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.

Case No. S181611

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

RESPONDENT'S BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

CONSTITUTIONAL PROVISIONS

ISSUE PRESENTED

Did the 15-year-old defendant's request to speak with his mother while he was being questioned by police after a valid waiver of Fifth Amendment rights, constitute a request to speak with an attorney that required the officer to cease the questioning immediately?

INTRODUCTION

In *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694, 86 S. Ct. 1602] (*Miranda*) the United States Supreme Court created procedural safeguards against the coercive nature of custodial interrogations. (*Miranda, supra,* 384 U.S. at p. 467.) These safeguards required police to inform suspects they have a right to remain silent, that any statement they make may be used against them, and they have a right to the presence of retained or appointed counsel before interrogation. (*Id.* at 444.) The right to silence and the right to an attorney both protect the privilege against compulsory self-incrimination by requiring interrogation to cease when either right is invoked. (*Miranda, supra,* 386 U.S. at pp. 467-474.)

Respondent is asking this Court to determine whether a juvenile, who has knowingly and voluntarily waived his rights under *Miranda,* thereafter invokes his *Miranda* rights by asking to speak to a parent but not to speak to an attorney. The question implicates the distinction between an initial voluntary waiver of Fifth Amendment rights and a subsequent invocation of those rights.

In *Fare v. Michael C.* (1979) 442 U.S. 707, 725 [99 S.Ct. 250, 61 L.Ed.2d 197] (*Fare*), the United States Supreme Court held that whether a suspect – adult or juvenile -- 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 (*Lessie*), 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. In so doing, *Lessie* disapproved the special rule in *People v. Burton* (1971) 6 Cal.3d 375 (*Burton*), that a minor's request to speak to a parent was a *per se* invocation of *Miranda* rights.

Although purporting to apply *Lessie,* the Court of Appeal in appellant's case ruled, however, 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 immediately 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] (*Davis*) 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." (*Davis, supra,* 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.) Recently, the United States Supreme Court established that "there is no principled reason to adopt different standards for determining when an accused has invoked the *Miranda* right to remain silent and the *Miranda* right to counsel at issue in *Davis*." (*Berghuis v.*

Thompkins (2010) 560 U.S. ____ [176 L.Ed.2d 1098, 1110, 130 S.Ct. 2250, 2260] ("*Berghuis*"), citing, *Davis, supra,* 512 U.S. at 459-462.)

Fare found no reason not to apply the totality of circumstances rule to all defendants, whether adults or minors, when evaluating the validity of an initial *Miranda* waiver. (*Fare, supra,* 442 U.S. at p. 719.) Similarly, *Davis* should apply to juveniles as well as adults when evaluating whether a suspect has invoked his or her *Miranda* rights after an initial, voluntary waiver, because "whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, subsequent to a valid waiver, he or she effectively has invoked the right to counsel." (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [83 L.Ed.2d 488, 105 S. Ct. 490]; *People v. Martinez* (2010) 47 Cal.4th 911, 951.) In the latter circumstance, after a knowing and voluntary waiver, interrogation may proceed "until and unless the suspect clearly requests an attorney." (*Davis, supra,* 512 U.S. at p. 461.)

Thus, the question whether an initial *Miranda* waiver is knowing and voluntary is directed at an evaluation of the defendant's state of mind; however, evaluation of ambiguity in a postwaiver invocation must include "consideration of the communicative aspect of the invocation--what would a listener understand to be the defendant's meaning." (*People v. Williams* (2010) 49 Cal.4th 405, 428.) In a postwaiver context, the inquiry is objective: to identify as ambiguous or equivocal those responses which "a reasonable officer in light of the circumstances would have understood [to signify] only that the suspect *might* be invoking the right to counsel," and therefore interrogation may continue. (*Id.*, citing, *Davis, supra,* 512 U.S. at p. 459; see also *People v. Gonzalez, supra,* 34 Cal.4th at p. 1124.)

Respondent respectfully submits that the Court of Appeal was incorrect when it declined to apply *Davis* to appellant's request to speak to his mother before taking a polygraph examination, and instead effectively

applied the defunct *Burton* special rule for juveniles which this Court had just disapproved in *Lessie*. This court should hold that the *Davis* rule applies to juveniles, meaning that after knowingly and voluntariy waiving his *Miranda* rights, a minor, like an adult, must unambiguously and unequivocally request counsel or questioning may continue. Since the trial court here applied the correct *Davis* test, the murder conviction and two burglary convictions should be reinstated.

CASE HISTORY AND FACTS

A. The Murder

In April 2004, appellant burglarized Katherine Parks' home in Laguna Niguel and took two purses. (1 CT 11, 13.[1]) In May 2004, appellant burglarized Sheryl Adler's home in Laguna Niguel and took two wallets and a checkbook. (1 CT 20, 22-23.) On June 18, 2004, appellant burglarized Jane Thompson's home in Laguna Niguel and took her purse, credit cards and a checkbook. (1 CT 34; 2 RT 345.)

On June 20, 2004, Thompson's neighbor, 15-year-old appellant, used Thompson's stolen Visa card to purchase $245 worth of lobster and steak at one restaurant and $600 worth of food at another. (1 CT 41-43, 63-65, 68-70.) His third attempt to use Thompson's checks to buy $35 worth of sandwiches was a failure. (1 CT 72-74.)

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 hemorrhages. (1 CT 25, 30; 2 RT 345, 349-350.)

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[1] Because appellant was tried by the court sitting without a jury, the statement of facts is taken generally from the transcript of the grand jury proceedings (1 CT 5-81), as summarized in the appellate court opinion. (Slip opn. at pp. 2-5.)

On June 28, 2004, Orange County sheriff's investigators spoke with appellant who admitted going into Thompson's house, but claimed he entered at her request. (1 CT 29, 30; 1 RT 87-89, 163-166.) Appellant agreed to take a polygraph exam. (3 CT 525, 541.) The next day, deputies approached appellant and asked him to come to the station for further discussion. (1 CT 30-33.) He agreed, and they drove him to the station where he waived his *Miranda* rights and confessed. (1 CT 33-40, 52.)

After finding the *Miranda* waiver was knowing and voluntary, the trial court admitted the videotape of appellant's confession and subsequently convicted him of one count of murder and five burglaries. The court sentenced him to an indeterminate term of twenty-five years to life for the murder, with concurrent terms for the burglaries and enhancements. (7 CT 1653-1655, 1658-1660; 2 RT 359-360, 379-381.)

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, a "reasonable officer" 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 they should have immediately terminated the questioning. (Slip opn. at pp. 30-31.) The appellate court purportedly applied the totality of circumstances test in *Fare, supra,* 442 U.S. at p. 725, and *Lessie, supra,* 47 Cal.4th at p. 1168; slip opn. at pp. 25-30. The court 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 that *Davis's* objective, reasonable officer test was the proper test -- under the federal constitution -- to determine if a

suspect, adult or juvenile, has unambiguously invoked his Fifth Amendments rights following a valid *Miranda* waiver, and the request here was ambiguous under *Davis,* as the trial court found. (Dis. opn. at pp. 1-5, 7-9, 12-14.)

On March 23, 2010, the Court of Appeal denied respondent's petition for rehearing. On June 17, 2010, this Court granted respondent's petition for review.

B. The Suppression Motion

Appellant moved to suppress his confession, contending the detectives violated his Fifth Amendment rights when they continued to interrogate him despite his multiple requests to speak with his mother, which he argued were the equivalent of requests for an attorney under *People v. Burton.* The People disagreed, and the trial court held a hearing. Appellant testified, as did the homicide investigators, and two police officers who had previously arrested appellant and given him *Miranda* warnings.

The entire interrogation on June 29, 2004, was recorded and the court reviewed the transcripts and DVD (1 RT 96, 142, 169; see, Exhibit 2 to People's Opposition; 3 CT 534-727.) The transcript disclosed that prior to interrogation, the investigators read and explained appellant's *Miranda* rights to him, and he said he understood his rights and was willing to talk to them. (3 CT 535-538; 2 RT 295-296.) Appellant admitted he had been arrested before and had been given *Miranda* rights before ("like you have the right to remain silent") and he had spent 61 days in juvenile hall. (3 CT 535-536.) There followed a lengthy discussion about how appellant supposedly learned about the Thompson murder (3 CT 553-555); how he entered her house at her request to remove a dead mouse (3 CT 555-556); how he found her purse (3 CT 557); and a belated admission that he had taken Thompson's credit cards and used them at several nearby restaurants (3 CT 562-563).

After several hours, the investigators reminded appellant that he had agreed to take a polygraph examination when they spoke the day before. (3 CT 635.) When asked if he was still willing to take the test, he said "sure," but he wanted to call his mother and tell her what was happening, and ask what he should do because he was being accused of murder. (3 CT 641-642.)

Shortly thereafter, Investigator Salcedo told appellant "we have a person here that can do the [polygraph] test right now. Then we can see the truth." Appellant responded, "All right. I want to talk to my mom though." (3 CT 646.)

Some time later, later, after he admitted taking Ms. Thompson's purse, he asked again to speak with his mother; he denied killing Ms. Thompson and asked once more to talk to his mother, to tell her where he was and "what was going on." (3 CT 657, 659.)

When appellant said he was willing to take the test, but still wanted to talk to his mother first, Investigator Salcedo loaned his cell phone to appellant to make the call. (3 CT 661-662.)

Appellant then made a series of five phone calls. (3 CT 661-666.) He did not reach his mother but left a message for her, saying that the police wanted to give him a polygraph test about a murder; he talked two times each to his brother and grandmother, and once to his brother's girlfriend, and told all of them that the police were about to give him a polygraph test about a murder and he was trying to reach his mother; he asked his grandmother whether to take the test. (3 CT 662-667.)

When the investigators told appellant the polygraph operator had arrived, and asked if the operator should stay or go, appellant replied that his family was "telling [him] not to take the test until my mom or a lawyer is here, is that okay?" (3 CT 665-666.) The investigators said it was his decision whether to wait for his mother before taking the test; appellant said

he wanted to wait and that ended the polygraph matter. (3 CT 666.) However, appellant continued to answer the investigators' questions, then said again that he needed to call his mother because the family wanted her to come to the station. (3 CT 687-688, 696.) After that, he continued his discussion with the investigators, and -- although he thought his mother was only ten minutes away -- he wrote out a confession to the murder, read it to the investigators and signed it. (3 CT 699-701, 720.) Appellant ultimately admitted burglarizing the Parks, Adler and Thompson residences, admitted using Thompson's stolen Visa card, and described in detail how he killed Thompson. (1 CT 35-40, 43-45, 49; 3 CT 701-720.)

The testimony of two law enforcement officers confirmed that appellant was arrested and given *Miranda* warnings at least twice before June 29, 2004: once on December 6, 2003, when he was arrested for vehicle theft, driving under the influence, driving without a license, and driving without insurance, and signed a written *Miranda* waiver form (1 RT 148-150, 152-154, 157-161); and again on January 17, 2004, after his arrest for burglary, a matter of months before the murder of Ms. Thompson. (1 RT 73-77.)

In his own testimony at the hearing, appellant acknowledged he was read his *Miranda* rights and said he understood them; he admitted he had been given *Miranda* rights on previous occasions, and had even heard them on TV; he admitted there were no threats, no weapons, no handcuffs and no promises from the investigators during the interrogation (1 RT 210-211, 238, 240, 242, 245, 248.) However, he claimed he had never put much thought into the meaning of those rights before the day of the interview and did not have much education about the law. (1 RT 240, 257-258.) As for the *Miranda* form he signed the previous December, he claimed he was under the influence of alcohol at the time. (1 RT 248.) He conceded that he was on probation for stealing a pickup truck and some jewelry, and he

had recently spent two months in juvenile custody. (1 RT 210-211, 230.) Appellant also admitted he knew what attorneys do, because he had been represented by an attorney in juvenile court. (1 RT 256.) He testified that he thought the police were getting tougher when he was tired and stressed from their questions, and he was "sort of being worn down" but thought it would "seem funny" if he did not talk to them. (1 RT 250, 251.) Appellant admitted he lied to the officers during the interview. (1 RT 259.)

On June 19, 2006, the trial court denied both the section 995 motion and the non-statutory motion to dismiss. (5 CT 1288; 2 RT 295, 309, 317, 324.) The court expressly resolved the credibility issue against appellant, based upon reading the transcripts, listening to the testimony and observing the interviews on video and DVD, finding "the young Mr. Nelson here has zero credibility with the court." (2 RT 295, 315-317.) The court found appellant's statements to the investigators were voluntary, and that there was a proper *Miranda* advisement and knowing, intelligent and voluntary waiver of those rights "at the inception" of the interrogation." (2 RT 296, 308, 310-311.) Further, the court found, appellant asked to talk to his mother about whether or not to take the polygraph and generally what he should do, given his predicament. (2 RT 297-298, 306.) The court concluded that if the request for his mother was an invocation of *Miranda,* it was limited to taking the polygraph examination, therefore the request, if any, was ambiguous. (2 RT 298-299, 303-304.) The court noted that when appellant told the investigators his relatives told him to wait to take the polygraph until he talked to his mother or an attorney, the investigators canceled the polygraph test. (2 RT 299-300.)

Relying on *Davis v. United States, supra,* 512 U.S. 452, the trial court found that if appellant did request a lawyer, as distinct from requesting to speak with his mother, it was "really ambiguous" because the "overall flavor of the entire interview" was that he was waiting for his mother, not

for an attorney, and he wanted advice on whether he should take the polygraph exam, yet he continued to consent to talk to the investigators. (2 RT 300-302, 308-309.) Finally, under *Davis,* the court found appellant did not invoke his right to silence, or request an attorney other than for the polygraph, and even if there was a request it was ambiguous, and the investigators were not required to stop the interview. (2 RT 309, 314-315.) The court therefore denied the motion to suppress the confession. (2 RT 317.)

C. Protection Against Compulsory Self-Incrimination (*Miranda*)

As this Court explained in *People v. Lessie, supra,* 47 Cal.4th 1152,

> The basic rule of *Miranda, supra,* 384 U.S. 436, and its progeny, is familiar: Under the Fifth Amendment to the federal Constitution, as applied to the states through the Fourteenth Amendment, '[n]o person ... shall be compelled in any criminal case to be a witness against himself.' (U.S. Const., 5th Amend.) 'In order to combat [the] pressures [of custodial interrogation] and to permit a full opportunity to exercise the privilege against self-incrimination, the accused must be adequately and effectively apprised of his rights' to remain silent and to have the assistance of counsel. (*Miranda,* at p. 467.) '[I]f the accused indicates in any manner that he wishes to remain silent or to consult an attorney, interrogation must cease, and any statement obtained from him during interrogation thereafter may not be admitted against him at his trial' (*Fare, supra,* 442 U.S. 707, 709, citing *Miranda,* at pp. 444-445, 473-474), at least during the prosecution's case-in-chief (*Fare, supra,* at p. 718; *Harris v. New York, supra,* 401 U.S. 222, 224).

(*People v. Lessie, supra,* 47 Cal.4th at p. 1162.) California courts are obliged to follow both the high court's decisions (see U.S. Const., art. VI, cl. 2 [supremacy clause]) and those of this Court (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455) when addressing *Miranda*-related issues. (*Lessie, supra,* at p. 1167.)

1. The Primary Protection: *Miranda* Warnings

The basic rules applicable to Fifth Amendment *Miranda* rights are well settled:

> [T]o counteract the coercive pressure inherent in custodial surroundings, '*Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. [Citation.] After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. [Citation.] Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. [Citation.] Critically, however, a suspect can waive these rights. [Citation.] To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458 [82 L. Ed. 1461, 58 S. Ct. 1019]." ' (*Maryland v. Shatzer* (2010) 559 U.S. __ [175 L.Ed.2d 1045, 130 S.Ct. 1213, 1219].)
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> 'The prosecution bears the burden of demonstrating the validity of the defendant's waiver by a preponderance of the evidence.' (*People v. Dykes* (2009) 46 Cal.4th 731, 751; see, *Berghuis v. Thompkins* (2010) 560 U.S. ___ [176 L.Ed.2d 1098, 1112, 130 S.Ct. 2250].) In addition, '[a]lthough there is a threshold presumption against finding a waiver of *Miranda* rights [citation], ultimately the question becomes whether the *Miranda* waiver ...was [voluntary,] knowing[,] and intelligent under the totality of the circumstances surrounding the interrogation.' (*People v. Cruz* (2008) 44 Cal.4th 636, 668.) On appeal, we conduct an independent review of the trial court's legal determination and rely upon the trial court's findings on disputed facts if supported by substantial evidence. (*People v. Dykes, supra,* 46 Cal.4th at p. 751.)

(*People v. Williams, supra,* 49 Cal.4th at 425.)

The central purpose of *Miranda* warnings is to ensure that an accused is advised of and understands the right to remain silent and the right to be represented by counsel. (See *Davis, supra,* 512 U.S. at p. 460; *Berghuis, supra,* 130 S.Ct. at p. 2261, 176 L.Ed.2d at p. 1112.) 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 [101 S.Ct. 1880, 68 L.Ed.2d 378] (*Edwards*) affords a second layer of prophylaxis by requiring immediate and total cessation of questioning when the suspect requests an attorney, the United States Supreme Court concluded that a third order of protection -- extending *Edwards* to ambiguous requests -- was unnecessary where a suspect has validly waived his rights. (*Davis, supra,* 512 U.S. at pp. 459-462; *Berghuis, supra,* 130 S.Ct. at p. 2260, 176 L.Ed.2d. at p. 1111.)

A minor has a Fifth Amendment privilege against self-incrimination, which precludes admission of a confession obtained without a voluntary, intelligent, and knowledgeable waiver of his or her constitutional rights. (*People v. Lewis* (2001) 26 Cal.4th 334, 383, citing *In re Gault* (1967) 387 U.S. 1, 55 [87 S.Ct. 1428, 18 L.Ed.2d 527]; *People v. Burton, supra,* 6 Cal.3d at pp. 383-384, overruled on other grounds, *People v. Lessie, supra,* 47 Cal.4th at p. 1168.)

As with claims regarding invocations made by an adult, a reviewing court must look to all of the underlying circumstances when deciding whether a minor voluntarily waived his or her rights. To determine whether a minor's confession is voluntary, a reviewing court looks at the totality of circumstances, including the minor's age, intelligence, education, experience, and capacity to understand the meaning and consequences of the given statement. (*People v. Lewis, supra,* 26 Cal.4th at p. 383.) Since the ratification of California's Proposition 8 in 1982, a challenge to the voluntariness of a minor's waiver of his or her Fifth Amendment rights in California is evaluated under federal law. (*Lessie, supra,* 47 Cal.4th at p. 1164; *In re Lance W.* (1985) 37 Cal.3d 873, 885-890.)

> The scope of review for whether a statement or confession is inadmissible because it was obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] is well established: When a court's decision to admit a confession is challenged on appeal, "we accept the trial court's determination of disputed facts if supported by substantial evidence, but we independently decide whether the challenged statements were obtained in violation of *Miranda*, *supra,* 384 U.S. 436." (Citation.)

(*People v. Lessie, supra*, 47 Cal.4th at p. 1169.)

2. The Unique Role of the Lawyer in the Totality of Circumstances Test (*Fare*)

In 1971, in *People v. Burton,* this Court was "called upon to decide whether a minor's request to see his parents 'reasonably appear[ed] inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police [a]t that time," within the framework of *Miranda.* (*Burton, supra,* 6 Cal.3d at p. 382.) Prior to the commencement of an interrogation, 16-year-old *Burton* asked to see his father who was present at the police station. His request was denied. Thereafter, the minor was advised of his *Miranda* rights, which he indicated he understood and waived. Subsequently, the minor confessed his crimes. (*Burton, supra,* 6 Cal.3d. at p. 379-381.)

After surmising that a minor would naturally seek help from a parent upon being taken into custody, 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. The police must cease custodial interrogation immediately upon exercise of the privilege. (*Burton, supra,* 6 Cal.3d at pp. 383-384.) Finding that the People had failed to meet their

burden of "affirmatively demonstrating" that the minor did not intend to assert his privilege, the minor's subsequent confessions were deemed inadmissible. (*Burton, supra,* 6 Cal.3d at. p. 383.)

Eight years after this Court rendered its decision in *Burton,* the United States Supreme Court in *Fare, supra,* overruled this Court's decision which had extended *Burton* to a minor's request to speak to his probation officer and held that the request amounted to a *per se* invocation of the minor's Fifth Amendment rights under *Miranda.*

In *Fare,* the United States Supreme Court emphasized that it had never "extended the *per se* aspects of the *Miranda* safe guards beyond the scope of the holding of the *Miranda* case itself." (*Fare, supra,* 442 U.S. at p. 717.) In that respect, the court stated, "it is clear that 'a State may not impose greater restrictions as a matter of *federal constitutional law* when this Court specifically refrains from imposing them.'" (*Ibid.*, quoting *Oregon v. Hass* (1975) 420 U.S. 714, 719 [95 S.Ct. 1215, 1219, 43 L.Ed.2d 570]; emphasis in original.)

The court explained that the *per se* rule of "*Miranda* [is] based upon the unique role [a] lawyer plays in the adversary system," where "an accused's request for an attorney is *per se* an invocation of his Fifth Amendment rights, requiring that all interrogation cease." (*Fare, supra,* 442 U.S. at p. 719.) After thoroughly considering the various duties and responsibilities of a probation officer, the Supreme Court concluded that a probation officer "is not in a position to offer the type of legal assistance necessary to protect the Fifth Amendment rights of an accused undergoing custodial interrogation." The court declared, "[w]hether 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." (*Id.* at pp. 719-722.)

After rejecting the argument that probation officers should be treated like attorneys for purposes of *Miranda, supra,* 384 U.S. 436, 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. (*Lessie, supra,* 47 Cal.4th at p. 1165.) When no such request is made, the court held, a "totality-of-the-circumstances approach" is adequate to determine whether there has been a waiver "even where interrogation of juveniles is involved." (*Fare,* 442 U.S. at p. 725.) Further, "[w]here 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." (*Ibid.*, italics added.) As this Court stated in *Lessie,* that United States Supreme Court language in *Fare,* equating "a minor's request to see a parent with a request to see a probation officer, leaves the rule of *Burton, supra,* 6 Cal.3d 375, 383-384 (concerning parents) with no more basis in federal law than the rule of *In re Michael C.* [1978] 21 Cal.3d 471, 476 (concerning probation officers), which the court in *Fare* expressly disapproved." (*People v. Lessie, supra,* 47 Cal.4th at pp. 1165-1166.)

Recalling that *Miranda* itself had applied the "totality of the circumstances surrounding the interrogation" approach to the determination of whether "the accused in fact knowingly and voluntarily decided to forgo his rights to remain silent and the have the assistance of counsel," the court in *Fare* could "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." (*Fare, supra,* 442 U.S. at p. 724-725.)

Finding "[t]he totality approach permits - indeed, it mandates-inquiry into all the circumstances surrounding the interrogation," *Fare* announced

that factors such as "the juvenile's age, experience, education, background, and intelligence, and whether he has the capacity to understand the warnings given him, the nature of his Fifth Amendments, and the consequences of waiving those rights," should be evaluated to determine the validity of the waiver. (*Fare, supra,* 442 U.S. at p. 724-725.) In regards to a juvenile's request for a probation officer *or a parent,* the court reasoned that the "totality" approach would "refrain[] 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 voluntary consents to interrogation." The court reiterated that "the issue of waiver" should be determined "on the basis of all the circumstances surrounding the interrogation" of a minor. (*Id.* at p. 725-726, emphasis added.)

Consequently, the court held that this Court erred when it found that the minor's "request to speak with his probation officer *per se* constituted an invocation of [his] Fifth Amendment right to be free from compelled self-incrimination," and that the minor's statements made during the interrogation should not have been suppressed at trial. (*Fare, supra,* 442 U.S. at p. 724.)

Even if there existed a relationship of trust between a minor and his or her probation officer, the United States Supreme Court concluded that such circumstance "does not indicate that the probation officer is capable of rendering effective [if any] legal advice sufficient to protect the juvenile's rights during interrogation by the police, or of providing the other services rendered by a lawyer." (*Fare, supra,* 442 U.S. at p. 722-723.) Otherwise "a juvenile's request for almost anyone he considered trustworthy enough to give him reliable advice would trigger the rigid rule of Miranda." (*Id.* at p. 723.) Similarly, "'the parental role does not equate with the attorney's role in an interrogation by police.'" (*Ahmad A. v. Superior Court* (1989)

215 Cal.App.3d 528, 537-538, quoting *People v. Maestas* (1987) 194 Cal.App.3d 1499, 1510, fn. 9.)

To paraphrase *Fare,* the shortcomings of a probation officer in a criminal interrogation apply equally well to a minor's request for a parent:

> A [parent] is not in the same posture [as an attorney] with regard to either the accused or the system of justice as a whole. Often he is not trained in the law, and so is not in a position to advise the accused as to his legal rights. Neither is he a trained advocate, skilled in the representation of the interests of his client before both police and courts. He does not assume the power to act on behalf of his client by virtue of his status as adviser, nor are the communications of the accused to the probation officer shielded by the lawyer-client privilege.

(*Fare, supra,* 442 U.S. at p. 719.)

3. The Objective, "Reasonable Officer" Test for Invoking *Miranda* Rights After A Waiver (*Davis*)

> An accused in custody, 'having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him,' unless he validly waives his earlier request for the assistance of counsel.

(*Edwards v. Arizona, supra,* 451 U.S. at pp. 484-485; *Miranda v. Arizona,* 384 U.S., at pp. 444-445.)

The purpose of the *Miranda-Edwards* guarantee and the reason for invoking it is to protect a suspect's "desire to deal with the police only through counsel." (*Edwards, supra,* 451 U.S. at p. 484; *McNeil v. Wisconsin* (1991) 501 U.S. 171, 177-178 [111 S.Ct. 2204, 115 L.Ed.2d 158].) Invoking the Fifth Amendment interest "requires, at a minimum, some statement that can reasonably be construed to be an expression of a desire for the assistance of an attorney in dealing with custodial interrogation by the police." (*McNeil v. Wisconsin, supra,* 501 U.S. at p. 178.)

In *Davis, supra,* 512 U.S. 452, the United States Supreme Court articulated the standard by which courts are to determine when a suspect's reference to an attorney after an initial waiver of rights, constitutes a request for counsel or to remain silent. In *Davis,* the adult defendant being interrogated by Naval Investigative Service agents, was advised of, and waived, his *Miranda* rights. But then, an hour and a half into the interview, he said, "Maybe I should talk to a lawyer." (*Davis, supra,* at p. 455.) The agents reminded him 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.'" (*Ibid*; *People v. Gonzalez, supra,* 34 Cal.4th 1111, 1123 and 1124.)

As this Court has explained:

> [W]hether a suspect has invoked his or her right to counsel 'is an objective inquiry.' (*Davis, supra,* 512 U.S. at p. 459.) The court continued: '[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.' (*Ibid.*, first italics added.) Accordingly, 'the suspect must unambiguously request counsel. Although a suspect need not "speak with the discrimination of an Oxford don," post, at 476 (SOUTER, J., concurring in judgment), 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. If the statement fails to meet the requisite level of clarity, *Edwards* does not require that the officers stop questioning the suspect.' (*Ibid.)* A contrary result, the court observed, would transform *Miranda's* protection into '"wholly irrational obstacles to legitimate police investigative activity," [citation], because it would needlessly prevent the police from questioning a suspect in the absence of counsel even if the suspect did not wish to have a lawyer present.' (*Id.* at p. 460, quoting *Michigan v. Mosley* (1975) 423 U.S. 96, 102 [46

> L.Ed.2d 313, 96 S.Ct. 321].) . . . . [¶] However, the court stated, the *Miranda* warnings themselves, once explained to the suspect, who then knowingly and voluntarily waives them, are sufficient to dispel whatever coercion inheres in the interrogation process. *Edwards* provided 'an additional protection' but 'is one that must be affirmatively invoked by the suspect.' (*Davis, supra,* 512 U.S. at p. 461.)

(*Gonzalez, supra,* 34 Cal.4th at p. 1124.)

This Court applied *Davis,* to the defendant in *Gonzalez,* who, before submitting to a polygraph examination during a custodial interrogation, stated he wanted an attorney if he was going to be charged, "for any little thing." The police assured him that he could talk to an attorney, but told him he would be released the following day if the polygraph showed he was telling the truth. Gonzalez ultimately confessed to the crime and was convicted. The appellate court reversed, but this Court found that was error, because Gonzalez's statement to the police was conditional, which rendered the statement ambiguous. Therefore, a reasonable officer would have understood only that Gonzalez *might* have been invoking the right to counsel, which was insufficient under [*Davis*] to require the cessation of questioning.

Gonzalez was also given an opportunity to clarify his statement, but he failed to do so. Since the officers could have reasonably assumed that defendant was capable of making an unequivocal request for counsel if he so desired and they were not required to ask clarifying questions, the conviction was reinstated. (*People v. Gonzalez, supra,* 34 Cal.4th at p. 1116, 1119.) In reversing the Court of Appeal, this Court noted that in the postwaiver, *Davis* context, "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." (*Gonzalez, supra,* 34 Cal.4th at p. 1126.)

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

In appellant's case, the trial court held that the minor's original *Miranda* waiver was knowing and voluntary, which appellant did not dispute. (Slip opn. at p. 25.) The question on appeal was whether after that voluntary waiver, appellant invoked his *Miranda* rights by asking to speak to his mother before taking a polygraph exam, and whether the applicable standard of review was the totality of circumstances test in *Fare* or the objective, reasonable officer test in *Davis*. Here, after testimony from appellant and others, review of the DVD of the interrogation, briefing and oral argument, the trial court denied appellant's motion to suppress his confessions, finding that under *Davis, supra,* 512 U.S. 452, appellant's requests to speak with his mother long after he had validly waived his rights, were ambiguous requests 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 again denied the motion. (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 he 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 initial request to speak to his mother was the legal equivalent of a request to speak with an attorney and all interrogation should have ended. (Slip opn. at pp. 30-31.) Instead,

the appellate court concluded that there was no factual basis for construing Nelson's requests 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." (Slip opn. at p. 27, italics added.) Even if the request for his mother was limited to the polygraph test, the appellate court stated, that was "a clear indication he desired assistance to protect his legal rights." (Slip opn. at pp. 27-28.) The court reasoned that if he had asked for the advice of a lawyer on whether to take the polygraph, there would be no dispute over the invocation, and his requests to speak to his mother were indistinguishable. (Slip opn. at p. 28.) Therefore, the appellate court found that appellant's expressed desire to speak with his mother before taking a polygraph exam was an invocation of his *Miranda* rights, and reversed the murder conviction and two burglary counts. (Slip opn. at p. 30-31, 32.)

As succinctly put by Justice Arronson in beginning a strong dissent:

> 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, the suspect 'must unambiguously request counsel.' (Citation.) 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. (Citation.) 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*).)

(Dis. opn. at p. 1, footnote omitted.)

Moreover, whether a suspect has waived the right to counsel with sufficient clarity prior to the commencement of interrogation is a separate inquiry from the question whether, subsequent to a valid waiver, he or she effectively has invoked the right to counsel. (*Smith v. Illinois, supra,* 469 U.S. at p. 98; *Williams, supra,* 49 Cal.4th at p. 427; *People v. Martinez, supra,* 47 Cal.4th at p. 951.)

As stated in the dissent, in the postwaiver context, it is *Davis* which sets out the applicable test. 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 and that he 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 (slip opn. 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. (Dis. opn at p. 2.) 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. (2 RT 261, 296, 297-302, 334.) As set out above, 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, 5-6, 8-9.)

A defendant may waive *Miranda* rights then refuse to take a polygraph exam without generally invoking *Miranda* rights. (*People v. Davis* (1981) 29 Cal.3d 814, 825; dis. opn at p. 14.) Similarly, a defendant may refuse to answer certain questions but answer others, without manifesting a desire to terminate the whole interview. (*People v. Silva* (1988) 45 Cal.3d 604, 629-630.) As the disssent pointed out, here, as in *Silva* and *People v. Davis,* despite appellant's requests to talk to his mother about the polygraph exam or anything else, he continued to answer the investigators' other questions. Thus, he did not make that straightforward request for a lawyer or to stop the questioning which is the standard set forth by the United States Supreme Court in *Davis.* (Dis. Opn. at pp. 12, 14-15; see, *Berghuis, supra,* 176 L.Ed.2d at p. 1110, 130 S.Ct. at p. 2260.)

The dissent also pointed out that Nelson's requests to talk to his mother were at least as ambiguous as statements which actually refer to an attorney, but which have been held to be ambiguous or equivocal and thus failed to establish postwaiver *Miranda* invocations:

- "I think I need a lawyer." (*Burket v. Angelone* (4th Cir. 2000) 208 F.3d 172, 196-198.)
- "Do you think I need a lawyer?" (*Diaz v. Senkowski* (2d Cir. 1996) 76 F.3d 61, 63-65.)
- "I can't afford a lawyer but is there any way I can get one?" (*Lord v. Duckworth* (7th Cir. 1994) 29 F.3d 1216, 1219-1221.)

- "Can I call a lawyer or my mom to talk to you?" (*People v. Roquemore* (2005) 131 Cal.App.4th 11, 24.)
- "[I]f 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 pp. 1119, 1122-1127.)
- "'I think I would like to talk to a lawyer." (*Clark v. Murphy* (9th Cir. 2003) 331 F.3d 1062, 1070-1072.)
- 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." (*Soffar v. Cockrell* (5th Cir. 2002) 300 F.3d 588, 593-596.)
- Defendant's request to call his girlfriend, immediately followed by "'Could I call my lawyer?" (*Dormire v. Wilkinson* (8th Cir. 2001) 249 F.3d 801, 803-804.)

(See, Dis. Opn at pp. 10-11.)

Moreover, in *People v. Stitely* (2005) 35 Cal.4th 514, this Court concluded that Davis applies to post-waiver invocations of the right to silence as well as the right to counsel. (Dis. opn. at p. 2. Very recently, the United States Supreme Court reached the same conclusion. (*Berghuis, supra,* 176 L. Ed. 2d at pp. 1110-1111]; quoted in *People v. Williams, supra,* 49 Cal.4th at p. 434.)

Finally, the Supreme Court has simply not set out a separate set of rules for a streetwise juvenile who is tried as an adult and seeks to suppress a confession on *Miranda* grounds. In *Fare,* the court found no reason to distinguish between an adult and a juvenile when determining if there had been an initial voluntary and knowing *Miranda* waiver. (*Fare, supra,* 442 U.S. at p. 719 or 725; *Lessie, supra,* 47 Cal.4th at pp. 1156-1157.) Similarly, in *Berghuis,* the court found no principled reason to adopt different standards to determine if an accused has unambiguously invoked the right to remain silent or the right to counsel in a *Miranda/Davis*

situation. (*Berghuis, supra,* 130 S.Ct. at p. 2260, 176 L.Ed.2d at p. 1110 [defendant did not say much of anything until he admitted he prayed to God to forgive him for the shooting, but that was not an unambiguous invocation of *Miranda* rights].)

In *Berghuis,* the Supreme Court noted the defendant did not say that he wanted to remain silent or that he did not want to talk with the police, but had he made either of these simple, unambiguous statements, he would have invoked his right to cut off further interrogation. (*Id.*, 130 S.Ct. at p. 2260, 176 L.Ed.2d at p. 1111.) The same is true here: appelant could have cut off further interrogation by simply saying "I do not want to speak without an attorney present;" he knew about attorneys from his prior burglary case. He could have said "I will not answer any more questions," but he did not. Thus he did not invoke his *Miranda* rights, as the trial court found, and the confession was properly admitted.

There is no explanation in the appellate opinion why a juvenile's initial 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 in a postwaiver situation. 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.*

As *Davis* stated, "[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, supra,* 512 U.S. at p. 459 ["the likelihood that a suspect would wish counsel to be present is not the test", citation omitted].) Yet the majority holds appellant unambiguously made known his wish for

counsel without even making reference to an attorney, but only to his mother. As the dissent points out, the majority thereby appears to resuscitate the *per se* parental invocation rule of *Burton,* which this Court just overturned. (*People v. Lessie, supra,* 47 Cal.4th 1152; dis. opn at p. 1.)

In sum, respondent respectfully submits that the objective, "reasonable officer" test in *Davis* states the correct standard of review for determining if a minor or adult has invoked the Fifth Amendment's right to an attorney or to remain silent, after a knowing and voluntary waiver of *Miranda* rights. A contrary result, such as that in appellant's case, would transform *Miranda's* protection into "irrational obstacles to legitimate police investigative activity." (*Davis, supra,* 512 U.S. at p. 460.) The convictions should be reinstated.

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CONCLUSION

For the foregoing reasons, respondent respectfully requests that the convictions for one count of murder and two counts of burglary be reinstated.

Dated: August 13, 2010

Respectfully submitted,

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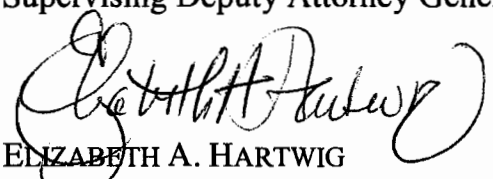

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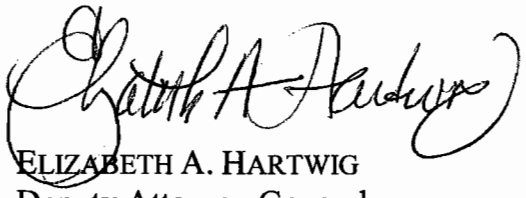
CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF ON THE MERITS uses a 13 point Times New Roman font and contains 8,538 words.

Dated: August 13, 2010

EDMUND G. BROWN JR.
Attorney General of California



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

Case Name: **People v. Samuel Moses Nelson** No.: **S181611**

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 **August 16, 2010,** I served the attached ***RESPONDENT'S BRIEF ON THE MERITS*** 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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Clerk of the Court – For Delivery To:
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The Honorable Tony Rackauckas
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and I furthermore declare, I electronically served a copy of the above document from Office of the Attorney General's electronic notification address ADIEService@doj.ca.gov on **August 16, 2010,** to **Appellate Defenders, Inc.** at the following electronic notification address:

eservice-criminal@adi-sandiego.com.

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on **August 16, 2010,** at San Diego, California.

Loreen Blume
Declarant

Loreen Blume
Signature

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