next day, Salcedo and Sutton returned with follow-up questions. Nelson's mother was not home, and Nelson agreed to go with the detectives to the police headquarters in Santa Ana for an interview. He was not handcuffed, promised anything, or threatened by the deputies.

When they arrived at police headquarters, Nelson was taken to an interview room. He was questioned for over six and one-half hours regarding Thompson's death and the burglaries. At the start of the interview (3:30 p.m.), Salcedo told Nelson they wanted to talk to him because there were a couple of things they wanted to clarify, and

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1 On our own motion, we take judicial notice of the DVD recording of the interview, which was considered by the trial court. We reviewed the recording in addition to the transcript provided by Nelson.

after talking with Nelson's mother, her boyfriend, and Nelson's brother, there were things "that they said that you said that just didn't make sense." Salcedo asked about Nelson's prior arrests. Nelson told him that four or five months earlier he was arrested after being caught in a stolen car. He also admitted a prior arrest for possessing stolen property. Nelson had recently spent 61 days in juvenile hall for his most recent arrest. During this portion of the interview, Nelson appeared relaxed and comfortable speaking with the two plain-clothed deputies and freely offered information in addition to answering their questions.

Salcedo stated he wanted to advise Nelson of his *Miranda* rights, and asked "I'm sure you're aware of those because of your prior arrests?" Nelson confidently replied, "Yeah." Salcedo stated it was a formality to advise him of these rights. Nelson stated, "Like you have the right to remain silent, okay, yeah." Salcedo asked Nelson if he had any questions, asked if he was speaking loud enough, and asked Nelson to indicate if he did not understand what was being read to him. Nelson responded, "All right." Salcedo stated he was going to read the *Miranda* rights verbatim from the card, but if Nelson had any questions, "I will re-explain it, more in kind of our terms." Nelson agreed and responded, "yes," after each *Miranda* right was read to him. Nelson indicated he understood everything that had just been explained to him.

After some introductory questions, Nelson repeated his dead mouse story from the previous day. Salcedo asked Nelson if he was being honest, and asked Nelson if there was anything else on his mind he wanted to discuss. Nelson replied, "Well, yeah, because I didn't want to mention this because it would be like weird and suspicious kind of, you know, cause of what's happening." Nelson admitted finding Thompson's purse in the greenbelt area behind her house. He confessed to using her credit cards at several local businesses. Nelson had been questioned for almost two hours at this point, and he still appeared willing to speak with the deputies and answer their questions.

Salcedo confronted Nelson with a problem in his story: His purchases had been made two days before Nelson said he found her purse. Only then did Nelson admit he grabbed credit cards from Thompson's coffee table when he was invited into her home to retrieve the dead mouse. Salcedo accused Nelson of lying about the dead mouse and asked Nelson if the police were going to find his DNA in the house. He said Nelson needed to clear his conscience and "be a man . . . ." Nelson asked if Salcedo was trying to say he murdered Thompson. Salcedo responded, "You brought it up, I didn't." Nelson adamantly denied killing "that lady."

The deputies continued to challenge Nelson's truthfulness, and revealed they had found his fingerprints on the sliding door to Thompson's living room. Nelson's demeanor changed. He looked less confident and started repeatedly rubbing his hands over his face and head before admitting he broke into Thompson's house. Nelson stated he opened the sliding door and entered Thompson's house when she was not home. He stole credit cards and some jewelry. He added that he returned to her house a few nights later. Nelson saw Thompson was at home and he waited until she fell asleep to sneak into her house to grab her purse. He stated Thompson was asleep on the couch. He denied burglarizing other houses in the area. Although the questioning had been ongoing without a break for a little over two and one-half hours, Nelson appeared willing to discuss the burglaries with the deputies in a friendly manner. He volunteered information about using Thompson's credit cards.

The tone of the interview changed during the third hour. Salcedo pressed Nelson to tell him about what else happened when he was in Thompson's house. He informed Nelson fingerprints were on a piece of paper that was bloody on both sides, suggesting someone had picked it up after hurting Thompson. The deputies also suggested Nelson's DNA was found at the house, and asked him for an explanation.

Salcedo questioned Nelson's truthfulness. Salcedo said, "I have some more information I want to ask you about. . . . Okay, remember when I asked you if you were willing to take a . . . lie detector test or polygraph yesterday?" Nelson replied he was still willing to do that. Salcedo asked Nelson if he hurt Thompson, and Nelson appeared angry at the accusation, and he denied harming her. Nelson attempted to convince the deputies he had nothing to do with the murder. However, the deputies persisted in accusing Nelson of hurting Thompson, and presented him with their theory of what happened that night. Nelson repeatedly stated he did not hurt her. Salcedo, in a combative tone, opined Nelson was lying and asked if he would make the same denial on the polygraph test. Nelson again stated he was telling the truth, but was becoming less talkative and assertive with the deputies. Many of their questions went unanswered or Nelson would simply nod his head. He began to slump down into his chair. He put his head in his hands and was looking down at the floor.

After seeing Nelson was becoming nonresponsive, Salcedo suggested Nelson take the polygraph test "right now," and he reminded Nelson "[y]ou can't deceive the machine. Do you understand that?" Nelson then made his first request to call his mother. He sat up and leaned forward to look at the deputies directly. In an assertive tone of voice, Nelson asked the following:

"Nelson: Can I call my mom?

"Salcedo: Sure. What do you want to call your mom for?

"Nelson: I want to let her know what is happening.

"Salcedo: Okay.

"Nelson: And I also want to like talk to her about it [and] see what I should do.

"Salcedo: Okay, but why the sudden urgency to talk to your mom?

"Nelson: No, I've been wanting to talk to my mom but I wanted to do it now before later.

"Salcedo: You've never brought that up, correct?

"Nelson: Because I didn't think it was important until now.

"Salcedo: But why is it so important right now?

"Nelson: Because I'm being accused of murder that's why it's important right now.

"Salcedo: Well 'cause [sic] we know you murdered . . . Thompson.

"Nelson: No I didn't."

Salcedo continued to question Nelson about whether he was being truthful, and reminded Nelson about his previous lies during the interview. Nelson resumed his position of looking at the floor and rarely responding to Salcedo's accusations. After only a few minutes had passed, Nelson made a second request to speak to his mother. Salcedo returned to the issue of taking the polygraph test, stating, "We have a person here that can do the test right now. Then we can see the truth." Nelson replied, "All right. I want to talk to my mom though." Salcedo replied, "Okay, wait, Sam, you got caught, do you understand that? Do you understand what that means, Sam?" Nelson stated he understood he had committed some crimes, but he repeated "I did not kill that lady though." Salcedo said the police knew he did it.

The interview continued for 20 minutes before Nelson made another request to speak to his mother. At this point Nelson was no longer volunteering information or conversing freely with the deputies. As the deputies repeated the same accusations, and continued to ask Nelson "why" he did it, Nelson sat hunched over in his chair, holding his stomach, and looking down at the floor. Occasionally, when pressed by one of the deputies to say something, Nelson would repeat the statements he did not hurt Thompson, and he did not know who killed her. At one point he stated he did not care who killed her, he just wanted them to leave him alone. He clarified, "It's not that I don't care that she, uh, whoever, gets, like whoever did it gets caught but it's the fact that I don't care who it is as long as you guys leave me alone."

Salcedo persisted with questions, changing the topic to questions about the theft of Thompson's purse and what Nelson did with the contents. Nelson answered some of their questions and admitted he made up the dead mouse story. At this point, Salcedo appeared angry and told Nelson he was lying about everything and law enforcement had evidence he hurt Thompson. Nelson retorted law enforcement had no evidence. Salcedo accused Nelson of calling the deputies liars. Sutton told Nelson circumstantial evidence was enough to convict him. Salcedo repeated the theory Nelson killed Thompson because he was afraid she would recognize him and he did not want to return to juvenile hall. The deputies repeated they knew he hurt her and demanded he tell them the truth about "why" he hurt her. Nelson then made his third request to speak with his mother.

"Salcedo: All we want is a simple explanation, [Nelson]. That's all I want. I want the truth. I want you to be a man and tell me.

"Nelson: I didn't, I didn't kill her.

"Salcedo: Did you hurt her?

"Nelson: No.

"Salcedo: You didn't do anything to . . . Thompson?

"Nelson: No.

"Salcedo: You took her purse?

"Nelson: Yes and I want to talk to my mom now.

"Salcedo: Okay. And your quote was I don't care what happened to her.

"Nelson: . . . that's because I was being . . . .

"Salcedo: No, that's what you said."

For the next five minutes, the deputies continued to question Nelson and accuse him of murder. They repeatedly demanded Nelson provide an explanation as to why he hurt Thompson. Nelson appeared to be listening to the deputies because he would occasionally nod his head, but he did not speak until he made his fourth request:

"Nelson: I didn't kill her . . . and let me talk to my mom now, please.

"Salcedo: What are you gonna [sic] cry to your mommy about?

"Nelson: I want to, I want to tell her what's going on right now, where I am.

"Salcedo: Are you going to tell her you murdered . . . Thompson?

"Nelson: No, because I didn't.

"Salcedo: Oh, you didn't?

"Nelson: No.

"Salcedo: So, do you think your mom's . . . .

"Sutton: . . . are you going to tell her about all the other stuff?

"Nelson: Yes.

"Salcedo: Oh you are?

"Nelson: I have to."

For approximately another five minutes, the deputies spoke to Nelson, who said very little in response. Salcedo advised Nelson he would be talking to his mother at jail. He stated, "You're never gonna [sic] be able to be back on your little couch with mommy and screwing around with your friends and ripping off all your neighbors ever again [Nelson], ever. You got caught. Do you understand that, [Nelson]? You're not, it's not a phone call to mommy and she's gonna [sic] come pick you up and you're gonna [sic] go home. It ain't gonna [sic] happen, okay? All we want is the decency of an explanation. . . ." Salcedo repeated the reasons why it was unlikely anyone else killed Thompson. He asked Nelson questions, but Nelson was nonresponsive. It was not until Salcedo again brought up the polygraph test that Nelson made his fifth request to call his mother.

"Salcedo: You didn't do anything? Okay, are you still willing to take that polygraph test for us?

"Nelson: Sure, if I can talk to my mom first.

"Salcedo: Okay. Ah, where's your mom right now?

"Nelson: What time is it?

"Salcedo: It is . . . almost 7 o'clock.

"Nelson: She should be home.

"Salcedo: Okay and do you want to use my cell phone?

"Nelson: Sure.

"Salcedo: Okay, do you mind if we sit here?

"Nelson: Sure.

"Salcedo: Okay . . . I'll dial the number for [you] and we're [going to] leave . . . the room and give you some privacy, is that fair? Okay? And then, are you gonna [sic] take the test for us?"

"Nelson: Yes.

"Salcedo: Look at me in the eye when you say that.

"Nelson: Yes.

"Salcedo: Okay, why are your eyes all watery?

"Nelson: Because I'm being blamed for a murder, plus, I'm gonna [sic] get busted for all this other stuff that I did.

"Salcedo: Oh, you're getting busted for all of it, [Nelson]. I mean everything. Everything [Nelson]. You got caught. You got caught. What's mommy's phone number?"

The deputies left the room, and Nelson started to cry. He left a tearful telephone message for his mother, stating he was in Santa Ana, he was being questioned "for a long time," and he was accused of killing their neighbor. Nelson stated he did not know what to do, and he had been there for three hours. In the message, Nelson stated the deputies wanted to give him a polygraph test and they told him he was going to jail for the rest of his life.

Nelson telephoned his grandmother next, stating he needed to talk to his mom. Nelson cried while he talked with his grandmother. Salcedo returned to the room to tell Nelson his mother had called the station earlier, and he gave Nelson a different telephone number to try. Salcedo left the room, and Nelson spoke next to his brother on the telephone. Nelson said the deputies told him they had evidence tying him to the murder and they "hardly even . . . let me make a phone call. Yeah I, they made me make 'em [sic] a trade basically. Like a phone call to take a polygraph test." Nelson asked his brother if he should tell them to "hold off" until he spoke to his mother.

When Salcedo and Sutton returned, Salcedo told Nelson the polygraph operator was there and waiting. Nelson, who was still on the telephone with his brother, told Salcedo, "[T]hey're telling me not to take the test until my mom or a lawyer is here, is that okay?" Salcedo replied, "That's your decision." Salcedo refused to speak to Nelson's brother and told Nelson he would call the brother back later. Nelson then asked if there was a telephone number his mother could use to call the station. Salcedo asked if Nelson's family was going to find his mom for him. Salcedo asked Nelson why he wanted to talk to his mother.

"Salcedo: Yeah, I mean, do you want to ask your mom if you should take this test? I mean, what, what do you want to do?

"Nelson: Uh, they don't want me to do anything until a lawyer or my mom is here. So I'm gonna, [sic] I need to wait."

Salcedo said he would inform the polygrapher of Nelson's decision. He asked, "Now did you, were you able to talk to everybody you wanted to?" Nelson said he did not talk to his mom, but he spoke with his grandmother and brother.

For the next hour, Salcedo lectured Nelson about doing the right thing, and he re-described the evidence against Nelson. Salcedo began to suggest the murder was just a regrettable mistake. He asked Nelson if his grandmother would want him to tell the

truth. Nelson again denied hurting Thompson and said he was not going to say he did something he did not do. He asked the deputies if they could "please stop talking about it." Nelson was crying and said very little during this hour. He sat slumped forward in his chair looking down at the ground.

The deputies ignored his plea to stop talking about the murder, and instead reminded Nelson he had not been truthful earlier in the interview and he needed to be honest. Four hours and forty-five minutes into the interview, Nelson asked if he could use the bathroom and made his sixth request to speak with his mother. He stated, "And I also need to call my mom, because she, my, my family wants her to come down here."

The deputies told Nelson he could use the restroom, and Sutton offered to get Nelson a candy bar. Nelson stated he was really hungry, and repeated, "Can I, could I try calling my mom again to see if I can reach her?" Salcedo told him to wait and left the room. When he returned he told Nelson, "Okay, . . . I think your mom may be coming down, so, uh, do you want to talk to your mom? Do you mind if I ask you any more things?" Nelson asked, "Is there anything new that you need to talk to me about?" Salcedo reminded Nelson they had to "drag" the truth out of him about the stolen credit card usage. He restated the evidence that had come to light so far, and continued to question Nelson for approximately five more minutes. Nelson was holding his stomach and his head. He did not respond to most of Salcedo's questions.

Approximately five hours into the interview, Nelson made his seventh and final request to speak to his mother. The following exchange took place:

"Nelson: Can I have a few minutes to myself?

"Salcedo: You certainly can, are you gonna [sic] tell us, think about what the truth is?

"Sutton: You know what[?] [D]o you want a pencil and a piece of paper to write down your feelings?

"Nelson: Yes."

Nelson stated he would write down what happened but then asked, "Could I use the phone real fast, though?" Salcedo asked who Nelson wanted to call. Nelson said, "I want to call my mom, and, uh, my brother again." Salcedo asked if Nelson could first write down his story but asked if Nelson would rather call first. Nelson said, "I'd rather call first."

The detective left the room, and Nelson's attempts to call his mother failed. He told Salcedo that he had not written down anything yet and asked if he could be alone "until my family gets here? They should be here in like 10 minutes[.]"

Salcedo asked if Nelson would like time alone to "write for us?" Nelson replied he wanted to be alone to think about stuff. Salcedo accused Nelson of "playing us again." Nelson said, "I know but this is my life here. I want some time." The deputies left the room and told Nelson to knock on the door when he was done.

The deputies left Nelson alone for a few minutes and returned and asked Nelson if he needed more time. Nelson asked if his family was there yet. He had been in the interview room five hours and 20 minutes. Salcedo said he would let him know when they arrived. Minutes later, Nelson completed a written statement admitting he murdered Thompson. The detective questioned Nelson about the details of his statement. At 10:00 p.m., the interview ended and Nelson met with his mother in the interview room.

The following day, a different sheriff's deputy (Larry Pool) questioned Nelson in juvenile hall about where his discarded clothing and some of Thompson's belongings were hidden. Pool also asked Nelson additional questions about the crime. Nelson agreed to tell Salcedo by cell phone the location of the concealed evidence. Nelson was not re-*Mirandized.* Pool also had Nelson write a letter apologizing for what he had done.

E. The Trial Court's Analysis and Ruling

Applying the totality-of-the-circumstances test to the undisputed facts, the trial court concluded Nelson made an initial voluntary waiver of his *Miranda* rights. The court made the further legal determination Nelson's subsequent requests to talk to and wait for his mother and an attorney were ambiguous. It inferred Nelson wanted to speak to his mother and the attorney about whether he should take a polygraph test. It found the facts Nelson continued to consent to voluntarily talk to the police and signed a written confession, rather than wait for his mother, showed Nelson never intended to invoke his Fifth Amendment rights. In addition, the court determined the juvenile hall and telephone interviews by Pool and Salcedo were "contemporaneous" with the earlier interview and admissible.

F. Our Analysis

As noted previously, "The totality approach permits-indeed, it mandates-inquiry into all the circumstances surrounding the interrogation. This includes evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights. [Citation.]" (*Fare*, *supra*, 442 U.S. at p. 725.)

Nelson does not dispute his initial waiver of his *Miranda* rights was valid. At the time of his interview, Nelson was 15 years old. He had two prior arrests, the most recent resulting in a several month stay in juvenile hall. Before Nelson was questioned, the detective advised him they needed to go through the "formality" of a *Miranda* right advisement. Nelson agreed he had heard the warning before and specifically told the detective he understood he had the right to remain silent. Nelson said he understood he could stop the detective at any time if he did not understand what rights he was waiving. His voluntary responses to the deputies' subsequent questions indicate he understood his

Miranda rights and waived them. "Nothing in the record indicates [Nelson] was of insufficient intelligence to understand the advisement and [Nelson] does not argue on appeal that the interview was unconstitutionally coercive. [Citation.]" (*People v. Hector* (2000) 83 Cal.App.4th 228, 236.)

Nelson argues his first request to speak to his mother was an invocation of his Fifth Amendment rights. Considering Nelson's request in light of the entire record, we conclude the request for a parent was clearly made in response to increased pressure from Salcedo to take a polygraph test and after Nelson was told he would not be able to "deceive" the polygraph. Salcedo had demanded proof Nelson did not kill Thompson. At this stage of the interrogation, the DVD recording plainly showed a significant change in Nelson's demeanor. The assertiveness obvious at the beginning of the interrogation had dissolved. Nelson was less responsive to the deputies' questions. He slumped in his chair, put his head in his hands, and stared at the floor. His conduct, words and demeanor together were an unmistakable indication Nelson was becoming overwhelmed by hours of persistent interrogation.

Turning to the specific words spoken, we discerned no ambiguity or equivocation. Nelson first asked, "Can I call my mom?" and made six other similar subsequent requests before confessing. Nelson's requests to speak to his mother were not conditional. (Cf. *People v. Gonzalez* 34 Cal.4th 1111 [statement by accused that if he was going to be charged he wanted to speak to a public defender held to be conditional and insufficient].) The requests were not uncertain. (Cf. *Davis v. U.S.* (1994) 512 U.S. 452, 460 [the statement "Maybe I should talk to a lawyer" was too ambiguous to be construed as request for counsel].) To the contrary, here the DVD shows Nelson's subsequent requests for his mother grew shorter, but more insistent. His second and third requests were not questions, but rather affirmative statements: "I want to talk to my mom." His fourth request sounded like a plea: "[A]nd let me talk to my mom now, please."

We recognize generally police officers need not seek clarification when faced with a statement that could be interpreted as an invocation of *Miranda* rights. (*People v. Johnson* (1993) 6 Cal.4th 1, 27.) But here, the deputies repeatedly chose to question Nelson regarding his request. Nelson attempted to explain why he wanted to speak to his mother, but after his fourth request the deputies began to ridicule Nelson. They referred derisively to Nelson's mother as his "mommy," asked Nelson what he was going "to cry to [his] mommy about." They taunted Nelson, telling him that he was never going to "be able to be back on [his] little couch with mommy." Statements such as these only served to discourage and thwart Nelson's efforts to exercise his Fifth Amendment rights, and must be considered in evaluating Nelson's statements.

Finally, we found the reasons Nelson gave for wanting to speak to his mother distinguish this case from *Fare* and *Lessie.* In his first parental request, Nelson referenced the polygraph test and said he wanted to talk to his mother about what he should do. When asked about the sudden urgency to speak with his mother, Nelson responded, "Because I'm being accused of murder that's why it's important now." Later on he was heard to leave a tearful message for his mother stating he was accused of killing their neighbor and he didn't know what to do. These statements clearly establish Nelson realized he was faced with the prospect of incriminating himself during a polygraph test and a charge of murder was imminent. He explicitly expressed a desire to speak to his mother for the purpose of obtaining her advice on how he should proceed. On these facts, there is no basis for construing Nelson's request to speak with his mother as anything other than an invocation of his Fifth Amendment rights, and any reasonable officer would know Nelson wanted the questioning to stop.

The trial court concluded Nelson simply wanted his mother to ask about the polygraph test. Even if we were to construe the request so narrowly, it still amounts to an invocation of his *Miranda* rights. Seeking advice from his mother about whether to remain silent and avoid incriminating himself on the polygraph test was a clear indication

he desired assistance to protect his legal rights. A lie detector test is a form of custodial interrogation. (*People v. Carter* (1970) 7 Cal.App.3d 332, 338, overruled on other grounds in *People v. Beagle* (1972) 6 Cal.3d 441, 443.) It is an effective way to secure incriminating statements from a suspect. If a suspect made a clear and unequivocal request to secure the advice of a lawyer as to whether he should agree to take a polygraph test, there would be no dispute the request constituted an invocation.

We recognize Nelson, like the juveniles in *Fare* and *Lessie,* was no stranger to the criminal justice system. But he was a year younger than these defendants and he was subjected to a much lengthier interrogation. After more than four hours of aggressive questioning, the 15 year old complained he was "really hungry." One of the deputies responded by offering to get Nelson a candy bar. Over the course of the interrogation Nelson was repeatedly tearful when speaking with the deputies, during telephone messages to his mother, and when speaking with family members on the phone. While individually these various factors may not be compelling, when taken as a whole they plainly demonstrate the degree to which Nelson was worn down by the persistent and extensive questioning. (Cf. *Fare, supra,* 442 U.S. at pp. 726-727 [in considering totality of the circumstances the court noted the evidence showed the juvenile "was not worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit"].)

This case is also distinguishable from *Lessie* where the court found the juvenile, by willingly answering questions, implicitly waived his rights. (*Lessie, supra,* 47 Cal.4th at p. __.) Here, Nelson initially answered questions eagerly, but over the course of time that willingness evaporated. As the interrogation continued, he became increasingly nonresponsive to questions and was no longer volunteering information. He indicated he did not care who was responsible for the murder, he just wanted the deputies to leave him alone. When pressed to make a decision regarding taking the polygraph test, Nelson said he had been told by his family not to do anything until his mother arrived, so

he needed to wait. Referring to the murder, Nelson asked the deputies to "please stop talking about it." This request was ignored. When asked if he minded if the deputies continued to ask him questions, Nelson responded, "Is there anything new that you need to talk to me about?" Another round of questions followed.

The record shows that during the latter part of the interview Nelson, by his statements and conduct, showed he no longer was willing to answer questions. While Nelson sat holding his stomach and his head, he did not respond to questions unless Salcedo forcefully demanded a response. Later in the interrogation, Salcedo candidly commented he felt as if he were being forced to "drag the truth" out of Nelson.

The record also shows Nelson made several attempts to end the questioning. He asked if he could have a few minutes to himself. After asking again to use the phone to reach his mother or brother, Nelson was asked if he could first write down "his story" for the deputies. Nelson responded he would rather call first. When deputies returned, Nelson said he had not written anything down yet, and asked if he could be alone until his family arrived. The deputies asked Nelson if he wanted time alone to write things down and Nelson replied he wanted to be alone to "think about things." When he was accused by one of the deputies of "playing us again," Nelson responded this was his life, and he needed time. Deputies then left Nelson in the room alone and told him to knock on the door when he was "done." However, the deputies did not wait for his knock but rather returned a few minutes later and asked if he needed more time to write. Nelson responded by asking if his family had arrived. The deputies left again telling Nelson they would let him know when his family arrived. Minutes later Nelson wrote out and signed a statement admitting he committed the murder.

Admittedly the deputies allowed Nelson to make numerous unsuccessful attempts to contact his mother, but we find no support in the record for the trial court's conclusion Nelson decided to confess rather than wait to speak with his mother. After

considering Nelson's age, experience, maturity, sophistication, the length, intensity, and content of the interrogation, we conclude Nelson's purpose in requesting to speak with his mother was to secure her assistance to protect his Fifth Amendment rights. Further evidence of Nelson's desire to invoke his *Miranda* rights is evidenced by his various requests to end the conversation about the murder. His words and conduct were inconsistent with "a present willingness to discuss the case freely and completely. [Citation.]" (*Samayoa, supra,* 15 Cal.4th at p. 829.) In short, the record reflects a juvenile who persisted in his attempts to seek his mother's assistance in protecting his rights, who numerous times indicated he did not want to continue speaking, and after over five hours of interrogation submitted to the deputies insistence that he write out a confession.

G. Our Conclusion

In summary, any statements made by Nelson after he first requested to speak with his mother were obtained in violation of *Miranda.* Moreover, Nelson's subsequent words and conduct were consistent with a person seeking to invoke his *Miranda* rights. Thus, the confessions obtained are inadmissible. In addition, Nelson's admissions made in juvenile hall and during telephone interviews are inadmissible. We conclude admission of the confession and subsequent incriminating statements were prejudicial and compel reversal of the convictions for murder and burglary (with the exception of the three burglary counts relating to Thompson because Nelson admitted these crimes before invoking his *Miranda* rights). (*Chapman v. State of California* (1967) 386 U.S. 18.)

H. *The Dissent*

Our dissenting colleague suggests we have "resuscitate[d] the per se parental invocation rule" of *Burton.* (Dis. opn. *post*, p. 1) Not so. As stated repeatedly throughout this opinion, we have analyzed the undisputed facts of this case under the

Fare/Lessie totality-of-the-circumstances test. (*Fare, supra,* 442 U.S. at p. 725; *Lessie, supra,* 47 Cal.4th at p. __.) As we have discussed, the *Fare* case concerned the validity of a juvenile's initial waiver of his *Miranda* rights, and the *Lessie* case, like the case before us, involved in part, a juvenile's parental request following a valid waiver. "The decisions of [the Supreme Court] are binding upon and must be followed by all the state courts of California." (*Auto Equity Sales, supra,* 57 Cal.2d at p. 455.) Our dissenting colleague has adopted a more narrow approach, applicable to adult suspects, and thus he reviews the facts from the "vantage point of a reasonable officer." (Dis. opn. *post,* fn. 2; *Davis, supra,* 512 U.S. 452 [holding reasonable officer perspective applies to adult suspects invoking *Miranda* rights following a valid waiver] and *People v. Gonzalez* (2005) 34 Cal.4th 1111 [implementing *Davis* test]). We respectfully disagree this test should be adopted for juveniles. Nothing said by the *Fare* or *Lessie* courts suggests that the totality-of-the-circumstances test must be abandoned when evaluating whether a postwaiver request to speak to a parent constitutes an invocation of a minor's *Miranda* rights. We decline the invitation of our dissenting colleague to do so.

III

Nelson requested this court review the materials considered by the trial court in camera before denying his *Pitchess* motion. The Attorney General does not object. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1227-1228 [procedure for review] (*Mooc*).) We have reviewed the sealed reporter's transcript. In ruling on the *Pitchess* motion, the trial court properly asked the court reporter to make a record of the court's questions, comments, and inquiry into the particular files, records, and documents produced by the custodian. (*Mooc, supra,* 26 Cal.4th at pp. 1228-1229.) The trial court did not abuse its discretion in finding no discoverable materials. (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039 [standard of review].)

IV

The murder conviction for the murder of Thompson, and the burglaries of Parks and Adler are reversed (counts 1, 2 and 6). We affirm the remaining burglary convictions (counts 3, 4 and 5). Accordingly the judgment is affirmed in part and reversed in part.

O'LEARY, ACTING P. J.

I CONCUR:

IKOLA, J.

ARONSON, J., Concurring and Dissenting:

The majority's justification for overturning Nelson's murder conviction rests on its conclusion that when Nelson first asked to speak with his mother, he actually wanted to speak with a lawyer. My colleagues view this as an unambiguous request for an attorney. Indeed, they conclude "there is no basis for construing Nelson's request to speak with his mother as anything other than an invocation of his Fifth Amendment rights," and any reasonable officer would know this. (Maj. opn. *ante*, at p. 27.)

It is difficult to fathom why this is so. In *Davis v. United States* (1994) 512 U.S. 452 (*Davis*), the Supreme Court held that to stop a police interview after officers obtain a valid *Miranda* waiver,[1] the suspect "must unambiguously request counsel." (*Id.* at p. 459.) A minor's request to call his mother "'to inquire about . . . *possible* representation'" is not an unambiguous request for counsel and therefore does not require officers to cease questioning. (*Flamer v. State of Delaware* (3d Cir. 1995) 68 F.3d 710, 725, italics added.) As the high court has explained, "[I]f a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require the cessation of questioning." (*Davis*, at p. 459; see, e.g., *McNeil v. Wisconsin* (1991) 501 U.S. 171, 178 (*McNeil*) ["the *likelihood* that a suspect would wish counsel to be present is not the test"].) Yet the majority holds Nelson unambiguously made known his wish for counsel without even making reference to an attorney, but only his mother. The majority thus appears to resuscitate the per se parental invocation rule of *People v. Burton* (1971) 6 Cal.3d 375, which our Supreme Court just overturned. (*People v. Lessie* (2010) 47 Cal.4th 1152 (*Lessie*).)

To invoke the Fifth Amendment right to counsel, the individual must "'express[]' his wish for the particular sort of lawyerly assistance that is the subject of *Miranda*." (*McNeil, supra*, 501 U.S. at p. 178.) A minor's request to speak with a parent

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[1] *Miranda* v. *Arizona* (1966) 384 U.S. 436.

may have nothing to do with securing the advice of an attorney or asserting the right to remain silent. (See, e.g. *People v. Hector* (2000) 83 Cal.App.4th 228, 236 (*Hector*) [minor wanted to inform his mother about the crime before she heard it from someone else]; *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1509 (*Maestas*) [minor wanted to let parents know "what was happening or to seek comfort"].) In any event, in the postwaiver context here, the inquiry under *Davis* does not focus on divining the suspect's subjective intent — which may have been confused or inchoate — in uttering particular words, but rather on the officer's objectively reasonable observations. "If the suspect's statement is not an unambiguous or unequivocal request for counsel, the officers have no obligation to stop questioning him." (*Davis*, *supra*, 512 U.S. at pp. 461-462.)

Under article I, section 28, subdivision (d), of the California Constitution, we must apply federal standards in deciding whether to exclude a confession for violating *Miranda*. (*People v. Crittenden* (1994) 9 Cal.4th 83, 129 [pursuant to California's adoption of federal standard, invocation of right to counsel must be unambiguous and unequivocal]; *People v. Cunningham* (2001) 25 Cal.4th 926, 993 [same].)

Here, as I discuss in more detail below, the officers knew Nelson had experience dealing with law enforcement and the juvenile justice system, had served a two-month juvenile commitment, and displayed the physical and emotional characteristics of a hardened and streetwise young adult. When Nelson explained he wanted "to let [his mother] know what is happening" and talk to her about whether to take the polygraph (maj. opn. *ante*, at p. 17), a reasonable officer could conclude Nelson's request to speak with his mother was not tantamount to a request for legal assistance. Because this statement, and Nelson's other statements that followed, were ambiguous, officers could proceed with the interview.

The *Davis* standard applies not only to postwaiver invocations of the right to counsel, but also the right to silence. (*People v. Stitely* (2005) 35 Cal.4th 514.) As our Supreme Court has explained, when a suspect validly waives his or her Fifth Amendment rights, as the majority agrees Nelson did here, "[i]t is not enough" that, later in the interview, "a reasonable police officer . . . understand[s] that the suspect *might* be

invoking his rights. [Citation.] Faced with an ambiguous or equivocal statement, law enforcement officers are not required . . . either to ask clarifying questions or cease questioning altogether." (*Id.* at p. 535.) Consequently, the majority's analysis fares no better supposing Nelson invoked his right to silence rather than an attorney.

Several jurisdictions have applied *Davis* to juvenile defendants. (*In re Christopher K.* (Ill. 2005) 841 N.E.2d 945, 964-965; *In re Frederick C.* (Neb.Ct.App. 1999) 594 N.W.2d 294, 301-302; *State v. Williams* (Minn. 1995) 535 N.W.2d 277, 284-286.) Until now, it appears no court has refused to do so. (See *In re H.V.* (Tex. 2008) 252 S.W.3d 319, 326-327 [observing it "need not decide" the issue since juvenile's statement he "'wanted his mother to ask for an attorney'" satisfied *Davis* standard].) There seems little reason to suppose the high court would conclude juveniles fall outside its holding in *Davis*, given the court "recognize[d] that requiring a clear assertion of the right to counsel might disadvantage some suspects who — because of fear, intimidation, lack of linguistic skills, or a variety of other reasons — will not clearly articulate their right to counsel although they actually want to have a lawyer present." (*Davis*, *supra*, 512 U.S. at p. 460.)

As the Supreme Court explained, "[T]he primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves. '[F]ull comprehension of the rights to remain silent and request an attorney [is] sufficient to dispel whatever coercion is inherent in the interrogation process.' [Citation.] A suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted." (*Davis*, *supra*, 512 U.S. at pp. 460-461.) Noting that in addition to the *Miranda* warnings, *Edwards v. Arizona* (1981) 451 U.S. 477 (*Edwards*) affords a second layer of prophylaxis by requiring immediate and total cessation of questioning when the suspect requests an attorney, the high court concluded a third order of protection — extending *Edwards* to ambiguous requests — was unnecessary where a suspect has validly waived his rights. (*Davis*, at pp. 459-462.)

This reasoning applies to juveniles who validly waive their rights. The majority does not dispute Nelson comprehended his rights, as contemplated in *Miranda*, *Edwards*, and *Davis*, and validly waived them. It follows, therefore, that *Davis* applies. Because *Davis* applies in the postwaiver setting here, the majority's reliance on pre-waiver cases is misplaced. (See, e.g., *Lessie*, *supra*, 47 Cal.4th 1152; *Fare v. Michael C.* (1979) 442 U.S. 707 (*Fare*)) are simply inapposite. Those cases attempt to discern under a totality of the circumstances test whether an individual's initial waiver of rights is valid, not whether a suspect has invoked his rights later in the interview.

Even assuming arguendo that *Davis*'s unambiguous and unequivocal invocation standard does not apply, a totality of circumstances analysis favors the trial court's conclusion Nelson did not intend to invoke his Fifth Amendment rights after his initial waiver. His own testimony establishes he intended to speak with the officers, not remain silent or request a lawyer. He testified at the pretrial *Miranda* hearing that during the course of the interview he thought it would "seem funny" if he did not talk to the investigators, and he conceded he was aware of the role lawyers played because an attorney had represented him in juvenile court. I do not believe we can say, consistent with our appropriately circumscribed and limited vantage point on appeal, that substantial evidence does not support the trial court's determination of Nelson's intent. The trial court, having heard Nelson and the other witnesses, was in the best position to make that assessment.

Whether a defendant has invoked the right to consult a lawyer or asserted the right to silence is a factual determination. (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1238 (*Musselwhite*).) The trial court here, after viewing the videotaped interview and hearing several witnesses, including Nelson, concluded Nelson did not unambiguously and unequivocally invoke his Fifth Amendment rights. My colleagues brush aside the trial court's conclusions, explaining that Nelson's desire to speak with his mother was a "clear indication" he invoked his rights. (Maj. opn. *ante*, at p. 27.) The trial court did not think so, and we are bound to accept the trial court's resolution of disputed facts and inferences. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125

(*Gonzalez*).) I therefore respectfully dissent from the majority's decision to reverse Nelson's murder conviction and the burglaries alleged in counts 1 and 2, but otherwise join in affirming the burglary convictions in counts 3, 4, and 5.

* * *

It is settled that a minor may waive *Miranda* rights if the minor "has the capacity to understand the warnings given him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare, supra,* 442 U.S. at p. 725.)

Although police officers must inform minors of their right to an attorney and their right to silence, "courts have declined to impose a requirement that police advise minors of a right to speak with parents or to have a parent present during questioning." (*In re John S.* (1988) 199 Cal.App.3d 441, 445 [failure to consult parents before interviewing juvenile does not negate minor's valid *Miranda* waiver]; *Maestas, supra*, 194 Cal.App.3d at 1509; see also *In re Bonnie H.* (1997) 56 Cal.App.4th 563, 577 [validity of juvenile waiver of rights not affected by failure to seek additional consent of parent or guardian].) Whether a juvenile has validly waived *Miranda* rights is determined by considering the totality of circumstances surrounding the interrogation, including "the juvenile's age, experience, education, background and intelligence, and . . . whether he has the capacity to understand the warnings given to him, the nature of his Fifth Amendment rights, and the consequences of waiving those rights." (*Fare, supra,* 442 U.S. at p. 725.)

Here, applying *Fare*'s totality of circumstances test, the trial court rejected Nelson's claim he did not knowingly and voluntarily waive his *Miranda* rights at the outset of the interview, and the majority does not dispute that conclusion. The court also rejected Nelson's claim he invoked his *Miranda* rights during the interview when he requested to speak with his mother, finding these statements to be ambiguous. The court reached this decision after hearing testimony from several witnesses, including Nelson, and reviewing the videotape and transcript of Nelson's interview.

In reviewing Nelson's *Miranda* claim, we must accept the trial court's resolution of disputed facts and inferences contained in its express or implied factual

findings, if supported by substantial evidence. (*People v. Storm* (2002) 28 Cal.4th 1007, 1022, 1023; *People v. Whitson* (1998) 17 Cal.4th 229, 248.) We exercise independent review over legal issues, however. (*People v. Benson* (1990) 52 Cal.3d 754, 778.) "Although we independently determine whether, from the undisputed facts and those properly found by the trial court, the challenged statements were illegally obtained [citation], we '"give great weight to the considered conclusions" of a lower court that has previously reviewed the same evidence.'" (*People v. Wash* (1993) 6 Cal.4th 215, 236; *Musselwhite, supra,* 17 Cal.4th at pp. 1238-1239.)

The record amply supports the trial court's determination Nelson validly waived his *Miranda* rights at the beginning of the interview. The officers fully explained to Nelson his *Miranda* rights, and Nelson responded he understood his rights. After some introductory questions, he waived his rights so he could engage the officers with his explanation he entered Thompson's home to retrieve a dead mouse for her. Nothing in the record suggested Nelson lacked the capacity to understand the warnings he received, or that he was confused about his right to the advice of a lawyer or unaware of the potential help a lawyer could provide. Nelson was an experienced 15 year old who had several past dealings with police officers when he was arrested for prior juvenile offenses. Nelson had received *Miranda* warnings on several occasions, the most recent occurring only two months before the interview when police officers arrested him for residential burglary. Nelson conceded during his testimony that during Salcedo's explanation of his rights, Nelson, without prompting, anticipated the advisement and before the officer finished, volunteered "'like you have the right to remain silent.'" Nelson testified he also understood the role of an attorney because a lawyer previously had represented him in juvenile court. The record therefore supports the conclusion that, unlike some minors, Nelson was an experienced and "streetwise" juvenile capable of independently exercising his *Miranda* rights. The majority agrees with this conclusion, citing Nelson's experience with the criminal justice system and his familiarity with *Miranda*.

Later in the interview, officers requested Nelson immediately submit to a lie detector test. Nelson asked to call his mother because he wanted to "let her know what is happening" (maj. opn. *ante*, at p. 17), and to "talk to her about it and see what I should do." (*Id.* at pp. 17-18.) The trial court found Nelson's request was ambiguous, and although he may have sought his mother's input on whether to take a polygraph, the court did not interpret this as an assertion of his *Miranda* rights. The court did not view Nelson as "some vulnerable waif," undoubtedly referring to Nelson's demeanor and experience with law enforcement, and therefore concluded there was nothing in his statement or conduct to suggest an unambiguous and unequivocal invocation of his rights.

The majority rejects the trial court's finding and concludes this criminally experienced and streetwise youth, speaking directly to the officer and "[i]n an assertive tone of voice" (maj. opn. *ante*, at p. 17), mistakenly requested to speak with his mother when he meant to ask for an attorney, and that a reasonable officer would have recognized this as an unambiguous and unequivocal request for counsel. This dubious proposition collapses if a reasonable officer could have found Nelson's statement to be ambiguous.

The importance of determining whether a suspect unambiguously invoked the right to counsel stems from *Davis, supra*, 512 U.S. 452. As I discussed earlier, the Supreme Court explained that *Miranda* warnings offered a suspect primary protection against an involuntary and coerced waiver of Fifth Amendment rights. (*Id.* at p. 461.) *Davis* noted that under *Edwards, supra*, 451 U.S. at pp. 484-485, a suspect who waives his *Miranda* rights and agrees to answer questions may assert the right to counsel at any time during the interview, and police officers immediately must stop questioning the suspect until an attorney is present or the suspect reinstates contact. (*Davis,* at p. 458.) For suspects who initially waive their rights, *Edwards* provides additional protection "if a suspect subsequently requests an attorney" because "questioning must cease," but this protection "must be affirmatively invoked by the suspect." (*Davis*, at pp. 460-461.)

Davis then focused on how courts should analyze a suspect's ambiguous request for counsel made during a police interrogation. To invoke the protection under *Edwards*, the request for counsel must be "unambiguous" and "unequivocal." (*Davis, supra,* 512 U.S. at p. 459.) The court explained that "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel, our precedents do not require cessation of questioning." (*Davis, supra,* 512 U.S. at p. 459.) Thus, the suspect "must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney." (*Ibid.*) Officers therefore are not required to stop questioning the suspect in the face of ambiguous comments that might be construed as a request for a lawyer. (*Ibid.*)

In *Gonzalez, supra,* 34 Cal.4th 1111, the California Supreme Court implemented the holding in *Davis* and articulated the standard of review for determining whether a suspect's statement, made during a custodial interrogation after initially waiving *Miranda*, constituted a request for counsel. "[A] reviewing court—like the trial court in the first instance—must ask whether, in light of the circumstances, a reasonable officer would have understood a defendant's reference to an attorney to be an unequivocal and unambiguous request for counsel, without regard to the defendant's subjective ability or capacity to articulate his or her desire for counsel, and with no further requirement imposed upon the officers to ask clarifying questions of the defendant. In reviewing the issue, moreover, the reviewing court must 'accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence.'" (*Id.* at p. 1125.)

In *Gonzalez*, the defendant waived his *Miranda* rights and agreed to take a lie detector test, but then stated, "if for anything you guys are going to charge me I want to talk to a public defender too, for any little thing." (*Gonzalez, supra,* 34 Cal.4th at p. 1119.) The officer assured the defendant he could talk to a public defender at any time, but explained an arrest was not a prosecution, although police would "book[]" him

for murder and hold him in custody that night. The defendant subsequently confessed the next day in a follow-up interview. (*Id.* at p. 1126.) The Supreme Court concluded the defendant's statement was ambiguous and therefore would not have put a reasonable officer on notice he wanted to speak with a lawyer before answering any more questions. "The question is not what defendant understood himself to be saying, but what a reasonable officer in the circumstances would have understood defendant to be saying." (*Ibid.*) The court explained "the police could reasonably have assumed the defendant was capable of making an unequivocal request for counsel if he so desired" because they were aware the defendant had prior contacts with law enforcement, was on probation, and had been advised of his *Miranda* rights on previous occasions. (*Id.* at p. 1127.)

Similarly, the officers here could have assumed Nelson was capable of either directly invoking his rights or raising the issue in a manner that would alert a reasonable officer his statement was equivalent to a request for a lawyer or an assertion of the right to remain silent. In other words, adopting *Davis*'s holding to the juvenile setting,[2] under the circumstances known to the officer, it must be clear the minor's request to speak with a parent is tantamount to a request for legal assistance from an attorney. (*Davis, supra,* 512 U.S. at p. 459, italics added ["Although a suspect need not 'speak with the discrimination of an Oxford don,' . . . he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer *in the circumstances* would understand the statement to be a request for an attorney"].) An interviewing officer may, as here, seek clarification from the minor to discern whether the minor actually wanted a lawyer, but *Davis* does not require this, and the officer may continue the interview in the face of the suspect's ambiguous or equivocal statements.

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[2] The holding in *Davis* could be interpreted to require juveniles to explicitly assert their right to a lawyer or to remain silent. At a minimum, I conclude *Davis* requires evaluation of the minor's request to speak with a parent from the vantage point of the interviewing officer, and the interview must cease if the statement objectively alerted, or should have alerted, the officer the minor unambiguously and unequivocally sought to invoke his or her rights.

Nelson's statement is at least as ambiguous as those found in other cases. In *People v. Roquemore* (2005) 131 Cal.App.4th 11, 24, the appellate court concluded the defendant did not make an unequivocal request for counsel when he asked, "'Can I call a lawyer or my mom to talk to you?'" In discussing the issue, the court listed numerous cases that "found references to an accused's expressed desire for counsel to be ambiguous." (*Ibid.*; see *Gonzalez, supra*, 34 Cal.4th at pp. 1119, 1122-1127 ["'[I]f for anything you guys are going to charge me I want to talk to a public defender too, for any little thing'" found to be equivocal and ambiguous]; *Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072 [defendant's statement, "'I think I would like to talk to a lawyer'" was not an unequivocal request for counsel]; *Soffar v. Cockrell* (5th Cir. 2002) 300 F.3d 588, 593-596 [defendant's questions on "whether he should get an attorney; how he could get one; and how long it would take to have an attorney appointed" were equivocal]; *Dormire v. Wilkinson* (8th Cir. 2001) 249 F.3d 801, 803-804 [defendant's request to call his girlfriend, immediately followed by "'Could I call my lawyer?,'" found equivocal]; *Valdez v. Ward* (10th Cir. 2000) 219 F.3d 1222, 1231-1233 [after confessing to murder, the defendant's statement, "'Yes, I understand it a little bit and I sign it because I understand it something about a lawyer and he want to ask me questions and that's what I'm looking for a lawyer,'" found ambiguous]; *Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 196-198 ["'I think I need a lawyer'" was equivocal]; *Diaz v. Senkowski* (2d Cir. 1996) 76 F.3d 61, 63-65 ["'Do you think I need a lawyer?'" held to be equivocal]; *Coleman v. Singletary* (11th Cir. 1994) 30 F.3d 1420, 1423, 1426 [when asked about the appointment of a public defender, the defendant stated: "'I don't know. But if he said to stop I don't want to do what he said not to do'"]; *Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1219-1221 ["'I can't afford a lawyer but is there anyway I can get one?'"]; *Connecticut v. Anonymous* (1997) 694 A.2d 766, 770-775 ["'Do I still have a right to an attorney?'"]; *Gresham v. United States* (D.C.App. 1995) 654 A.2d 871, 873-875 ["at the time of his arrest but before the police questioned him, he invoked his right to counsel by asking his girlfriend, in the presence of police, to call his mother and tell her to get him a lawyer" — not a clear assertion of the right to counsel]; *State v.*

Eastlack (Ariz. 1994) 883 P.2d 999, 1005-1007 (concur. opn. of Kleinschmidt, J.) ["'I think I better talk to an attorney'" found equivocal]; *Poyner v. Murray* (4th Cir. 1992) 964 F.2d 1404, 1410 ["'Didn't you tell me I had the right to an attorney?'" did not constitute an unequivocal invocation of the right to counsel]; *Cothren v. Alabama* (1997) 705 So.2d 861, 862-866 ["'I think I want to talk to an attorney before I answer that'" subject to differing interpretations].)

Of course, it is *possible* Nelson meant to invoke his *Miranda* rights with his request to see his mother, although substantial evidence supports the trial court's contrary conclusion. But as several cases have noted, a suspect's hesitancy to take a lie detector test is not necessarily an automatic invocation of *Miranda* rights. (*People v. Davis* (1981) 29 Cal.3d 814, 825 [specific reluctance to take lie detector not an invocation of *Miranda* rights]; *People v. Hurd* (1998) 62 Cal.App.4th 1084, 1091 (*Hurd*) [refusal to take polygraph not a *Miranda* invocation because defendant continued to answer questions about the crime].) Moreover, considering Nelson's experience in dealing with police officers and the likelihood he fully understood the benefits an attorney could provide based on his juvenile court experience, it is not unreasonable to conclude he would have directly asserted his rights if that was what he wanted. He certainly demonstrated no hesitancy in asking to see his mother or to phone relatives. Nelson's streetwise demeanor and experience with law enforcement contrasts sharply with those juveniles who lack his knowledge and understanding of a criminal suspect's rights. Nelson's request to see his mother must be examined with his experience and background in mind. After all, few minors could recite from memory one of the *Miranda* advisements, as Nelson confidently did at the outset of his interview. The trial court no doubt had this contrast in mind when it found that Nelson was not "some vulnerable waif."

The California Supreme Court's recent decision in *Lessie*, *supra*, 47 Cal.4th 1152, does not aid the majority. In *Lessie*, the court concluded a juvenile's request to speak with his father during the initial *Miranda* advisement did not constitute a request for counsel. Although there was no evidence the juvenile had received *Miranda*

advisements in the past, he previously had been arrested and committed to juvenile hall. In rejecting his *Miranda* claim, the court noted the juvenile did not say he "wanted his father to call an attorney on his behalf." (*Lessie*, at p. ___, [2010 WL 308813, at p. 10].)

The majority argues a different result is called for here because Nelson was a year younger, subjected to lengthier interrogation, became tearful at times and was hungry — factors that, according to the majority, "demonstrate the degree to which Nelson was worn down by the persistent and extensive questioning." (Maj. opn. *ante*, p. 28.) This might be persuasive if Nelson had claimed the police coerced him into confessing, but the sole issue raised is whether Nelson invoked his *Miranda* rights. The majority concedes Nelson validly waived his rights at the outset and, if he did not validly invoke them during the interview, then it is beside the point whether he was tired and hungry.

The majority also points to how Nelson's demeanor changed as the interview progressed, becoming more withdrawn and providing terse answers, in contrast to the defendant in *Lessie*, who willingly answered questions. True, Nelson's enthusiasm for the interview process appeared to diminish, but succinct answers and a sullen demeanor hardly furnishes legal grounds for finding an invocation of the right to counsel. (See *People v. Michaels* (2002) 28 Cal.4th 486, 510-511; *People v. Silva* (1988) 45 Cal.3d 604, 629-630 (*Silva*) [during an ongoing interrogation, defendant may refuse answer certain questions without demonstrating an intent to terminate the interview].)

Thus, the record supports the trial court's findings Nelson's initial request to speak with his mother was not a clear invocation of his Fifth Amendment rights. Based on the officer's knowledge of Nelson's background, it was not unreasonable for the officer to judge that Nelson would have asked for a lawyer if he wanted legal advice, and therefore his request to speak with his mother was not equivalent to an invocation of his right to counsel.

These findings support with equal force the trial court's rejection of Nelson's claim his subsequent requests to speak with his mother constituted a request for counsel. A reasonable officer could have understood these requests as reflecting

Nelson's desire to discuss with his mother whether to take a polygraph test, and, as Nelson explained at one point, to tell her about the "other stuff," presumably referring to his numerous burglaries and the use of the murder victim's credit card. (Maj. opn. *ante*, p. 20.)

Substantial evidence also supports the trial court's decision Nelson did not invoke his right to silence. There is nothing inherent in the request for a parent that compels a finding the juvenile intended to invoke his right to silence. (*Fare, supra,* 442 U.S. at p. 724 [request to speak to probation officer does not by itself invoke the juvenile's right to silence]; *United States v. Franzen* (7th Cir. 1981) 653 F.2d 1153, 1159 [applying *Fare* to juvenile's request for his father and concluding it did not constitute an invocation of minor's right to silence].) This is particularly true where the minor does not indicate a desire to remain silent and continues to freely answer questions. In *Hector, supra,* 83 Cal.App.4th 228, the juvenile did not invoke his right to silence when informed detectives had not been able to reach his mother because he "did not indicate he wished to stop speaking with the detectives and instead readily continued to answer their questions." (*Id.* at p. 236.) Similarly, Nelson did not invoke his right to silence merely by asking to speak with his mother, and continued to respond freely to questions up until the time he spoke with his brother and grandmother.

At this point, Nelson informed Salcedo his grandmother and brother advised him not to do "anything" until he had spoken with his mother or a lawyer. The majority describes this as an unambiguous request by Nelson to halt the entire interview and invoke his *Miranda* rights. This conclusion rests on an expansive interpretation of Nelson's use of the word "anything." But when considered in context, a more reasonable interpretation is that Nelson was referring only to the lie detector test.

A few minutes before Nelson's statement, the deputies granted his request to call his mother. Although unable to reach his mother, Nelson talked with his grandmother and was on the telephone with his brother when Salcedo returned to the interview room and informed Nelson the polygraph operator was ready to begin the test. Nelson responded, "All right, uh, they're telling me not to take *the test* until my mom or a

lawyer is here, is that okay?" (Italics added.) Salcedo responded, "That's your decision," and Deputy Sutton reiterated, "That's up to you." Salcedo offered to provide Nelson's family with the telephone number of the sheriff's office so his mother could call and speak with Nelson, who explained his mother was expected home shortly. At this point Salcedo asked, "Yeah, I mean, do you want to ask your mom if you should take *this test*? I mean, what, what do you want to do?" (Italics added.) Nelson responded, "Uh, they don't want me to do anything until a lawyer or my mom is here. So I'm gonna, I need to wait." Salcedo then asked Nelson to wait briefly while he left the room to tell the polygraph operator "what your decision was." Shortly thereafter, Salcedo and Nelson resumed the interview.

Thus, it is apparent that Nelson's request not to do "anything" is not the clear-cut invocation of rights the majority claims. Indeed, the trial court found that Nelson did not intend to halt the interview, but only to defer taking the polygraph. This is certainly how Salcedo understood it, and based on the trial court's findings, I cannot say this conclusion was unreasonable.

As discussed above, the majority states it does not matter whether Nelson only intended to defer a decision on the polygraph exam, finding that his request was an invocation of his *Miranda* rights. But a suspect's hesitancy to take a lie detector test is not necessarily an automatic assertion of *Miranda*. (*Silva*, *supra*, 45 Cal.3d at pp. 629-630 [during an ongoing interrogation, defendant may refuse to answer certain questions without demonstrating an intent to terminate the interview].) In *People v. Davis*, *supra*, 29 Cal.3d 814, the defendant waived his *Miranda* rights and agreed to take a lie detector test, but later refused to answer any questions during the test. The California Supreme Court rejected the defendant's claim his silence during the test constituted a *Miranda* invocation, explaining "the surrounding circumstances show that his reluctance was related only to the polygraph examination." (*People v. Davis*, at p. 825.) Because the defendant "showed no hesitation to speak with the interrogating officers," his silence during the polygraph exam was not an assertion he was unwilling to discuss the case, "but only that he was unwilling to submit to the scrutiny of the lie detector, a mechanical

device." (*Ibid.*; see also *Hurd, supra*, 62 Cal.App.4th at p. 1091 [defendant's refusal to take polygraph and demonstrate how homicide occurred not a *Miranda* invocation because defendant continued to answer questions about the crime].) Based on the foregoing, I would defer to the trial court's finding that Nelson's reluctance to take the lie detector test before talking with his mother did not evidence an intent to terminate the interview. Consequently, I would affirm the judgment.

ARONSON, J.

G040151
The People v. Nelson

Superior Court of Orange County

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

Case Name: **People v. Samuel Moses Nelson**
No.: **S**_____ [Fourth District Court of Appeal – Div. 3 – G040151]

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 **April 6, 2010,** I served the attached ***PETITION FOR REVIEW*** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West A Street, Suite 1100, P.O. Box 85266, San Diego, CA 92186-5266, addressed as follows:

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The Honorable Tony Rackauckas
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Additionally, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address **ADIEService@doj.ca.gov** on **April 6, 2010,** to the following entity at its electronic notification address:

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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 **April 6, 2010,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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