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Frederick K. Ohlrich
Administrator and Clerk of the Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

re: *People v. Samuel Moses Nelson*, S181611 //Supplemental Letter Brief

Dear Mr. Ohlrich:

This letter brief is in response to the Court's request for supplemental briefing on the effect, if any, of *J.D.B. v. North Carolina* (2011) 564 U.S. __, 121 S.Ct. 2394 [2011 WL 2369508](" *J.D.B.*") on the question regarding the proper test to evaluate a post-*Miranda* invocation of the right to counsel by a youth who asks to speak to a parent.

Introduction

Appellant recognizes that *J.D.B.* turned on the specific question of when a suspect is to be considered in custody, which is a different aspect of *Miranda* than is presently before this Court. However, the United States Supreme Court's continuing acknowledgement of the inherently coercive nature of custodial interrogations in that case, its "commonsense" recognition of the fundamental differences between the juvenile and adult minds, and respective ruling that the police must take into account the objective fact of the age of a youth they are going to question, supports appellant's argument in this case that the *Fare/Lessie* totality of circumstances test as articulated by the majority in *Nelson* is the constitutionally appropriate test to apply to post-*Miranda* invocations by a juvenile.

Relevant Case History

The Court of Appeal[1] in this case reversed Samuel Nelson's convictions for murder and two burglary counts after determining any statements made

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1 *People v. Nelson* (2010) 2010 WL 673215 [Cal.App.4 Dist.].

after Nelson first requested to speak with his mother were obtained in violation of *Miranda.*[2] The majority applied the "totality of the circumstances" test in *Fare v. Michael C.* (1979) 442 U.S. 707, 725, and *People v. Lessie* (2010) 47 Cal.4th 1152, 1169, and found that "after considering Nelson's age, experience, maturity, sophistication, the length, intensity, and content of the interrogation, Nelson's purpose in requesting to speak with his mother was to secure her assistance to protect his Fifth Amendment rights" and that "his words and conduct were inconsistent with a 'present willingness to discuss the case freely and completely.'" (*Nelson, supra*, 2010 WL 673215, p. 18.) The dissent, claiming the majority had improperly resurrected the per se parental invocation rule of *Burton,* urged application of a more narrow unequivocal invocation standard that was described in *Davis v. United States* (1994) 512 U.S. 452, a case which did not involve a juvenile suspect but rather the interrogation of an adult member of the United States Navy by Naval Investigative Service agents. (*Nelson, supra,* pp. 18-19; *Davis, supra*, 512 U.S. at pp. 454-455.)

In his Answer Brief on the Merits, appellant argued that the question whether a juvenile's request to speak with a parent constitutes a proper invocation of his Fifth Amendment privileges should be addressed under the *Fare/Lessie* totality of circumstances test and that the Attorney General's request to apply the *Davis* standard to the fifteen-year-old Nelson should be rejected. Unlike *Davis*, which requires an unequivocal and unambiguous request for counsel, a burden of clarity arguably unattainable for most youth, the *Fare/Lessie* totality of circumstances test best affords courts the flexibility to balance the special concerns universally recognized to be present when young persons are involved against the legitimate needs of law enforcement to interview criminal suspects and investigate crime. (*Lessie, supra,* 47 Cal.4th at pp. 1666-1167; *Fare, supra*, 442 U.S. at pp. 725.)

J.D.B. v. North Carolina

In *J.D.B.,* one of the first United States Supreme Court cases since *Fare* to address *Miranda* issues and youth,[3] the Supreme Court addressed the

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2 *Miranda v. Arizona* (1966) 384 U.S. 436 (hereinafter, "*Miranda*").

3 In *Yarborough v. Alvarado* (2004) 541 U.S. 652, the Supreme Court considered the same issue in *J.D.B.* as to the relevancy of a suspect's age to the question of custody but did not explicitly settle the age issue as a general constitutional matter because it was required to apply a deferential habeas standard.

specific question whether the age of a child subjected to police questioning is relevant to the custody analysis in *Miranda.* J.D.B., a 13-year-old seventh grader, was escorted from his class to a conference room where he was questioned about two recent home break-ins. J.D.B. was not given *Miranda* warnings, his grandmother (his legal guardian) was not contacted, and he was not told that he was free to leave the room. The assistant principal told J.D.B. to "do the right thing," warning him that "the truth always comes out." The police officer said that "what is done is done" and told J.D.B. that "you need to help yourself by making it right." After learning he might be placed in juvenile detention, J.D.B. confessed his and a friend's responsibility for the break-ins. At that point, the officer inform the youth he could refuse to answer questions and was free to leave. J.D.B provided more information, wrote a statement, and was allowed to leave. Two juvenile petitions were filed and J.D.B.'s public defender moved to suppress his statements arguing J.D.B. had been interrogated by police in a custodial setting without being afforded *Miranda* warnings and his statements were involuntary under the totality of the circumstances. The trial court denied the motion finding J.D.B. was not in custody at the time of the schoolhouse interrogation and his statements were voluntary. A divided panel of the North Carolina Court of Appeals affirmed and the North Carolina Supreme Court held, over two dissents, that J.D.B. was not in custody when he confessed. (*J.D.B., supra,* 124 S.Ct. 2394, 2399-2400.)

On certiorari from the North Carolina Supreme Court, the United States Supreme Court determined in a 5-4 opinion that a minor's age is relevant in the custody analysis and remanded for the state courts to address whether J.D.B. was in custody when police interrogated him. Justice Sotomayor, writing for the majority, stated that "'our history is replete with laws and judicial recognition' that children cannot be viewed simply as miniature adults." (*J.D.B., supra,* at p. 2404.) Seeing "no justification for taking a different course here," the court ruled that, "so long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." It cautioned that a child's age will not "be a determinative, or even a significant, factor in every case," but affirmed that "it is, however, a reality that courts cannot simply ignore." (*Id.* at pp. 2404, 2406.)

Analysis

The United States Supreme Court's recent holding in *J.D.B.* that the age of a child properly informs *Miranda's* custody analysis supports appellant's argument that the *Fare/Lessie* totality of circumstances test is the proper standard to apply whether evaluating an adolescent's initial waiver or

subsequent invocation of rights. Although *J.D.B.* did not speak to the specific question presented here – whether appellant's post-waiver requests to speak with his mother constituted an invocation of his Fifth Amendment rights – *J.D.B.* is relevant nonetheless because it is the first United States Supreme Court case since *Fare* to directly address the matter of youth rights under *Miranda* and it reaffirms that the objective "reality" of the differentiating characteristics of youth cannot be ignored by law enforcement or the courts if children are to receive "the full scope of the procedural safeguards that *Miranda* guarantees to adults." (*J.B.D., supra*, at p. 2408.)

As Justice Sotomayor explained in the majority opinion, age is far more than "a chronological fact" (*J.B.D., supra* at p. 2400), and "common sense" and "a wide basis of community experience" make it possible for adults to understand, as an objective matter, what is to be expected of children in a wide variety of different situations, including when they are subjected to police questioning. (*Id.* at pp. 2403, 2404.) A child's age can be considered without compromising the objective nature of the custody analysis "[p]recisely because childhood yields objective conclusions like those we have drawn ourselves – among others, that children are 'most susceptible to influence,' *Eddings*, 455 U.S., at 115, and 'outside pressures,' *Roper*, 543 U.S., at 569." (*Id.* at pp. 2404-2405.)

The crux of *J.D.B,* – that the reality of a child's age may not be ignored when evaluating objective circumstances specific to children (*J.D.B., supra,* at p. 2405) – is relevant to this case because the determination whether the fifteen-year-old Nelson's post-waiver request to speak to his mother constituted an invocation of his Fifth Amendment rights is largely dependent upon whether the circumstance of his youth can even be considered – and *J.D.B.* says not only that it can be, it must be.

Indeed, the record shows the *Nelson* majority embraced *J.D.B.*'s message of the importance of considering the circumstance of a youth's age because it reached its determination that appellant invoked his Fifth Amendment rights only after a consideration of his "age, experience, maturity, sophistication, the length, intensity, and content of the interrogation" under the totality of the circumstances test. (*Nelson, supra,* at p. 18.) A minor's natural tendency to seek help from a parent – as opposed to a lawyer – is considered a relevant factor under the totality approach. (*Lessie, supra*, 47 Cal.4th at p. 1168.) And here, the *Nelson* court determined the totality of the circumstances indicated the fifteen year old Nelson's purpose in asking to speak with his mother was to invoke his Fifth Amendment privilege and that his subsequent words and conduct were consistent with that purpose. (*Ibid.*)

Appellant urges, furthermore, that the *Fare/Lessie* test is the proper test to apply to a juvenile's invocation of rights whether it involves a pre-waiver or

post-waiver fact pattern because it provides the courts with the flexibility to account for those "special concerns" involved with juvenile suspects without imposing rigid restrictions on law enforcement in dealing with experienced older juveniles. (*Fare, supra,* at p. 725; L*essie, supra*, at p. 1167.) There is nothing in *Fare* or *Lessie* that holds the totality test inapplicable to post-waiver situations. In fact, *Lessie* was, in part, a post-waiver invocation case. Further, Justice Souter, who unsuccessfully championed a clarification approach to the issue of equivocal waiver in his concurring opinion in *Davis,* questioned the legitimacy of distinguishing between initial waiver and subsequent decisions to revoke them, noting that *Miranda* itself described the warnings as being meant to assure a "continuous opportunity" to exercise the rights to silence and attorney, and that the interrogation "must cease" if "the individual indicates in any manner, *at any time prior to or during questioning*, that he wishes to remains silent, [or if he] states that he wants an attorney." (*Davis, supra*, 512 U.S. at p. 471, conc.opn. of Souter, J., citing *Miranda, supra*, 384 U.S. at p. 444, and *Moran v. Burbine* (1986) 475 U.S. 412, 420, italics added.)

The dissent in *Nelson* and respondent, however, have urged application of the narrow approach applied to adults in *Davis v. United States*, *supra*, 512 U.S. 452, which requires a suspect to "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." (*Id.* at p. 459.) However, *Davis* did not involve a juvenile suspect and certainly did not speak to the question of what happens when a juvenile makes a mid-interrogation request to speak to his parent. The reasonable officer test, furthermore, is wholly inappropriate for the juvenile setting. The request for counsel must be made unambiguously and a high burden of clarity is placed on the shoulders of the individual in custody, allowing police to ignore unclear invocations. So, too, despite *J.D.B.'s* recent affirmation of the importance of age in the context of custodial interrogations (*J.D.B.*, *supra*, at 2403), it is not clear whether age is among the "variety of other reasons" *Davis* allows the officers to ignore (*Davis, supra,* at p. 460). Finally, the flexibility of the *Fare/Lessie* totality test is missing entirely under *Davis* because if a suspect's statement fails to rise to an unambiguous or unequivocal invocation of his Fifth Amendment rights, officers have absolutely no obligation to stop questioning him. (*Davis, supra*, at pp. 460-461,) This seriously handicaps juveniles who, as a class, are physiologically and psychologically limited (*J.D.B., supra*, at p. 2403, fn. 5) in their collective ability to meet such a burden of clarity.

In sum, appellant submits that *J.D.B.* is relevant for its recognition of the differentiating characteristics of youth, that the status of being a minor

renders a child particularly susceptible to the coercive techniques of police interrogation, and that the objective fact of a child's age is a "reality that courts cannot simply ignore." (*J.D.B., supra*, at p. 2406.) Furthermore, the record in this case fully supports the decision by the *Nelson* majority that, under the totality of the circumstances, Samuel Nelson's purpose in requesting to speak with his mother was to seek her assistance to protect his Fifth Amendment rights; that the record reflects a juvenile who persisted in his attempts to contact his mother and who made several requests to stop the questioning, and after five hours of interrogation by two officers who ignored, deflected and derided the juvenile for his efforts, submitted to their insistence that he write out a confession.

For the reasons cited above and in his Answer Brief on the Merits, appellant requests the Court of Appeal's judgment be affirmed.

Respectfully submitted,

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People v. Samuel Nelson
Supreme Court No. 181611

DECLARATION OF SERVICE

I, Mary W. Wells, say: I am a citizen of the United States, over 18 years of age, employed in the County of San Diego, California, in which county the within mentioned delivery occurred, and not a party to the subject cause. On July 26, 2011, I served the attached supplemental letter brief by transmitting the document electronically to the following address:

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On the same date, I also served the same above-entitled document by placing a separate copy thereof with postage prepaid into the United States mail, in a separate envelope for each addressee named hereafter and addressed respectively as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 26, 2011, at Del Mar, California.

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