SUPREME COURT COPY

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.	

FOURTH APPELLATE DISTRICT, DIVISION THREE
SUPERIOR COURT OF ORANGE COUNTY
HONORABLE FRANK F. FASEL, JUDGE PRESIDING

APPELLANT'S ANSWER BRIEF ON THE MERITS

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

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

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

APPELLANT'S ANSWER BRIEF ON THE MERITS

ISSUE PRESENTED

This Court has asked the parties to brief the issue "whether the 15-year-old defendant's request to speak to his mother while he was being questioned by police constituted a request to speak with an attorney that required the officer to cease the questioning immediately."

This issue implicates the distinction between a criminal suspect's initial waiver of his Fifth Amendment rights and subsequent invocation of those rights and the related question whether a juvenile suspect's post-waiver invocation of his Fifth Amendment rights should be analyzed under the same standard of review as an adult.

INTRODUCTION

On June 26, 2004, Jane Thompson was found beaten to death in her Laguna Niguel home. Sam Nelson, Thompson's fifteen years old neighbor, was subsequently identified as having made some purchases with her credit cards. On June 29, he was transported from his home to the sheriff department's headquarters in Santa Ana, advised of his *Miranda* rights, and then questioned over a six to seven hour period regarding Thompson's homicide and two neighborhood burglaries.

A little over halfway through the interrogation process, and facing increasingly pointed questions about Thompson's murder and pressure to take a lie detector test, Nelson asked to call his mother so that he could tell her what was happening, talk to her about it, and see what he should do. He repeated this request to the officers several more times before being given a phone. Although he contacted other family members, he was unsuccessful in reaching his mother and eventually confessed to Thompson's murder and two neighborhood burglaries.

The Court of Appeal reversed Nelson's murder conviction and two burglary convictions. Applying the totality of the circumstances test described in *Fare v. Michael C.* (1979) 442 U.S. 707 [99 S.Ct. 2560, 61 L.Ed.2d 197]("*Fare*") and *People v. Lessie* (2010) 47 Cal.4th 1152 ("*Lessie*"), the court determined Nelson's purpose in asking to speak with

his mother was to secure her assistance to protect his Fifth Amendment rights, and that his words and actions were inconsistent with a present willingness to discus the case freely and completely. (maj. opn., p. 30.)

Respondent, however, contends the Court of Appeal has "effectively resurrected" the per se parental invocation rule in *Burton*[1] that was recently disapproved by this court in *Lessie* and claims there was substantial evidence to support the trial court's findings appellant had not clearly and unambiguously invoked his Fifth Amendment rights as required under the objective reasonable officer standard that is applied to adult suspects in *Davis v. United States* (1994) 512 U.S. 452, 461-462 [114 S.Ct. 2350, 129 L.Ed.2d 362] ("*Davis*").(BOM[2] 2, 22-23.)

Appellant respectfully submits the Court of Appeal correctly applied the *Fare/Lessie* totality of circumstances test in evaluating whether his post-waiver requests to speak with his mother constituted an invocation of

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1 On appeal, appellant also contended that his Fifth Amendment rights were violated when his statements were analyzed under the presumptive parental invocation rule of *People v. Burton* (1971) 6 Cal.3d 375. However, while appellant's case was pending in the appellate court, this court disapproved the *Burton* rule as inconsistent with *Fare v. Michael C. supra,* 42 U.S. 707 and determined that a juvenile's request for his parents or other non-attorneys must be evaluated under a totality of the circumstances. (*People v. Lessie*, *supra*, 47 Cal.4th 1152, 1167.)

2 Respondent's Brief on the Merits ("BOM").

his *Miranda*[3] rights. Unlike the more restrictive *Davis* test, which is applied from the reasonable officer's viewpoint and demands a linguistic precision or bluntness largely unattainable for most juveniles, the totality test accounts for the fundamental differences between juvenile and adult offenders and provides courts with the necessary flexibility to balance the special concerns that accompany an evaluation of a juvenile's invocation of his Fifth Amendment rights without unduly restricting law enforcement in the gathering of information from older, more experienced juveniles. (*In re Gault* (1967) 387 U.S. 1, 55 [87 S.Ct. 1428, 18 L.Ed.2d 527]; *Fare, supra,* 442 U.S. at pp. 725-726; *Lessie, supra*, 47 Cal.4th at p. 1167.)

In sum, this court should affirm the Court of Appeal's reversal of appellant's convictions. Not only do the circumstances prove that Nelson's request to speak to his mother constituted an invocation of his Fifth Amendment right to counsel, the case aptly demonstrates the inapplicability of the *Davis* test to juveniles, and in particular, evaluations of a juvenile's request for a parent or other non-attorney.

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[3] *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694] ("*Miranda*").

THE PROCEDURAL AND FACTUAL CASE HISTORY

The Three Burglaries:

In April 2004, Katherine Parks' home in Laguna Niguel was burglarized of two purses. (1CT 14-16.) In May, two wallets, a checkbook, and an engagement book were stolen from Sheryl Adler's nearby home. (1CT 22-23.) These two incidents were followed by a burglary on June 18, in which a credit card and some jewelry items were stolen from Jane Thompson's home on Vista Way. A purse was taken from Thompson's home in a later incident. (1CT 34-35.)

On June 20, Sam Nelson was identified using Thompson's credit card to purchase $245 worth of steak and lobster tails from the local Chart House restaurant and $500-600 in steaks and lobster tails from the Beach House. (1CT 59-60, 64-66) On June 25, appellant tried unsuccessfully to use one of Thompson's personal checks to pay for a $35 sandwich order at a nearby Subway. (1CT 69-70.)

Thompson's Murder:

On June 26, 2004, Orange County Sheriff deputies found 72 year old Jane Thompson beaten to death in her home. She died from massive blunt force head trauma, with multiple skull fractures and brain hemorrhaging. (1RT 349-350.) On June 28, 2004, Orange County Deputy Sheriffs Daniel Salcedo and Brian Sutton were investigating the homicide and contacted

the 15-year-old appellant outside his home. Nelson agreed to be interviewed and, while sitting inside Salcedo's vehicle, told the deputies he had been inside Thompson's home a few weeks earlier to help remove a dead mouse from an upstairs bedroom. (1CT 25-26; 1RT 87-88.) He had heard about the rash of local burglaries and recent murder but didn't have any knowledge about the crimes. He was telling the truth and willing to take a lie detector test. (4CT 525, 531-532.)

After the manager of the Beach House restaurant identified a photograph of Nelson as the person who had used Thompson's credit card to purchase a large to-go order on June 20 (1CT 32-33, 64-66; 1RT 93-94), the officers returned to Nelson's house on June 29 and asked if he would be willing to go to the stationhouse for some questions. It was about 2:30 p.m. (1RT 94, 170, 187.) Nelson agreed and the officers transported Nelson to the Sheriff Department's Santa Ana headquarters – a 35 to 40 minute drive. (1CT 28-29; 1RT 94-95, 108-109, 167.) Nelson's mother was not at home and no explanatory note was left for her. (1RT 106-107.)

Appellant's Sheriff's Headquarters Interrogation:

The audio/videotaped interrogation was conducted in the second floor interview room at the Orange County Sheriff's headquarters. It began at 3:35 p.m. (1RT 169; 3CT 537.) Deputy Salcedo began by asking Nelson if he would be willing to clear up some things from their previous day's

interview that "didn't make sense." (3CT 535.) Salcedo then read the minor his *Miranda* rights from a department-issued card, calling it a "formality." (1CT 536.) Nelson answered that he understood his rights and was willing to answer some questions. (3CT 537-538.)

After some introductory questions (3CT 538-552), Nelson repeated that he had been in Thompson's house a few weeks ago to help her remove a dead mouse. (3CT 555.) He later admitted to using Thompson's credit cards at several local businesses after discovering her purse in the greenbelt area behind her house. (3CT 557-584.) When pressed about some purchases at the Chart House and Beach House restaurants, Nelson said he got the credit card from Thompson's coffee table the day he was helping her with the dead mouse. (3RT 587.)

Deputies Salcedo and Sutton challenged Nelson's truthfulness and started to suggest that he killed Thompson. (3CT 587-592.) The minor vehemently denied hurting Thompson but admitted breaking into her empty house on June 18 and taking a credit card and some jewelry. (3CT 592-593, 593-608.) After further questioning, he admitted sneaking into Thompson's house a few nights later and taking her purse while she slept on the couch. (3CT 608-634.)

Salcedo continued to question Nelson's truthfulness, claiming that fingerprint, blood and DNA evidence proved his responsibility for

Thompson's death. When the deputy challenged Nelson to take that polygraph test "right now," insisting that "[y]ou can't deceive the machine...." (3CT 635-641), Nelson asked to call his mother:

> 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's happening.
> Salcedo: Okay.
> Nelson: And I also want to like talk to her about it. [S]ee 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.[4]
> Salcedo: You've never brought that up, correct?
> Nelson: Because I didn't think it was important until now.
> Salcedo: But why it so important right now?
> Nelson: Because I'm being accused of murder that's why its important right now.

Salcedo responded "Well, cause we know you murdered Ms. Thompson," and just continued with questioning, asking if the "machine is gonna be a bad machine or trick you?" (3CT 641-642.) Salcedo challenged Nelson to quit lying and pressed Nelson again about taking the polygraph test. Nelson responded by making his second request to talk to his mother:

> Salcedo: We have a person here that can do the test right now. Then we can see the truth.
> Nelson: **All right. I want to talk to my mom though.**
> Salcedo: Okay, wait, Sam, you got caught, do you understand that? Do you understand what that means, Sam?

(3CT 645-646.) Nelson repeated he did not kill Thompson. When Salcedo

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[4] The defense prepared transcription reads: "Nelson: I've been wanting to talk to my mom, but I want to do it now, because...." (4CT 998.)

continued to challenge Nelson, he asked to be left alone, explaining: "It's not that I don't care that she, uh, whoever, gets like whoever did it gets caught, but is the fact that I don't care who it is as long as you guys leave me alone." (3CT 647.) Appellant continued to deny killing Thompson but Salcedo persisted with his questioning, ignoring Nelson's third request to call his mother:

> Salcedo: All we want is a simple explanation, Sam 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 Ms. Thompson?
> Nelson: No.
> Salcedo: You took her purse?
> Nelson: **Yes, and I want to talk to my mom now.**

(3CT 657.) The deputies, again, ignored this request, confronted Nelson with his previous responses, and began lecturing him. Salcedo kept repeating that Nelson "got caught," that "there's no way out of this," and that all he wanted from Nelson was "the decency of an explanation." (3CT 658.) Nelson continued his denials and the deputies ignored a fourth request to call his mother:

> Salcedo: ...Like Investigator Sutton said, all I want is the decency of an explanation...You can do it in one minute or you can take your time and tell me all about it. You can have me ask [ ] questions about it and you can answer yes or no and give me the decency of that. I'll even take that kind of explanation, are you willing to do that for me?
> Nelson: **I didn't kill her so no and let me talk to my mom now. Please.**

Salcedo: What are you gonna 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 gonna tell her you murdered Ms. Thompson?
Nelson: No, because I didn't.
Salcedo: Oh, no you didn't?
Nelson: No.

(3CT 659.) Salcedo continued his demand for the "decency of an explanation," telling Nelson: "...its not a phone call to mommy and she's gonna come pick you up and you're gonna go home." (3CT 659-660.) He challenged Nelson again with incriminating DNA evidence and the polygraph test, prompting Nelson to make his fifth request to talk to his mother:

Salcedo: It's in the quadrillions if that's even a number, of the same guy having your DNA. I mean, it we can't even talk about it its so ridiculous. Tell me what happened Sam. Did she sit up and see you and you knew...
Nelson: I didn't do anything.
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.**

(3CT 661.) It was not until this point, about three hours into the interrogation (and about four hours since the deputies first contacted appellant at his house), that Salcedo acknowledged Nelson's request to make a phone call. However, permission to make the call was conditioned on Nelson's promise to take the polygraph test:

Salcedo: ...Okay? And then, are you gonna 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 get busted for all this other stuff that I did.
> Salcedo: Oh, you're getting busted for all of it, Sam. I mean, everything. Everything, Sam. You got caught. You got caught. What's mommy's phone number?

(3CT 662.) Nelson was unable to reach his mother but talked to his brother and his grandmother about what was happening. (3CT 664-666.) Salcedo interrupted, telling appellant the polygraph operator was present and waiting. Nelson, who was on the phone with his brother, told Salcedo: "they're telling me not to take the test until mom or a lawyer's here. Is that okay?" Salcedo and Sutton replied that the decision was up to him. Nelson asked if there was a phone number his mother could use to call sheriff's headquarters, but Salcedo ignored the question and asked Nelson how his family was going to find his mom. Nelson tried to answer but Salcedo interrupted, saying:

> 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: Yeah, they don't want me to do anything until a lawyer or my mom is here. So I'm gonna, I need to wait.

(3CT 666.) Salcedo told Nelson he was going to inform the polygrapher "what [Nelson's] decision was." Salcedo stepped out for a minute but on his return – fully aware Nelson wanted to talk to his mother and was waiting for her arrival – asked if Nelson was able to talk to everyone he wanted. Nelson repeated that he couldn't talk to his mom but Salcedo just began

rehashing the evidence they had against him for murder. (3CT 667-678.) Nelson continued his denials and again pleaded with the deputies to stop talking about the murder:

> Nelson: I'm not gonna say this is me for not doing anything.
> Salcedo: Sam, we're not gonna make you admit to something.
> Nelson: Well, then I told you no it wasn't me, then, then, can you please stop talking about it…
> Sutton:…but wait a minute, wait a minute…
> Nelson:…at least for now.
> Sutton:…wait a minute, Sam…

(3CT 679.) The deputies, however, continued to press Nelson about the murder (3CT 679-687), pausing only when he asked to use the restroom and make his sixth and seventh requests to call his mother:

> Nelson: Can I use the bathroom?
> Salcedo: Sure.
> Nelson: Thank you.
> Salcedo: Okay.
> Nelson: **And I also need to call my mom**, because she, my, my family wants her to come down here.
> Salcedo: Okay.
> Sutton: That way. … get you a candy bar, what do you want?
> Nelson: Uh, anything, I'm just really hungry
> Sutton: All right…
> Nelson: **Can I, could I try calling my mom again** to see if I can reach her?
> Sutton: Uh, hang on just a second…
> Nelson: Thank you.
> [pause in proceedings.]
> Salcedo: Okay. Hey. Uh, 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: Is there anything new that you need to talk to me about?

Salcedo replied "the truth," and reminded Nelson they've had to "drag" it

out of him so far, complaining his continuing refusal to admit to murder was "almost getting ridiculous." (3CT 687-688.) Salcedo started rehashing all the evidence they had against Nelson, saying that he was "a big boy," that he "got caught" and needed to "own up" to what he did. (3CT 689.)

The deputies started increasing the pressure, asking Nelson why his DNA would be found on Thompson and started accusing him of going into Thompson's house fully intending to kill her. (3CT 695.) Nelson then interrupted, asking for a few minutes to himself. The deputies asked if he wanted paper and pencil to write his thoughts down, and admonished him to do the "right thing" and not tell any "stories." Salcedo told him to knock on the door when he was ready. Nelson said "okay" but then made yet another request – now his eighth separate reference – to call his mother:

> Nelson: Could I use the phone real fast, though?
> Salcedo: Who do you want to call?
> Nelson: **I want to call my mom** and, uh, my brother again.
> Salcedo: Well, do this for us. Would you want to, can you write that out real quick or do you want, rather call them first?
> Nelson: I'd rather call first.

(3CT 696-697.) Nelson tried unsuccessfully to contact his mother. He then knocked on the door and Salcedo returned:

> Salcedo: Were you knocking?
> Nelson: Yeah, uh…
> Salcedo: What did you write, dude?
> Nelson: Uh, nothing yet, but, uh, cause I'm thinking for a second.
> Salcedo: Okay.
> Nelson: Do you think I would be alone until my family gets here? They should be here in like 10 minutes.

Salcedo: Did you just talk to 'em?
Nelson: Uh, yes, I called, uh Tony's sister and they left the house like 45 minutes ago so they should be here any minute.
Salcedo: Did they say she was coming, your mom and where who were coming here?
Nelson: Yes.
Salcedo: Okay, time alone to write for us?
Nelson: Uh, to be alone and like think about stuff and...

(3CT 697.) At this point, Salcedo started accusing Nelson of avoiding the issues for the past five hours and "playing" them but Nelson interrupted, saying, "I know, but this is my life here. I want some time." (3CT 698.)

Salcedo and Sutton continued challenging Nelson, gave him a few minutes, then returned to see if he had finished preparing a statement. (3CT 699.) Nelson asked for a few more minutes and asked if his family had arrived. Salcedo said "no" but said he'd let Nelson know when they arrived. Minutes later, Nelson completed and signed a written statement admitting to killing Thompson. (3CT 699-700, 5CT 1198.) The deputies questioned the minor about the details of his statement. Afterwards he was allowed to see his mother for a few minutes. (3CT 722; 2CT 382.)

The next day, a different deputy, Larry Pool, contacted Nelson at juvenile hall. At Pool's request, Nelson agreed to direct Saledo by cell phone to the location of his discarded clothing and Thompson's belongings. (5CT 1200-1261.) Nelson also wrote letters to Salcedo explaining where he had concealed various pieces of evidence and to Thompson apologizing for what he had done. (5CT 1263, 1265.)

The Case:

Samuel Moses Nelson was charged by indictment with the first degree burglaries of Parks and Adler (counts 1 & 2), three counts of first degree burglary against Thompson (counts 3, 4, & 5) and Thompson's murder (count 6). It was also alleged Nelson personally used a deadly weapon (Pen. Code, §12022, subd.(b)(1), (2)) and the burglaries were committed against someone over 65 years of age (Pen. Code, § 667.9, subd.(a)).(1CT 1-4.)

A defense motion to suppress Nelson's statements to his mother at the sheriff's headquarters was granted following the prosecution's concession. (2CT 352, 359.) Appellant's motion to exclude his confession to the officers as involuntary and in violation of *Miranda* was denied on the court's ruling that: (1) Nelson voluntarily waived his *Miranda* rights, (2) subsequent requests to wait for his mother and/or a lawyer were in the limited context of seeking advice regarding a polygraph test and did not constitute an unambiguous and unequivocal request for counsel as required by *Davis,* and (3) by continuing to consent to voluntarily talk to the police and sign a written confession, rather than wait for his mother who was expected to arrive shortly, Nelson never invoked his Fifth Amendment right to silence. (2RT 308-309, 314-315.)

A *Pitchess*[5] motion concerning three officers' personnel records and a motion to dismiss the indictment and transfer the case to juvenile court were also denied. (1CT 148; 1RT 54, 60-61; 2RT 327-328.) Nelson submitted to a court trial and he was found guilty as charged. (2RT 334, 335-343.) The court imposed a 25 years to life term for murder and concurrent upper six-year terms for the burglaries. (2RT 359-360; 379-381; 7CT 1653-1655.)

On February 25, 2010, the Court of Appeal reversed Nelson's murder conviction (count 6) and the burglaries of Parks and Adler (counts 1 and 2). (maj.opn. at 32.) 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.

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[5] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

ARGUMENT

I.

THE COURT OF APPEAL'S APPLICATION OF THE TOTALITY OF THE CIRCUMSTANCES RULE MUST BE UPHELD BECAUSE THERE ARE NO OTHER PROCEDURAL SAFEGUARDS FOR JUVENILES FACING CUSTODIAL INTERROGATIONS.

A. Respondent's Claims:

Respondent contends the Court of Appeal has effectively resurrected the per se parental invocation rule in *Burton*[6] that was recently disapproved in *People v. Lessie*, *supra*, 47 Cal.4th 1152 with its ruling that Nelson's post-waiver request to speak to his mother constituted an invocation of his Fifth Amendment rights and rendered his subsequent confessions inadmissible.

According to respondent, the reasonable officer test that is applied to adults in *Davis v. United States, supra,* 512 U.S. 452 states the correct standard of review for determining if any defendant – adult or juvenile – has invoked his Fifth Amendment rights to counsel or silence after a knowing and voluntary waiver of his *Miranda* rights. (BOM 3, 26.)

Respondent reasons that because the United States Supreme Court found no reason not to apply the totality of the circumstances test to adults

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[6] *People v. Burton*, *supra*, 6 Cal.3d 37, 383-384 [a minor's request to see a parent before or during custodial interrogation must, in the absence of evidence demanding a contrary conclusion, be construed to indicate the minor suspect desires to invoke the Fifth Amendment privilege].

and minors alike when evaluating the validity of an initial *Miranda* waiver (*Fare v. Michael C.*, *supra*, 442 U.S. at p.719), the reasonable officer standard in *Davis* should also apply to juveniles and adults alike when reviewing the validity of a suspect's post-waiver *Miranda* invocation. (BOM 3.) Respondent concludes that appellant's convictions should be reinstated because the trial court properly denied appellant's motion to suppress his confessions on the basis appellant's post waiver requests to speak with his mother were "ambiguous" under *Davis* and the officers were not required to terminate questioning. (BOM 20.)

Appellant urges that the question whether a juvenile's request to see a parent constitutes an invocation of his Fifth Amendment privilege – whether that request is made before or during custodial interrogation – is not only properly addressed under the *Fare/Lessie* totality of the circumstances test, it is simply outside the ambit of the clear articulation rule and objective reasonable officer standard that comprises the *Davis* test.

Here, the record will show the Court of Appeal did not find that Nelson's request to speak with his mother was "tantamount to a request for an attorney" as respondent claims (BOM 2), but concluded Nelson successfully invoked his Fifth Amendment privilege after proper consideration of the totality of the record, including evidence that reflected "a juvenile who persisted in his attempts to seek out his mother's assistance

in protecting his rights, indicated numerous times that he did not want to continue speaking, and only submitted to the deputies' insistence that he write out a confession after being subjected to five-plus hours of interrogation." (maj. opn. at 30.)

B. The Standard of Review is Independent and Non-deferential.

When a court's decision to admit a confession is challenged on appeal, the reviewing court accepts the trial court's determination of disputed facts if supported by substantial evidence but independently determines, from the undisputed facts and facts properly found by the trial court, whether the challenged statement was illegally obtained. (*People v. Gonzalez* (2005) 34 Cal.4th 1111, 1125.)

Respondent describes the applicable standard of review only in terms of a trial court's resolution of disputed facts. (BOM 11, 13, 23.) While the trial court may have ruled that it was resolving any issues of credibility against appellant in this case (2RT 295), where the interrogation was tape recorded and transcribed, and thus the relevant facts surrounding the giving of the statement are undisputed, this Court conducts an independent – and thus non-deferential – review of the legal question whether appellant's post-waiver statements constituted an invocation of his Fifth Amendment privilege. (*People v. Bacon* (2010) ___ Cal.4th___ (2010

WL4117545, p. 13); *People v. Maury* (2003) 30 Cal.4th 342, 404; *People v. Vasila* (1995) 38 Cal.App.4th 865, 873.)

C. *Miranda v. Arizona* – Privilege against Compelled Self Incrimination

In the landmark decision of *Miranda v. Arizona. supra*, 384 U.S. 436, the United States Supreme Court determined the Fifth Amendment privilege against compelled self-incrimination extends to suspects in the stationhouse. (*Id.* at p. 444.) Recognizing that "the privilege against self-incrimination is jeopardized" when a person is taken into custody and questioned, the Court held that a criminal defendant may not be subjected to the "inherently compelling pressures" of a custodial interrogation unless he has been advised of and has knowingly and intelligently waived his rights to silence, to the presence of an attorney, and to appointed counsel if he is indigent. (*Miranda, supra,* 384 U.S. at pp. 444-445, 467; *People v. Davis* (2005) 36 Cal.4th 510, 551-552.)

"Once warnings[7] have been given, the procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (*Miranda, supra,* at pp. 473-474.) "If the individual states that he wants an

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[7] The Court has since described the *Miranda* warnings as a "constitutional rule" that cannot be superseded by statute. (*See Dickerson v. United States* (2000) 530 U.S. 428, 444 [120 S.Ct. 2326, 147 L.Ed.2d 405].)

attorney, the interrogation must cease until an attorney is present."(*Id.* at p. 474.)

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 he effectively has invoked the right to counsel subsequent to a valid waiver. (*Smith v. Illinois* (1984) 469 U.S. 91, 98 [105 S.Ct. 490, 83 L.Ed.2d 488][an accused's subsequent responses can not be used to cast doubt on the clarity of his earlier request for counsel]; *People v. Martinez* (2010) 47 Cal.4th 911, 951.)

Once an individual has "clearly asserted" his right to counsel, he may not be subjected to further interrogation until counsel has been made available to him, or unless he initiates further communication, exchanges, or conversations with the police. (*Edwards v. Arizona* (1981) 451 U.S. 477, 484-485 [101 S.Ct.1880, 68 L.Ed.2d 378]; *People v. Neal* (2003) 31 Cal.4th 63, 67; *People v. Cunningham* (2001) 25 Cal.4th 926, 992.)

A request for counsel "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* (1991) 501 U.S. 171, 178, [111 S.Ct. 2204, 115 L.Ed.2d 158] italics in original omitted.) To avoid difficulties of proof and to provide guidance to officers conducting interrogations, this is an

objective inquiry. (See *Connecticut v. Barrett* (1987) 479 U.S. 523, 529 [107 S.Ct. 828, 93 L.Ed.2d 920].) An ambiguous or equivocal reference to an attorney that would lead a reasonable officer in the circumstances to understand only that a suspect might be invoking his right to counsel is insufficient. (*Davis v. United States* (1994) 512 U.S. 452, 458-459 [114 S.Ct. 2350, 129 L.Ed.2d 362]; *Berghuis v. Thompkins* (2010) __ U.S. __ [130 S.Ct. 2250, 2259, 176 L.Ed.2d 1908] [the requirement that a mid-interrogation invocation be clear and unambiguous[8] extends to the assertion of the right to remain silent]; *People v. Martinez* (2010) 47 Cal.4th 911, 947-948.)

D. *Miranda*'s Application to Juveniles / Totality of Circumstances Test

Miranda itself did not address any procedures for dealing with juveniles. However, consistent with the Supreme Court's history[9] of

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[8] The Court noted that it has not yet stated whether an invocation of the right to remain silent can be equivocal or ambiguous, but has found "no principled reason to adopt different standards for determining when an individual has invoked *Miranda* rights to silence and right to counsel at issue in *Davis*. (*Berghuis v. Thomkins, supra*, at p. 2260.)

[9] See, e.g., *Haley v. Ohio* (1948) 332 U.S. 597 [68 S.Ct. 302, 92 L.Ed.2d 224][because fifteen year old boy was particularly susceptible to overbearing interrogation tactics, the voluntariness of his confession could not "be judged by the more exacting standards of maturity"] or *Gallegos v. Colorado* (1962), 370 U.S. 49, 52-53 [82 S.Ct. 1209, 1211-1212, 8 L.Ed.2d 325] [confession involuntary where fourteen-year-old suspect held five days without contact from adult advisor "could not be compared with an adult in full possession of his senses and knowledgeable of the consequences of his admissions"].)

heightened concern for juveniles under investigation in a custodial setting, the Court extended *Miranda*-type standards to juveniles a year later when it held the Due Process Clause of the Fourteenth Amendment applied to juveniles as well as adults in the seminal case of *In re Gault, supra,* 387 U.S. 1, 55.

Declaring the *Miranda* warnings to be a basic guarantee for juveniles in custody, the *Gault* court recognized a juvenile's privilege against self-incrimination and the "need for special care in scrutinizing the record," noting that "age 15 is a tender and difficult age for a boy of any race [and] he cannot be judged by the more exacting standards of maturity." (*Id.* at p. 46.) The Court recognized that "special problems may arise with respect to waiver of the privilege by or on behalf of children." While it did not expand on these "special problems" or set forth guidelines for lower courts to follow (*Id.* at p. 55), the Court noted the importance of counsel to a juvenile's effective *Miranda* waiver and the role of a juvenile's parents in such situations:

> We appreciate that special problems may arise with respect to waiver of the privilege by or on behalf of children, and that there may well be some differences in technique - but not in principle - depending upon the age of the child and the presence and competence of parents. The participation of counsel will, of course, assist the police, Juvenile Courts and appellate tribunals in administering the privilege. If counsel was not present for some permissible reason when an admission was obtained, *the greatest care must be taken* to assure that the admission was voluntary, in the sense not only that it was not coerced or

> suggested, but also that it was not the product of ignorance of rights or of adolescent fantasy, fright or despair.

(*Id.* at p. 55, italics added.)

Three years after *Gault* and its prophetic message about the "special problems" that may arise with juveniles, this court addressed the question whether evidence of a minor's request to see his parents invoked the Fifth Amendment privilege in *People v. Burton, supra*, 6 Cal.3d 375.

In *Burton*, a 16-year-old murder suspect asked to see his father sometime between his booking and transfer to the interrogation room but prior to being Mirandized and questioned. Reaffirming that any words or conduct which "reasonably appears inconsistent with a suspect's present willingness to discuss his case freely and completely with the police at that time" constitutes an invocation of his Fifth Amendment privilege, this court ruled that a minor's request to see one of his parents, "made at any time prior to or during custodial interrogation," must, in the absence of evidence demanding a contrary conclusion, be construed to have invoked his Fifth Amendment privilege against self-incrimination. (*Burton, supra,* at p. 382, citing *People v. Randall* (1970 1 Cal.3d 948, 956.) The court compared the natural inclination of an adult to seek help by requesting an attorney with that of a minor whose desire for help would most naturally manifest itself in a request for parent, explaining:

> 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.

(*Id.*)

The United States Supreme Court, meanwhile, did not confront the question of juvenile *Miranda* rights again until 1979 when it addressed this court's extension of *Burton's* presumptive parental request rule to a minor's request for his probation officer in *Fare v. Michael C., supra,* 442 U.S. 707. In *Fare*, the Court confirmed that the "pivotal role" played by attorneys justifies the per se rule established in *Miranda* for requests for counsel, but it determined courts must otherwise consider the totality of the circumstances in determining whether a minor or adult has invoked his *Miranda* rights to silence or assistance of counsel. The Court noted:

> 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 warning given him, the nature of his Fifth Amendment rights and the consequences of waiving those rights.

(*Id.* at p. 725, citing *Miranda, supra*, 384 U.S. at pp. 475-477.) The Court reasoned this test would provide courts with "the necessary flexibility" to consider the significance of any requests a juvenile might have, whether it was to consult his parents, a probation officer, or another party. At the same time, it would refrain from imposing "rigid restraints" on law enforcement and the courts in "dealing with an older more experienced juvenile." (*Ibid.*)

Most recently, in *People v. Lessie, supra*, 47 Cal.4th 1152, this Court revisited the issue of parental requests by juveniles and its prior holding in *Burton* interpreting a minor's request to see a parent – either before or during custodial interrogation – as presumptively indicative of a "minor's desire to invoke the Fifth Amendment privilege." (*Id.* at pp. 1156, 1168, citing *Burton, supra*, at pp. 383-384.) This Court confirmed the ongoing need for "special care" in scrutinizing the record to determine whether a minor's confession is voluntary and the ongoing basic premise that "admissions and confessions of juveniles require special caution." (*Lessie, supra,* at pp. 1166-1167.) However, it determined *Burton's* special rule for minors was inconsistent with the high court's decision in *Fare, supra,* and therefore "no longer good law." (*Id.* at p. 1156.)

This Court determined the presumptive weight that previously accompanied a minor's parental request was more than federal law compels and concluded that "a defendant's confession would be subject to exclusion

under the federal Constitution only if the totality of the relevant circumstances demonstrated his purpose in asking to speak with his father was to invoke his Fifth Amendment privilege." (*Lessie, supra,* at p. 1156.)

E. The United States Supreme Court Recognizes the Legally Significant Developmental Differences Between Adults and Juveniles.

Although the United States Supreme Court has not yet addressed the question whether a juvenile suspect's post-waiver invocation of his Fifth Amendment rights should be analyzed under the same standard as an adult, its historically consistent recognition of the developmental capabilities and limitations of adolescents renders it highly unlikely that it would countenance any standard of review that failed to account for those special concerns that are naturally present when addressing police interrogation of detained juveniles. (See, e.g., *In re Gault, supra*, 387 U.S. 1, 55; *Gallego v. Colorado, supra*, 370 U.S. 49, 54; *Haley v. Ohio, supra*, 332 U.S. 596, 599-600.)

Indeed, the Supreme Court's particular sensitivity to the need for more stringent protection of the constitutional claims of juveniles has continued to manifest itself, most recently in the Eighth Amendment arena. (See, e.g., (*Thompson v. Oklahoma* (1988) 487 U.S. 815, 835 [18 S.Ct. 2687, 101 L.Ed.2d 702][Eighth Amendment prohibits execution of individuals under age 16]; *Roper v. Simmons* (2005) 543 U.S. 551, 569

[125 S.Ct. 1183, 161 L.Ed.2d 1][the Court struck down the use of the death penalty for defendants who committed their crimes before age 18]; and *Graham v. Florida* (2010) ___U.S.___ [130 S.Ct. 2011, 2030, 176 L.Ed.2d 825][8th Amendment prohibits a sentence of LWOP for juvenile offenders who have committed non-homicidal offenses].)

Observing "strong moral, legal, and policy reasons for distinguishing between juvenile delinquents and adult criminals" (*Thompson, supra*, 487 at p. 835), the high court has identified three such reasons: (1) juveniles' lack of maturity and under developed sense of responsibility; (2) their increased susceptibility to negative influences and outside pressure; (3) juveniles are not as well formed in character and personality and have a greater potential for rehabilitation. (*Roper, supra,* 543 U.S. at 569-570.)

While the Supreme Court addressed these developmental and cognitive capabilities and limitations of adolescents in support of its reasoning for abolishing the death penalty for juveniles, these basic principles are no less relevant to the juvenile's place in the interrogation room. And, it is on this foundation that appellant turns to a review of the high court's decision in *Davis v. United States* and a discussion why its clear articulation and reasonable officer test is simply not applicable in the juvenile setting.

F. *Davis v. United States*

On October 2, 1988, Robert Davis and Keith Shackleton, both members of the United States Navy, spent the evening playing pool. Shackleton lost a wager on the game, which he refused to pay. The next morning, Shackleton was found beaten to death with a blunt object. The investigation centered on Davis and the Naval Investigative Service (NIS) arrested Davis. At the interrogation that followed, Davis waived his Miranda rights orally and in writing. After questioning went on for about an hour and half, Davis said "Maybe I should talk to a lawyer." The agents testified they made it very clear to Davis they weren't there to violate his rights, that if he wanted a lawyer, they would stop any kind of questioning with him, that they weren't going to pursue the manner unless they had it clarified whether he asking for a lawyer or is he just making a comment about a lawyer, and he said, "No, I'm not asking for a lawyer," and then added, "No I don't want a lawyer."

After a short break, and after re-reading o*f Miranda r*ights, the agent recommenced the interrogation. The interview continued for about an hour until Davis said "I think I want a lawyer before I say anything else." A motion to suppress the statements made during the interrogation was denied. Davis was later convicted of unpremeditated murder and sentenced to life in prison. The Supreme Court granted certiorari to decide how law

enforcement officers should respond when faced with an ambiguous request. (*Davis, supra*, 512 U.S. at pp. 454-456.)

Justice O'Connor, writing for the majority, held that "after a knowing and voluntary waiver of the *Miranda* rights law enforcement officers may continue questioning until and unless the suspect clearly requests an attorney." (*Id.* at p. 461.) In order for the police to be required to cease questioning, "the suspect must unambiguously request counsel," meaning that the individual "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." The Supreme Court described this as an "objective inquiry" to avoid difficulties of proof and provide guidance to officers conducting interrogations. (*Id.* at p. 459.)

The Court declined to extend *Edwards* and require law enforcement officers to cease questioning immediately upon the making of an ambiguous or equivocal reference to an attorney. (*Davis, supra, at* p. 459.) The Court did not view the possibility that many suspects might not be able to clearly articulate their right to counsel[10] as justification for fashioning a

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[10] As Justice O'Connor wrote: "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, supra*, at p. 460.)

new protective rule, reasoning that the giving of the *Miranda* warnings afforded suspects the "primary protection." (*Id.* at p. 460.) Further, the Court was unwilling to create a rule which, in its view, would compromise the "other side of the *Miranda* equation: the need for effective law enforcement." (*Id.* at p. 461.) Lastly, although clarifying a suspect's request for an attorney was "good police practice," the Court was unwilling to require it. (*Ibid.*)

In one of two strongly worded concurring opinions filed in *Davis*, Justice Souter advocated a "clarification approach" to the question of equivocal waivers, reasoning it would be more consistent with the purpose of *Miranda* to protect an "individual's right to choose" whether to be silent or to speak as well as more logically and practically applicable to the real world in which misunderstandings often arise between suspect and interrogator. Souter questioned the Court's decision to place the burden of clarity on the individuals in custody, by demanding a "heightened [level of] linguistic care" by those who may speak uncertain English, or be "woefully ignorant" or be simply so "sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them." (*Davis, supra,* at p. 469, conc.opn. of Souter, J.)

Finally, Justice Souter discredited the legitimacy of distinguishing between initial waivers and post-waiver invocations on the theory the suspect should shoulder the burden of showing a clear subsequent assertion. He observed that *Miranda* itself discredited that distinction, describing the object of the warning as being to assure "a continuous opportunity to exercise the [right of silence]." (*Davis, supra*, at p. 471, citing *Miranda, supra,* 384 U.S. at p. 444, conc opn. of Souter, J.)

G. The *Davis* Test Eliminates Necessary Protections For Juveniles Facing Custodial Interrogations.

As directly relates to this case, the immediate problem with *Davis* is that it simply does not speak to the question of what happens when a juvenile makes a post-waiver request for a parent. Rather, *Davis* was written as a *Miranda* right-to-counsel case and meant to address uncertain, conditional, or otherwise disconnected references by an adult suspect to having or wanting an attorney. Under *Davis*, to invoke the Fifth Amendment privilege after a knowing and voluntary waiver of *Miranda* rights, "a suspect must unambiguously request counsel." (*Davis, supra,* at 459.) It's an objective inquiry. If the statement fails to meet the requisite level of clarity, the officer isn't required to stop questioning. As explained in *Davis*, if the interrogating officers "reasonably do not know whether or not the suspect wants a lawyer, a rule requiring the immediate cessation of questioning would 'transform the *Miranda* safeguards into wholly irrational

obstacles to legitimate police investigative activity.' [citation]." (*Id.* at 459-460.)

From a pure language and grammar standpoint, however, there is nothing ambiguous about a juvenile's request to contact a parent during the course of a custodial interrogation. In this case, for example, three hours into his interrogation, fifteen year old Sam Nelson asked the officer quite plainly, "Can I call my mom?" (3CT 641.) As the Court of Appeal determined, the statement contained no ambiguity or equivocation. It was plainly stated and neither uncertain nor conditional. (maj. opn. p. 26.) In the context of a custodial interrogation, however, a minor's request for a parent, no matter how clearly stated, is meaningless without some interpretation or clarification by the interrogating officer. Unlike an adult's ambiguous reference to counsel, the question here isn't *what* the minor is asking for. It's *why*. Is the minor asking for a parent to seek legal assistance with this case? Is he simply looking for comfort? Or does he simply want to let his parent know where he is. *Davis* does not direct itself to this question.

The law currently states that a minor's request for a parent or other guardian – whether made before or during interrogation – *can* constitute a Fifth Amendment invocation if "the totality of the relevant circumstances demonstrated his purpose in asking to speak with his [parent] was to invoke his Fifth Amendment privilege." (*Lessie, supra*, 47 Cal. 4th at p.1167;

Fare, supra, 442 U.S. at p. 725.) It is a subjective test and the intent of the defendant is a relevant factor to consider.

Under *Davis*, however, the inquiry becomes an objective one and is much more narrowly focused. As Justice O'Connor stated, "a statement either is such an assertion of the right to counsel or not."(*Davis, supra,* 512 U.S. at p. 459.) An interrogating officer is not obligated to ask clarifying questions and can rightfully ignore any statement if "the 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." (*Id.*, italics in original.) Further, as there is the unanswered question whether age is among the "variety of other reasons" that *Davis* allows the interrogating officers to ignore, it appears that evidence of a minor's parental request would appear to fall totally outside the intended ambit of *Davis's* reach.

On a more general level, appellant submits that *Davis* was simply a poorly written decision and this Court should not extend its reach to juveniles under any circumstances. First, *Davis* places an unfair burden of clarity upon individuals in custody. It is at least as plausible, if not more plausible, that a suspect who ambiguously invokes his rights is, albeit imperfectly, attempting to do exactly that – invoke his rights. "The right to have counsel present at the interrogation is indispensible to the Fifth

Amendment privilege." (*Fare, supra,* at 719.) Yet, *Davis* knowingly operates to the disadvantage of many suspects who, because of "fear, intimidation, lack of linguistic skills or a variety of other reasons" – reasons all particularly applicable to juveniles – refrain from making specific demands of the police. (*Davis, supra,* at p. 460.) As Justice Souter noted:

> Criminal suspects ...would seem an odd group to single out for the Court's demand of heightened linguistic care. A substantial percentage of them lack anything like a confident command of the English Langue, many are woefully ignorant and many more will be sufficiently intimidated by the interrogation process or overwhelmed by the uncertainty of their predicament that the ability to speak assertively will abandon them.

(*Id.* at 469, conc.opn. of Souter, J.) The Court reasoned that the "primary protection afforded suspects subject to custodial interrogation is the *Miranda* warnings themselves." However, as Justice Souter once again responds, how can a "once-stated warning, delivered by those who will conduct the interrogation ...suffice to assure that the...right to choose between silence and speech remains unfettered throughout the interrogation process." (*Id.* at p. 471, conc.opn. of Souter, J.)

More than fifteen years after *Davis* was decided, considerable uncertainty remains as to what the actual standard amounts to. The Supreme Court in *Davis* insisted that it was being consistent with the rule in *Edwards* and was preserving the "bright line nature of that decision: "if we were to require questioning to cease if a suspect makes a statement that

might be a request for an attorney, this clarity and ease of application [as set forth in *Edwards*] would be lost." (*Davis, supra*, at p. 461.)

However, having failed to provide any significant guidelines for the lower courts for determining when any statement should be deemed equivocal, the lower courts have been left to fill in the blanks, with the predictable result being a total lack of consistency in its application. This has even been acknowledged by the courts. (See, e.g. *Clark v. Murphy* (9th Cir. 2003) 317 F.2d 1078 [Ninth Circuit is somewhat inconsistent as to what qualifies as unequivocal and what constitutes an equivocal request for a lawyer].) [11]

Indeed, respondent points to multiple cases involving suspects' requests for counsel that were deemed insufficient invocations under *Davis* in an attempt to demonstrate that Nelson's requests to talk to his mother were equally insufficient to establish a *Miranda* invocation. (BOM 23-24; conc.& dis.opn. by Aronson, J. at 10-11.) Appellant, too, can cite to cases in which almost identical invocations were deemed legally sufficient.[12]

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[11] See, also, Strauss, Marcy S., *Understanding Davis*, Loyola of Los Angeles Law Review, Vol. 40, 2007; Loyola-LA Legal Studies Paper No. 2006-30, and examples cited therein.

[12] Consider, for example, that the right to counsel was deemed correctly invoked under the following circumstances: "I think I need a lawyer present" (*State v. Jackson* (1998) 348 N.C.52, 56-57); when the suspect said that he did not "want to make a statement at this time without a lawyer" (*United States v. Johnson* (4th Cir.2005) 400 F.3d 187, 195); or

However, apart from proving appellant's point about the inconsistencies in *Davis's* application by the courts, it does not further appellant's cause to attempt to distinguish each and every one of the opposition's references because none of the cases cited involves the situation here – multiple straightforward requests for a parent by a minor. The closest case, factually, is *People v. Roquemore* (2005) 13 Cal.App.4th 11, 24-25, wherein an 18 year old's request to the police – "Can I call a lawyer or my mom to talk to you" – was deemed an insufficient *Miranda* invocation. However, it, too, is distinguishable from this case because the facts show the defendant told the police he was familiar with his rights because of his numerous arrests, his stepfather was a police officer, he was Mirandized and reminded of his rights a second time, and he twice initiated conversations with the police – hardly the situation that occurred here.

Finally, respondent challenges appellant to justify why the *Davis* test shouldn't apply to the evaluation of a juvenile's post-waiver invocation of *Miranda* rights when the totality of the circumstances test has been held

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"Uh, yeah. I'd like to do that" in response to a question whether the suspect understood his right to counsel; (*Smith v. Illinois, supra,* 469 U.S. 91, 93); or "Maybe I should talk to an attorney by the name of William Evans" and proffering that attorney's business card (*Abela v. Martin* (6th Cir.2004) 380 F.3d 915, 919, 926-27; or "Can I get an attorney right now, man?" (*Alvarez v. Gomez* (9th Cir.1999) 185 F.3d 995, 998, and "I'd just as soon have an attorney 'cause, you know-ya'll say there's been a shooting." (*Kyger v. Carlton* (6th Cir.1998) 146 F.3d 374, 376, 379.) (See, also, *In re H.V.* (Tex.2008) 252 S.W.3d 319, 326, and cases cited therein.)

applicable to both juveniles and adults in the initial waiver situation. (BOM 3, 25.) Respondent overlooks that the law has always recognized differences between adults and minors, and not just in the constitutional arena. The law, for example, contains well recognized age restrictions on when an individual can marry (Cal. Fam. Code, § 301), vote (Cal.Const. Art.2, § 2), or serve on a jury (Cal. Civ. Proc. §203). In *Thompson v. Oklahoma*, *supra*, 487 US. 815, 835, the Supreme Court observed that "inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult." So, too, in *Eddings v. Oklahoma* (1982) 455 U.S. 104, 115-116 [102 S.Ct. 869, 71 L.Ed.2d 1], it reaffirmed that "youth is more than a chronological fact...Our history is replete with laws and judicial recognition that minors, especially in their earlier years, are generally less mature and responsible than adults."

As applies here, the Supreme Court justified its application of the totality of circumstances test to juveniles in *Fare* only because it allowed for consideration of those personal characteristics of the defendant such as age and experience. Thus, it expressly accounted for the special caution that society recognizes must be extended to juveniles while also allowing the courts and law enforcement the flexibility to deal with more mature or

experienced minors. (*Lessie, supra,* 47 Cal.4th at p. 1167; *Fare, supra*, 442 U.S. at p. 725.)

However, that flexibility and balancing of competing interests of law enforcement and the rights of the suspect is lost with the clear articulation/reasonable officer rule of *Davis* which was justified on its purported clarity and ease of application by law enforcement. (*Davis, supra*, at p. 461.) Indeed, it is hard to avoid the conclusion that the *Davis* court opted for a regime that would allow the police to deliberately ignore a suspect's attempt to invoke the *Miranda* rights, a practice that in or of itself can increase the very coercive atmosphere *Miranda* was intended to dispel. Under those circumstances, it is difficult to imagine how juveniles would fare if required to function under the *Davis* rubric as well.

The concurring and dissenting opinion in this case notes that "several other jurisdictions" have already chosen to apply *Davis* to juvenile defendants. (conc.& dis. opn. by Aronson, J., at p. 3.) However, only one of the four cases cited, *In re H.V., supra*, 252 S.E.2d 319, involves a juvenile's request for a parent. In that case, the Texas Supreme Court addressed the parties' conflict over the proper application of *Davis* and the lack of authority instructing whether the boy's age was among the "variety of other reasons" the courts could not consider. It did not resolve that issue because it determined the minor's statements that he wanted to talk to his mother,

coupled with his statement that he wanted his mother to ask for an attorney, and exclamation of "but I am only sixteen" when told by the magistrate that only he could ask for an attorney, constituted an unequivocal invocation of right to counsel. (*Id.* at pp. 325-327.)

H. Nelson's Request to Call His Mother Constituted an Invocation of his Fifth Amendment Privilege When Considered Under the *Fare/Lessie* Totality of the Circumstances Test.

The Court of Appeal correctly applied the *Fare/ Lessie* test in concluding that Nelson invoked his Fifth Amendment rights. The totality of circumstances in this case demonstrates that Nelson clearly invoked his Fifth Amendment rights when the interrogation had just entered its third hour, Nelson was facing increasingly pointed questions on Thompson's murder and was being challenged to take a polygraph test, and he asked Deputy Salcedo if he could call his mother to let her know what was happening, talk to her about it, and see what he should do. (3CT 641-642.) His stated reasons for wanting to call his mother clearly informed the interrogating officer that he wished to seek advice from her on how to proceed and, in response to Salcedo's questioning the juvenile's "sudden urgency" to call his mother, Nelson clearly and plainly explained that it was important to call "right now" because "I'm being accused of murder...." (3CT 641-642.) Faced with the prospects of incriminating himself during a polygraph test and a looming murder charge, Nelson's request to call his

mother reflected a clear invocation of his Fifth Amendment privilege. It was neither ambiguous, equivocal, conditional, nor uncertain, and the officers should have ceased the interrogation immediately.

Although evidence of a parental request no longer carries presumptive weight in determining whether a minor has invoked his Fifth Amendment privilege (*People v. Lessie, supra,* 47 Cal.4th at p. 1167), it remains a relevant factor and Nelson's confessions are still subject to exclusion under the federal Constitution if the totality of the circumstances as defined by the *Fare/Lessie* test demonstrate his purpose in asking to speak with his mother was to invoke his Fifth Amendment privilege. (*Ibid.*) And it does.

The facts in *Fare* and *Lessie* are illustrative. In *Fare*, the 16 ½ year old defendant was taken into custody on suspicion of murder. Before being questioned, he was advised of his *Miranda* rights. At the onset of questioning he asked if he could see his probation officer. The police denied his request and he stated he would talk without consulting an attorney. He then proceeded to make statements and draw some sketches implicating himself in the murder. A subsequent motion to suppress was denied. This court reversed, holding the defendant's request for his probation officer was a *per se* invocation of his Fifth Amendment rights in the same way the request for an attorney was found in *Miranda* to be.

(*Fare, supra,* 442 U.S. at pp. 709-713.) On appeal to the Supreme Court, the high court ruled that the California Supreme Court erred in finding that the defendant's request for his probation officer was a *per se* invocation. The question whether the defendant's incriminating statements and sketches were admissible was a question to be resolved on the totality of the circumstances surrounding the interrogation. The record reflected the defendant voluntarily and knowingly waived his Fifth Amendment rights and consented to the continued interrogation. Hence their admission in the Juvenile Court proceeding was correct. (*Id.* at pp. 713-724.)

In *Lessie*, by comparison, a 16 year old defendant, who was arrested for murder, made two requests to call his father. The first request was after he had been transported to the station and was in response to an officer asking if he wanted to notify his father himself or have the officer do it. He responded "Id like to call him." He was then Mirandized and gave a detailed confession after briefly denying involvement. During a break in questioning, Lessie asked again if he could call his father. While waiting for the phone, the officers asked a few more "quick questions" and Lessie gave additional information about the persons involved in the crime and their gang affiliation. Eventually, he was given a phone and he left a message for his father saying "Hey man, what's up? Dad [its] me, I'm in jail. So, see if you can, as soon as you get this, call back at this number."

Lessie was interviewed again four months later while in custody at juvenile hall. (*Lessie, supra*, 47 Cal.4th at pp. 1158-1160.) A subsequent motion to suppress his confessions was denied. The record included observations by the trial court that the defendant "never said anything close to, 'Id like to remain silent,' 'I don't want to talk,' 'Im not gonna answer any of those questions,' and 'can I get a lawyer' – anything that would be an invocation of his 5th or 6th Amendment rights."(*Id.* at p. 1170, fn. 12.)

On appeal, this Court ruled the totality of the circumstances supported the trial court's conclusion that Lessie's purpose is asking to speak with his feather did not constitute an invocation of his right to remain silent or obtain the assistance of counsel and his confessions were properly admitted into evidence. (*Lessie, supra*, at p. 1170, fn. 12.)

The importance of *Lessie*, apart from this court's establishment of the applicability of the totality of the circumstances test, is the identification of the specific circumstances this court found relevant to its finding whether Lessie's parental requests constituted an invocation of his Fifth Amendment privilege – specifically, that the juvenile did not say that he wanted to speak with his father before answering questions, that he did not say that he wanted his father to call an attorney on his behalf, and that he never hesitated to answer the detectives' questions at any point. (*Id.* at p. 1170.)

In this case, on the contrary, those circumstances in varying degrees were all present. The record shows that after Nelson was challenged to take a polygraph test, and made his request to call his mother, the two officers involved either ignored, deflected or derided the juvenile as he made four more requests to talk to his mother and, at one point, pleaded for "you guys to leave me alone" before he was finally offered a phone about three and one-half hours after the interrogation began. (3CT 641-642, 646-647, 657, 659-661.) After talking with either his brother or grandmother, he told the officers that family members were telling him that he needed to wait for his mother or a lawyer before taking the test and then emphasized that he needed to wait for his mother or a lawyer to arrive *before doing anything.* (3CT 666-667.)

However, at no time during the six to seven hours Nelson was in the interview room did the officers stop their questioning or ever re-advise Nelson of his Fifth Amendment rights. Rather, the record reflects Nelson asked Salcedo to stop talking to him about the murder. (3CT 679.) He asked if he could try and reach his mother again (twice) (3CT 688), requested a few minutes to himself (3CT 696-697), and then asked if he could be alone until his family arrived, explaining that this was his life and he wanted some time (3CT 598). From 3:30 when the interview began to about 8:30 when appellant submitted a written confession to Thompson's

murder, Salcedo and Sutton kept challenging Nelson, prodding him to confess, and created the impression Nelson had no option but to confess, by saying he had been "caught," that he should "be a man," that there was "no way out of this," that the officers are not just "going to go away, and that "mommy" wasn't going to pick him up and take him home. (3CT 646, 657, 659-660.)

Throughout the evening, Nelson's attitude and body language grew more defensive and increasingly less cooperative, as the questions shifted from neighborhood burglaries to his culpability for Thompson's murder. He began to cry. (2RT 304.) Salcedo questioned the juvenile's watery eyes (3CT 662), and criticized him for making them have to drag the truth out of him (3CT 688), all reflective of his total reluctance and lack of present willingness to discuss the case with the police. (*People v. Dreas* (1984) 153 Cal.App.3d 623, 630.)

The record, furthermore, did not show that Nelson had any purpose for contacting his mother that was unrelated to this criminal prosecution. (Compare, e.g., *People v. Rivera* (1985) 41 Cal.3d 388, 395 [suggesting a possible scenario where juvenile only wanted to call his parents to ask them to bring his toothbrush to juvenile hall.) There was no indication he was just looking for comfort or just wanted to let his family know what had happened. (*People v. Maestas* (1978) 194 Cal.Ap.3d 1499, 1508; *People v.*

Dreas, supra, 153 Cal.Ap.3d 623, 631.) So, too, he wasn't concerned about talking to his mother before she heard about the murder from someone else. (*People v. Hector* (2000) 83 Cal.App.4th 228, 236.) Clearly, Nelson wanted to talk to his mother for the purpose of seeking help with invoking his Fifth Amendment rights. The officers knew it. And they should have stopped the interrogation immediately.

So, too, Nelson's request to call his mother cannot be parsed out as invocation limited to the taking of the polygraph test. The timing of Nelson's initial request to call his mother followed immediately after the officer's shift in focus to the subject of Thompson's murder and the claim to an apparent plethora of evidence – fingerprint, blood and DNA evidence – that was available to incriminate him for that crime. (3CT635-641.). Up to that point, the interrogation had been limited to questions about Nelson's use of Thompson's credit cards and the rash of neighborhood burglaries. In asking to call his mother, Nelson was not just expressing a reluctance to take a polygraph test or to answer certain questions. The record reflects his desire to terminate the interrogation itself.

Indeed, while the officer's challenge to take the polygraph test may have been the catalyst behind Nelson's request to call his mother, the record shows he was not just responding to the anticipated test but was reacting to the sudden realization that he was going to be charged with murder and all

that entailed. Nelson's exchange with Salcedo supports this. When asked to explain the "sudden urgency" to call his mother, Nelson did not mention the polygraph test but answered it was important to call his mother "right now" because he was "being accused of murder." (3CT 641-642.)

Respondent maintains that a defendant may refuse to take a polygraph test without generally invoking *Miranda* rights and refuse to answer certain questions but answer others without manifesting a desire to terminate the whole interview. (BOM 22-23.) That may be generally true. However, it simply did not occur here and respondent's reliance on *People v. Silva* (1988) 45 Cal.3d 604 and *People v. Davis* (1981) 29 Cal.3d 814 is misplaced.

In *Davis*, a 16-year-old defendant who was charged with rape and murder, waived his *Miranda* rights, and then refused to take a polygraph test. However, the youth's refusal to answer the test administrator's questions was limited entirely to a reluctance to submit to the scrutiny of the actual mechanical device itself. (*Davis, supra*, at. pp. 824-825.) He was otherwise willing to answer his interviewer's questions and he continued to do so freely. In fact, the record from the suppression hearing shows that when defense counsel asked his client, "did you tell the polygraph man that you didn't want to take the test?" the defendant responded, "Yes." However,

when asked, "Did you tell him that you didn't want to talk about the case?" he said, "No." (*Ibid.)*

So, too, in *Silva*, a murder suspect claimed on appeal that his statement, "I really don't want to talk about that" represented an invocation of his rights to remain silent and that any further questioning occurred in violation of his *Miranda* rights. The trial court rejected this argument, after listening to the tape of the interview and determining the defendant's response was simply part of his denial of any knowledge concerning the crime or the victim, rather than any independent effort to terminate the interrogation. (*Silva, supra,* 45 Cal.3d at p. 630.)

Here, respondent claims the record shows Nelson continued to freely answer the officer's other questions. However, this is belied by a record that is replete with evidence of this juveniles' repeated and insistent pleas over several hours to try and contact his mother, to be left alone, to wait for his mother's and/or an attorney's arrival, and the interrogating officer's own admission that it was "almost getting ridiculous" how they've had to "drag" the truth out of him so far. (3CT 688.)

Questioning during the course of a lie detector test is clearly 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, *People v. Miller* (1989) 208 Cal.App.3d 1311; [polygraphs are frequently

used for "investigative purposes"]; *United States v. Lee* (3d Cir. 2003) 315 F.3d 206, 211-212 & fn. 3[questions during a polygraph examination include "'direct accusatory questions concerning the matter under investigation'"].) And here, whether appellant's request to speak with his mother was for purposes of seeking help in deciding whether to submit to a polygraph exam or looking for general assistance with how to proceed, it constituted an invocation of his Fifth Amendment privileges and the questioning should have ceased immediately.

Finally, respondent cites Nelson's prior experience with law enforcement and the juvenile justice system, including a two-month juvenile commitment, in support of the argument that a reasonable officer could have concluded Nelson's request to speak with his mother was not a request for an attorney. (BOM 22.) However, the fact a juvenile has had past experience with the courts or police bears little relevance to whether he actually understood the consequences of waiver – or in this case – that Nelson understood how to adequately invoke his *Miranda* rights after an initial waiver. Nelson had two prior experiences with being Mirandized. In December 2003 Nelson was stopped for driving under the influence and the arresting officer Mirandized him, despite the fact he displayed signs of being under the influence, he flunked the field sobriety tests (1RT 151-152), and it was against department policy to Mirandize individuals under

such circumstances (1RT 161). So, in January 2004, when a deputy sheriff *Mirandized* Nelson prior to taking a burglary report at his residence, she admitted doing so "immediately," explaining "that's what she likes to do with juveniles" and she "just wanted to get that out of the way." (1RT 75, 81.) Apart from these two experiences, there is no evidence Nelson was ever subjected to a custodial interrogation or that he invoked or waived his Miranda rights – any one of which would have better prepared him for knowing what "magic words" were necessary to instruct Salcedo and Sutton to cease questioning him.

In denying the motion to suppress, the trial court resolved all issues of credibility in favor of the prosecution, finding Nelson had "zero" credibility. (2RT 295.) However, the juvenile's testimony that he had heard *Miranda* warnings before but just never gave them much thought (1RT 240) is not only believable but it is consistent with most studies showing absolutely no relationship between the amount of juvenile court experience and the ability to truly grasp the meaning of the *Miranda* warnings. (Grisso, Thomas, "*What We Know about Youths' Capacities as Trial Defendants*," Youth on Trial, note 49, at 139, 151.) Indeed, until one realizes some experienced youths learn a lot, others learn nothing from their experiences, and the two types nullify each other, knowing simply that a youth "has lots of experience" is of absolutely no predictive value when evaluating degrees

of understanding. (Grisso, Thomas, "Adolescents Decision Making: a Developmental Perspective on Constitutional Provisions in Delinquency Cases," 32 New Eng. J. on Crim. & Civ. Confinement 3, p. 11.)

CONCLUSION

Unlike an inexperienced suspect, confused and confined on the police's turf, law enforcement possesses experience and extensive training in conducting custodial interrogations. The imbalance in training, experience and power in the coercive environment of a custodial interrogation more than justifies the police follow *Miranda* precisely with no shortcuts, particularly when a minor is involved.

Accordingly, appellant respectfully requests the judgment of the Court of Appeal be affirmed.

Date: November 15, 2010

Mary Woodward Wells
Attorney for Defendant-Appellant
Samuel Moses Nelson

CERTIFICATE OF COMPLIANCE

I, Mary Woodward Wells, appellate counsel for appellant, Samuel Moses Nelson, hereby certify that I prepared the forgoing Answer Brief using Microsoft Word 2003 and the word count for this document is 12,137 words, which does not include the cover or the tables.

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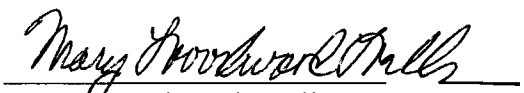

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