SUPREME COURT No. 181611

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent.	Court of Appeal No. G040151
v.	Superior Court No. 04ZF0072
SAMUEL MOSES NELSON, Defendant and Appellant.	

AFTER DECISION OF THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE

APPEAL FROM THE SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK F. FASEL, JUDGE PRESIDING

ANSWER TO PETITION FOR REVIEW

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By appointment of the Court of Appeal
under the Appellate Defenders, Inc.
Independent case system.

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

Pursuant to California Rules of Court,[1] rule 8.500(e)(4), defendant-appellant Samuel Moses Nelson answers respondent's petition for review of the February 25, 2010, unpublished opinion of the Court of Appeal for Division Three of the Fourth Appellate District (O'Leary, Acting P.J.), reversing defendant's conviction of first degree murder and two counts of residential burglary but affirming three other counts of residential burglary.

[1] Further unspecified references to rules are to the California Rules of Court.

The Court of Appeal majority denied respondent's petition for rehearing on March 23, 2010. A copy of the opinion is appended to respondent's petition filed in this court on April 7, 2010. Respondent presents no sufficient ground for review under rule 8.500(b).

APPELLANT NELSON'S ANSWER TO RESPONDENT'S PETITION FOR REVIEW

On April 7, 2010, respondent filed a petition for review asking the Court to review the following question:

> 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) to determine if the juvenile has invoked his Fifth Amendment rights which means interrogation must cease?

Appellant Nelson files this answer to show respondent's petition presents no proper grounds for review.

ARGUMENT

I.

WHERE THE COURT OF APPEAL APPLIED THE WELL-SETTLED TOTALITY OF CIRCUMSTANCES TEST IN DETERMINING THAT INCRIMINATING ORAL AND WRITTEN STATEMENTS BY THE FIFTEEN-YEAR-OLD APPELLANT WERE OBTAINED IN VIOLATION OF HIS MIRANDA RIGHTS, REVIEW IS UNNECESSARY.

In seeking this court's review, respondent challenges the Court of Appeal's application of the well-settled totality of circumstances test as articulated by the United States Supreme Court over thirty years ago in *Fare v. Michael C.* (1979) 442 U.S. 707 ("*Fare*") and more recently by this Court in *People v. Lessie* (2010) 47 Cal.4th 1152 ("*Lessie*") in determining that multiple parental requests by the fifteen-year-old Nelson, when viewed in context, compelled exclusion of his subsequent confession and, thus, the reversal of his convictions for murder and two of three burglaries.

As appellant will show, review is unnecessary because resolution of this issue by the Fourth District majority presents no unsettled area of the law needing clarification. (California Rules of Court, rule 8.500(b).)

A. The Majority Merely Applied Well-Settled Legal Principles to a Record-Based Analysis.

On appeal, Nelson argued that his statements were improperly admitted because they were obtained in violation of his Fifth Amendment *Miranda* rights – either under the rule of *People v. Burton* (1971) 6 Cal.3d 375) which presumes a minor invokes his Fifth Amendment privileges by

asking for a parent or, in the alternative, under the federal totality of circumstances rule adopted in *Fare, supra*, 442 U.S. 707.

At the time, this Court had granted review in *People v. Lessie* (2010) 47 Cal.4th 1152 to re-examine *Burton* and address the "long standing, unresolved conflict between binding precedents" regarding the standard that should be applied for juveniles invoking their Fifth Amendment *Miranda*[2] rights to silence and counsel in the context of a custodial interrogation. (*Id.* at p. 1168.) In fact, this Court declared that the totality of circumstances approach in *Fare* – which mandates inquiry into all the circumstances surrounding the interrogation – is the appropriate legal test to apply to determine whether a juvenile suspect has validly invoked his *Miranda* rights. (*Ibid.*)

Recognizing the binding nature of this court's decisions on all the state courts (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), the Court of Appeal majority, as required, applied the *Fare/Lessie* totality of circumstances test to the undisputed facts of this case, and concluded "Nelson's parental requests, when viewed in context, compel exclusion of his subsequent confession." (Slip opn., at p. 2.) And rightfully so. Substantial evidence of appellant's repeated please to talk to his mother, his numerous efforts to end the conversation about the murder,

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

and the coercive and lengthy interrogation tactics employed by the authorities unambiguously demonstrate that "Nelson's purpose in requesting to speak with his mother was to secure her assistance to protect his Fifth Amendment rights." (Slip opn., at p. 30.)

Respondent acknowledges that the Court of Appeal majority applied the *Fare/Lessie* totality of circumstances test to the facts of this case as required. However, invoking the dissenting opinion, it contends the majority improperly "added a gloss" to its evaluation that appears to treat juveniles specially by construing a parental request as an invocation of his *Miranda* rights, "effectively resurrect[ing] the special rule in *Burton.*" (PFR, at p. 2.)

Respondent is mistaken. Indeed, the totality of the circumstances test, as applied to juveniles,[3] necessarily includes an assessment of a minor's age and experience in determining whether there's been an effective invocation of his Fifth Amendment rights. (*Lessie, supra,* 47 Cal.4th at p. 1169.) The courts have never been held to "blind themselves to the differences between minors and adults in this context." (*Lessie, supra*, 47

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[3] As stated in *Fare, supra*, 442 U.S. at p. 725, "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. [Citaiton.]"

Cal.4th at p. 1167.) And, here, the Court of Appeal properly inquired into "all the circumstances surrounding the interrogation" (*People v. Lessie, supra,* 47 Cal.4th at 1167) in finding appellant's *Miranda* rights were violated when, after being accused of murder, he requested to speak with his mother "to let her know what was happening" and explained that he wanted to "talk to her about it [and] see what [he] should do." (Slip opn., at p. 2.)

B. The Trial Court Improperly Relied on the Objective Reasonable Officer Test in *Davis v. United States.*

Respondent, again invoking the dissenting opinion in this case, maintains that the trial court properly denied appellant's motion to suppress his confession under the "reasonable officer" test of *Davis v. United States, supra,* 512 U.S. 452 ("*Davis*"), and finding under the totality of the circumstances that appellant's requests to speak with his mother 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. (PFR, p. 10.)

This argument must be rejected. Not only was *Davis* limited to the narrow question of an adult's post-waiver invocation of the right to counsel. In holding that an adult suspect's statement must be reviewed from the perspective of "a reasonable police officer," *Davis* apparently removed the need to even consider a defendant's personal characteristics, in direct contravention of this Court's clear directive in *Lessie* to review the totality

of the circumstances in determining whether a juvenile has invoked his Fifth Amendment rights during a custodial interrogation.[4]

Whether a juvenile's age and experience are among the "variety of reasons" not to be considered is not entirely clear. (Slip opn, dissent, at p. 3.) What is clear, however, is that this Court has already decided the totality of the circumstances test, as articulated in *Fare, supra,* controls and that "nothing said by the *Fare* or *Lessie* courts suggests [that this test] must be abandoned when evaluating whether a post-waiver request to speak to a parent constitutes an invocation of a minor's *Miranda* rights." (Slip op. at p. 31.) Indeed, to apply the officer-based test announced in *Davis* to an assessment of a juvenile's right to remain silent and counsel would be tantamount to a rejection of over 60 years of jurisprudence recognizing the innate differences between juveniles and adults and the corresponding need, in particular, to use "special caution" in assessing confessions of juveniles. (See, e.g., *Haley v. Ohio* (1948) 332 U.S. 596, 599; and *In re Gault* (1967) 387 U.S. 1, 45.)

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[4] As our country's highest court held in *Davis, supra:*

> We recognize 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 v. United States, supra*, 512 U.S. at 460; italics added.)

Under the circumstances here, there is no basis for construing the fifteen-year-old appellant's requests to speak to his mother as anything other than an invocation of his Fifth Amendment rights. The dissent has made a weak attempt to parse out appellant's request to defer taking the polygraph, submitting that a suspect's hesitancy to take a lie detector test is not necessarily an automatic assertion of *Miranda*. (Slip.opn., dissent, at p. 14.) However, the fact is, reversal was required here because as the majority court found, under the circumstances, "any reasonable officer would know Nelson wanted the questioning to stop." (Slip opn., at p. 27.)

In short, this case presents no grounds for review and respondent's petition should be denied.

CONCLUSION

For the reasons stated, defendant-appellant Samuel Moses Nelson requests this court deny review of the issue presented by the Attorney General.

Dated: April 26, 2010

Mary Woodward Wells

Mary Woodward Wells
Attorney for Defendant-Appellant
Mr. Samuel Moses Nelson

CERTIFICATE OF APPELLATE COUNSEL

I, Mary Woodward Wells, appointed appellate counsel for appellant, Samuel Nelson, hereby certify that I prepared the forgoing Answer to respondent's Petition for Review using Microsoft Word 2003 and the word count for this document using that software program is 1646 words, which does not include the cover or the tables.

Dated: April 26, 2010

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People v. Samuel Nelson
Supreme Court No. 181611
Court of Appeal No. G040151
Superior Court No. 04ZF0072

DECLARATION OF SERVICE

I, Mary W. Wells, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, California, in which county the within mentioned delivery occurred, and not a party to the subject cause. My business address is Suite 103, 445 Marine View Avenue, Del Mar, California.

I served the *Answer to Respondent's Petition for Review* of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

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The envelope was then sealed and with the postage thereon fully pre-paid deposited in the U.S. mail by me at Del Mar, California, on April 27, 2010. I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 27, 2010, at Del Mar, California.

Mary Woodward Wells

Mary Woodward Wells
Attorney for Defendant-Appellant