IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. TONY LESSIE Defendant and Appellant.	No. S163453 Court of Appeal No. D050019 Superior Court No. SCN200740

APPEAL FROM THE SUPERIOR COURT OF
SAN DIEGO COUNTY

Honorable Joan P. Weber

APPELLANT'S REPLY BRIEF ON THE MERITS

Elisa A. Brandes
State Bar No. 157164
PMB 14
2650 Jamacha Road # 147
El Cajon, CA 92019

(619) 579-6266

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

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ARGUMENT

APPELLANT'S CONVICTION SHOULD BE REVERSED BECAUSE ADMISSIONS MADE DURING THE INTERVIEWS ON SEPTEMBER 20, 2005 AT THE POLICE STATION AND SEPTEMBER 21, 2005 AT JUVENILE HALL WERE OBTAINED IN VIOLATION OF APPELLANT'S FIFTH AMENDMENT *MIRANDA*[1] RIGHTS.

I. Introduction

In this reply brief, appellant makes no attempt to respond to each of respondent's arguments as such arguments are fully addressed in Appellant's Opening Brief on the Merits. Rather, appellant limits his reply to those points upon which he believes further discussion will be helpful to the Court.

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

II. The *Burton* Rule Should Remain The Law in California.

In *People v. Burton* (1971) 6 Cal.3d 375, 383-384, this Court held that a minor's request to call 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." (*Id.* at 383-384.) A review of the *Burton* decision makes clear that the case was decided based upon the defendant's *federal* constitutional rights under *Miranda* and the Fifth Amendment. (*See Fare v. Michael C.* (1979) 442 U.S. 707, 717 ["We note at the outset that it is clear that the judgment of the California Supreme Court [in the *Burton* case] rests firmly on that court's interpretation of federal law."].) Thus, as explained in appellant's opening brief, any contention that the *Burton* rule was somehow abrogated by Proposition 8, codified as article I, section 28, subdivision (d) of the California Constitution, has no merit. (AOBOM 28.)

As also explained in his opening brief, the *Burton* case has not been overruled by the United States Supreme Court. (AOBOM 24-26.) The *Fare* case, upon which respondent relies, concerns a minor's request to call his probation officer - - a role which readily distinguishable from that of a parent. Nevertheless, respondent asks this Court to extend the *Fare* rule to apply to a minor's request to call his parents.

In this regard, respondent contends that in *People v. Rivera* (1985) 41 Cal. 3d 388, this Court "recognized that the *Burton* rule is inconsistent" the holding of *Fare*. In the *Rivera* case, this Court stated, "[a]lthough [the *Fare* case] suggests that the *Burton* rule -- equating a juvenile's request to speak to a parent with the invocation of his privilege against self-incrimination -- may not be compelled by the federal self-incrimination

clause, *Burton* has been an established part of California jurisprudence for well over a decade and it is appropriate to recognize its holding as one component of the state constitutional privilege against self-incrimination." While this language suggests the possibility of an alternative state constitutional ground for the *Burton* rule, such language does not go so far as to "recognize" that the federal basis for the *Burton* has been overruled.

Moreover, as this Court noted in *People v. Black ("Black II")* (2007) 41 Cal. 4th 799, 819, this Court will not speculate as to whether the United States Supreme Court will change its position in the future, notwithstanding indications in recent cases that it may do so. Where the United States Supreme Court has never directly addressed an issue, the California Supreme Court is free to interpret matters of federal constitutional law. (*Ibid.*)

Moreover, there is nothing in the *Burton* decision which prevents the a court from considering the circumstances of an individual case. Indeed, the *Burton* rule expressly considers the surrounding circumstances. The issue appears to be one of presumption and the weight of the factors.

The rationale for the *Burton* rule was clearly set forth in the *Burton* case. Respondent does not attempt to argue that any of the reasons underlying the Court's decision have changed. The reasons for the *Burton* rule are as valid today as they were in 1971 and the *Burton* rule should remain the law in California.

III. Even under the *Fare* "Totality of the Circumstances" Test, Appellant's Request Invoked His Miranda Rights.

Respondent argues that the circumstances of the present case do not support a finding that a *Miranda* violation occurred. In this regard, respondent contends that appellant did not want to seek advice from his father, rather, appellant merely wanted his father notified that he was in jail. (RBOM 24.)

Respondent notes that appellant did not specifically request to call his father, but only responded to Detective Deveney's questions and that appellant did not ask for advice in the message he left for his father. On these two facts, respondent concludes that appellant merely wanted to have his father notified. (RBOM 24.) Such conclusion is flawed in that it is based on two isolated facts and ignores the surrounding circumstances.

First, while in route to the police station, Deveney asked appellant if he wanted anyone notified of his arrest. Appellant responded his father. Deveney promised appellant that, once they reached the police station, appellant would be allowed to make as many phone calls as he wanted. (2RT 36.) After having received this assurance from Deveney, there would have been no reason for appellant to make a special request to call his father as he was led to believe he could call anyone he wanted.

But, once at the police station, Deveney asked appellant whether he wanted to call his father personally or whether he wanted Deveney to notify his father. Appellant told Deveney twice, he wanted to call his father himself. (2CT 282.) If as respondent suggests, appellant merely wanted his father notified, there is no reason why a call from Deveney would not have served this purpose.

Respondent further argues when appellant reached his father's answering machine, he left a message that he was in jail, but did not ask for any advice. (RBOM 24.) This respondent concludes was circumstantial evidence that appellant merely wanted his father notified of his location. Such conclusion, ignores the rest of appellant's message, appellant did not merely tell his father where he was, *he asked his father to call him back.* (2CT 327-328.)

But, appellant's efforts to reach his father did not end with the single message, appellant made two additional phone calls in a continuing effort to speak with his father. (2CT 327-328.) Appellant's multiple attempts to reach his father, and his request for his father to call him, is strong evidence that appellant wanted to do more than to merely notify his father - - he wanted to talk to him.

Respondent further contends that two factors considered in *Fare v. Michael C.* (1979) 442 U.S. 707, support the conclusion that appellant's desire to speak with his father was not the equivalent of a request for an attorney: that there is no evidence that his father was trained in the law; and that communications between a father and son are not privileged. Of course, such communications are never privileged and most parents are not trained in the law. Were these factors decisive, a child's request to speak to his parents would virtually never be sufficient to invoke a minor's *Miranda* rights. Even respondent concedes this is not the law.

Respondent further argues that there is nothing in the record to suggest that appellant wanted to call his father for legal advice or in order to contact an attorney. (RBOM 24.) In this regard, respondent concludes that because appellant did not reside with his father and did not have his phone

number memorized that the father-son relationship was not a close one.

One does not have to look too far in today's society to understand that situations where father and child do not reside in the same household are very common and that this fact is not indicative of the closeness of the relationship. Moreover, today's world is one of multiple and changing phone numbers. Even the most basic phone today is equipped with "speed-dial." There is no longer a need to memorize phone numbers as one need only program the most current number into the phone. Consequently, these facts are not indicative of the lack of a close father-son relationship.

Indeed, contrary to respondent's assertions, the record suggests that appellant's father was exactly the person to whom he would turn for advice and for assistance in obtaining counsel under these circumstances. While appellant was charged as an adult in this case, appellant's prior criminal history was not extensive. Appellant's prior record consisted of a single burglary conviction for which he was granted probation and *released to his father*. (2CT 461.) Appellant's other police contact was a traffic stop from which appellant fled on foot. There is no record that appellant was convicted of any charge resulting from this incident. (2CT 461.) Significantly, however, it was appellant's *father* who brought him to the police station to turn himself in. (2CT 461.) Thus, in both of appellant's prior contacts with the police, it was his father to whom appellant turned to for help. It would only seem natural that it would be his father to whom he would turn again.

Finally, respondent argues that appellant's willingness to speak to the police after being advised of his *Miranda* rights weighs strongly against a finding that a violation occurred. (RBOM 25.) Respondent contends that

appellant was a "sophisticated minor" who, notwithstanding his request to call his father, waived his rights. First, any alleged waiver of appellant's *Miranda* rights occurred *after* appellant's request to call his father and *after* the interrogation should have ceased.

Second, as discussed above, appellant's prior criminal record was minimal and there is nothing to indicate that he had ever before been interrogated or given his *Miranda* rights. One of appellant's teachers, who had spent almost 200 hours working with appellant, described him as "immature" and "easily manipulated." (5RT 587-588.) Thus, there is nothing to support a conclusion that appellant was "sophisticated" in this regard.

The dubious nature of the police conduct in this case also cannot be ignored. (*Fare, supra,* 442 U.S. at 726 (the court may consider whether the purported waiver was the result of trickery or deceit).) By promising appellant that upon arrival at the police station he would be able to make as many phone calls as he wanted, Devaney pre-empted any specific request by appellant call his father. Once at the police station, the officers told appellant that before he could use the phone, "we've just got to fill out these papers." (2CT 282.) The process of filling out the "papers" was one which required appellant to answer the officers' questions. The officers' refusal to let appellant use the phone within an hour of his arrest was a violation of state law. (Welf. and Inst. Code, § 627, subd. (b)). Moreover, the officers improperly conditioned appellant's use of the phone upon his answering the officer's questions.

After asking appellant a few questions, the answering of which was an apparent prerequisite to using the phone, Deveney advised appellant of

his *Miranda* rights, but told him such rights were "no big deal." (2CT 284.) Having just been told that before he could use the phone, the "papers" must be completed, appellant could only have believed that he would not be allowed to call anyone (parent or an attorney) until he had finished answering the detectives questions.

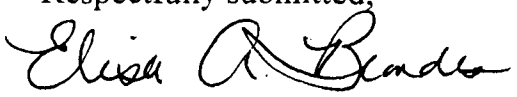
Appellant's desire to speak to his father in this case was made clear to the officers. Even if this Court applies the *Fare* totality of the circumstances test, appellant's lack of sophistication, his lack of experience with police interrogation, his repeated attempts to speak to and not merely notify his father of his location, and the misleading police tactics employed in this case, all support a finding that appellant's communicated desire to speak to his father was sufficient to invoke his *Miranda* rights.

CONCLUSION

For the reasons stated above, and in Appellant's Opening Brief on the Merits, Mr. Lessie asks this Court to reverse his conviction and exclude all evidence obtained during the September 20 and 21, 2005 interrogations.

February 25, 2009

Respectfully submitted,



Elisa A. Brandes
SBN 157164
PMB 14, 2650 Jamacha Rd # 147
El Cajon, CA 92019
(619) 579-6266

Attorney for Appellant
Tony Lessie

Elisa A. Brandes
PMB 14
2650 Jamacha Rd. #147
El Cajon, CA 92019
(619) 579-6266

Case Number: S163453

CERTIFICATE OF APPELLATE COUNSEL

Pursuant to rule 8.504(d) of the California Rules of Court

I, Elisa A. Brandes, appointed counsel for appellant Tony Lessie in Supreme Court case number S163453, hereby certify, pursuant to rule 8.504(d) of the California Rules of Court, that I prepared the foregoing Reply Brief on the Merits on behalf of my client, and the word count for this petition is 2714. I prepared this document using WordPerfect®X3, and the above-stated word count was generated by WordPerfect®X3 for this document.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed, at San Diego County, California, on February 25, 2009.

Elisa A. Brandes
Attorney for Appellant

Elisa A. Brandes
PMB 14, 2650 Jamacha Rd. #147
El Cajon, CA 92019
(619) 579-6266

Case Number: S163453

DECLARATION OF SERVICE

I, undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within-mentioned delivery occurred, and not a party to the subject cause. My business address is PMB 14, 2650 Jamacha Road # 147, El Cajon, California. I served the APPELLANT'S REPLY BRIEF ON THE MERITS of which a true and correct copy of the document filed in the cause is affixed, by placing a copy thereof in a separate envelope for each addressee named hereafter, addressed to each such addressee respectively as follows:

Court of Appeal
Fourth District
Division One
750 "B" Street, Suite 300
San Diego, CA 92101

Honorable Joan Weber
San Diego Superior Court
325 South Melrose
Vista, California 92081

Wilfred C. Rumble
Multiple Conflicts Office
110 West "C" Street, Suite 1211
San Diego, CA 92101

Tony Lessie
#F-55878
P.O. Box 290066
Represa, CA 96571

Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266

Appellate Defenders, Inc.
555 West Beech St., Suite 300
San Diego, CA 92101-2939

Giacomo W. Bucci
Deputy District Attorney
325 South Melrose Dr., Suite 5000
Vista, CA 92081

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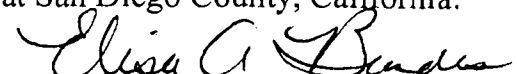

Elisa A. Brandes